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P. 15. Wilkie, Neck and Smith *v.* Inland Revenue Comrs. Solicitors for the appellants: for "Caporn & Campbell" read "Skan & Skan."

P. 29. Line 32, Hirsch *v.* Somervell. For "(at p. 634, *ante*)" read "([1946] 1 All E.R. at p. 634)." Line 48, for "(at p. 637, *ante*)" read ([1946] 1 All E.R. at p. 637)."

P. 59. Shayler *v.* Woolf. Last two words of judgment of Somervell, L.J., for "these contracts" read "this context."

P. 142. Rushden Heel Co., Ltd. *v.* Keene (Inspector of Taxes). Case referred to No. 8: for "[1932] 1 All E.R. 362" read "[1942] 1 All E.R. 362."

P. 396. For "Barry (Inspector of Taxes) *v.* Cordy" read "Barry *v.* Cordy (Inspector of Taxes)."

P. 471. Read *v.* J. Lyons & Co., Ltd. Last line but one: for "the Lord Chancellor" read "Lord Simon." P. 473, line 4, for "Viscount Simon, L.C.," read "Viscount Simon."

P. 638. Angel *v.* Angel. Solicitors for the wife, for "Kingsley & Co." read "Kingsley, Napley & Co."

P. 692. Line 1, Dodd *v.* Wilson. For "Walter Jones" read "C. P. Wallis-Jones."

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WEATHERLEY *v.* WEATHERLEY

[COURT OF APPEAL (Scott and Tucker, L.JJ., and Evershed, J.), March 29, April 1, 16, 1946.]

Divorce—Desertion—Wilful and unjustifiable refusal to continue sexual relations—Parties continuing to reside in matrimonial home—Whether amounting to desertion—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 176—*Matrimonial Causes Act,* 1937 (c. 57), *s.* 2.

The parties were married on May 17, 1941, the husband petitioner being then a sergeant in the Royal Air Force, aged 22, and the respondent wife a spinster of 30. After the marriage sexual intercourse took place every week-end in May and June of that year and during the petitioner's periods of six days' leave in each of the months of July, August and October. When the petitioner came on leave in Nov., 1941, the respondent informed him that she had prepared another bed for him; that she could not sleep if they shared the same bed; that she had finished with sexual intercourse, and did not want any more of it. The parties continued, however, to share the flat which constituted the matrimonial home; the respondent prepared the petitioner's meals for him when on leave; they had their meals together and visited their social clubs together. They continued on these terms during the petitioner's various periods of leave, until June 1, 1943, when the petitioner asked the respondent, at a restaurant, to which he had taken her, to resume normal married relations. The respondent refused and the petitioner had nothing more to do with her. At the hearing of a petition, dated Feb. 22, 1945, alleging desertion from Nov. 24, 1941, the petitioner stated that when the respondent refused intercourse, in Nov., 1941, she said she thought it was very hard on him and if he wanted that sort of thing he could have it with some other woman. He also stated that he kept going back to the flat after Nov., 1941, when on leave, in the hope that he might be able to get the respondent to alter her opinion:—

HELD (SCOTT, L.J., *dissenting*): the wilful and unjustifiable refusal of the respondent to continue sexual relations, intended to be final and persisted in for the requisite period of time, coupled with an intimation to the petitioner that he was at liberty to seek sexual gratification elsewhere, was not, by itself, capable in law of constituting desertion without cause within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, s. 2.

Synge v. *Synge*, [1901] P. 317 is not an authority to the contrary. The statement in the headnote relating to this point is based upon an *obiter dictum* of SIR FRANCIS JEUNE, P., in the court below.

Per Tucker, L.J.: in any event, the desertion could only date from the time when the matrimonial home was in fact disrupted by the husband's departure, and could not be ante-dated to the first refusal of sexual intercourse by the wife. So long as the husband continued to live with his wife, even though for the purpose of persuading her to change her decision, it was impossible for him to say that he had been deserted.

[**EDITORIAL NOTE.** This is the first occasion upon which the Court of Appeal has been called upon to decide whether wilful and unjustifiable refusal to continue sexual relations constitutes desertion. The whole current of authority since the decision of the Divisional Court in *Jackson* v. *Jackson* (1) has been against the view that this does amount to desertion, and the majority of the court so decides. Scott, L.J., bases his dissenting judgment on the view that marriage as understood in English law is primarily Christian marriage, in which the procreation of children is an essential element, as shown by the recent decision in *Cowen* v. *Cowen* (4). Refusal then, is a dereliction from matrimonial duty such as to cause a break-up of the matrimonial home amounting to desertion. The majority judgments, however, regard desertion as importing an element of forsaking or abandonment which is not satisfied by a mere refusal of intercourse.

As to the Matrimonial Causes Act, 1937, s. 2, see HALSBURY'S STATUTES, Vol. 30, p. 336.]

Cases referred to:

*(1) *Jackson* v. *Jackson*, [1924] P. 19; 27 Digest 308, *2852*.
*(2) *Bell* v. *Bell*, [1941] S.C. [H.L.] 5.
*(3) *Dickinson* v. *Dickinson*, [1913] P. 198; 27 Digest 268, *2369*; *sub nom. D.* v. *D.* (*otherwise P.*), 82 L.J.P. 121; *sub nom. Dickinson* v. *Dickinson* (*otherwise Phillips*), 109 L.T. 408.
*(4) *Cowen* v. *Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176.
*(5) *Synge* v. *Synge*, [1901] P. 317; 27 Digest 375, *3631*; 70 L.J.P. 97; 85 L.T. 83 C.A.; *affg.* [1900] P. 180.
*(6) *Pulford* v. *Pulford*, [1923] P. 18; 27 Digest, 307, *2846*; 92 L.J.P. 14; 128 L.T. 256.
*(7) *Beevor* v. *Beevor*, [1945] 2 All E.R. 200; 173 L.T. 393.
*(8) *Forster* v. *Forster* (1790) 1 Hag. Con. 144; 27 Digest 356, *3403*.
*(9) *Orme* v. *Orme* (1824), 2 Add. 382; 27 Digest 273, *2431*.
*(10) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, *2845*; 38 L.J.P. & M. 14; 19 L.T. 575.
*(11) *R.* v. *Lereshe*, [1891] 2 Q.B. 418; 27 Digest 313, *2910*; 60 L.J.M.C. 153; 65 L.T. 602.
*(12) *Barlow* v. *Teal* (1885), 15 Q.B.D. 403; 42 Digest 642, *460*; 54 L.J.Q.B. 400; 53 L.T. 52.
*(13) *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*, [1898] A.C. 571; 42 Digest 642, *464*; 67 L.J.Ch. 628; 79 L.T. 195.

Appeal by the petitioner from an order of Bucknill, J., dated Oct. 12, 1945. The facts are fully set out in the judgment of Tucker, L.J.

Geoffrey H. Crispin and *J. W. Wellwood* for the appellant.

E. Holroyd Pearce, K.C. and *William Latey* for the King's Proctor.

Cur adv. vult.

Scott, L.J.: This appeal raises a question of extreme importance to the well-being of the nation, as it goes to the very root of the marriage relationship. The husband petitioned for divorce on the ground of desertion. The case was not defended, but Bucknill, J., held that the absolute refusal by the wife of marital intercourse which was intended to be permanent and had continued for more than three years before the date of the husband's petition, did not amount to desertion within the meaning of that word in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, s. 2. I think it did, although in view of the judgment of the Divorce Court in *Jackson* v. *Jackson* (1) I can understand why the judge felt unable to decide in favour of the petitioner. That case is distinguishable; but anyhow we are free, if necessary, to review the decision.

The facts of the case are as follows. The marriage took place on May 17, 1941, the husband being then 22 years old and the wife 30. The marriage was consummated and normal marital intercourse continued for a time, but there were no children of the marriage. The husband was in the Royal Air Force, on operational duties, and until the following July he got weekly leave and spent the week-ends with his wife, for whom he evidently had, and continued to have, real affection. From July to October he got leave each month. Normal sexual intercourse took place during all those leaves; but, at his November leave, the matrimonial home then being a two-roomed flat, the wife refused sexual intercourse. There were no physical defects on either side. What passed between them was this:

> (Q) Did your wife say something to you? (A) Yes, she said she had prepared another bed for me; I could sleep in that or the other one. (Q) What did you say to that? (A) I said: 'You have not minded my sleeping with you before, why should you change?' She said she could not get any sleep if we shared the same room. (Q) Did you have any conversation with her the next day? (A) Yes. (Q) What was then said? (A) She said not only did she not want to sleep with me, but she was finished with marital relationship. (Q) Has there, in fact, been any resumption of marital relations? (A) No. (Q) Did you ask her why? (A) Yes. She said she knew she was being awfully selfish but she thought this sex business was horrid and beastly; she did not want any more of it. (Q) Did she say what you could do? (A) Yes. She said she thought it was awfully hard on me, but if I wanted that sort of thing I could have it with some other woman.

There are two more questions and answers which I ought to quote:

> (Q) In November, 1941, did she say anything of what her intentions were with regard to the future? (A) Yes. She said she did not want to have any marital relationship with me, but she would like to be a friend and companion; nothing more than that. (Q) Was anything more discussed as to what you were going to do in the future as regards living together? (A) She said I could take it or leave it.

After that the wife compelled the husband to sleep at first in another bed, and then in another room. He got leave again in Jan., June and Aug., 1942. He said in evidence that he went back to her because he was very fond of her and hoped to get her to alter her opinion; but "she was very cold and indifferent." During these leaves they used to go out together, but he had to live apart although in the same flat, of which she was the tenant. The last leave he spent with her was Nov., 1942. In June, 1943, he took her to a restaurant and asked her to resume normal married life, but she refused; and he then gave up the attempt and did not return to her.

In my opinion, the wife deliberately broke up the matrimonial home and brought to an end the matrimonial life, so far as she was able to bring those results about. In addition, she made it clear over a prolonged period of time that she intended the disruption to be permanent. The question of law is whether that was desertion by her. If it was, the statutory condition of the necessary three years' period was satisfied.

When the Act of 1937 was passed "desertion" was already a well known and rather wide conception in matrimonial law, and Parliament must be presumed to have used it in its current connotation, not intending to restrict it by any but well recognised limitations, not to extend it further than the principles upon which its connotation rested, would reasonably justify. Judges have more than once deprecated any attempt to substitute for the word any rigid definition; but it is essential for the present appeal to get some clear idea, positive or negative, about its meaning in 1937. Desertion has always, both before and since 1857, been a matrimonial wrong, and I think also an offence. Broadly speaking, it imports dereliction from matrimonial duty. Wilful departure from the matrimonial home with no *animus revertendi* may be the typical, and probably is the commonest form which it takes; but that is not by any means the only form; nor is departure from the site of the matrimonial home an essential ingredient in its connotation. Spouse A may be driven out of the matrimonial home by the matrimonial misconduct of spouse B—and I use the word "misconduct" generically to cover all matrimonial wrongdoings, but I am not for the moment thinking of adultery. B's misconduct is desertion, and the stay-at-home B is the deserter; not A, who is driven away. And there may be desertion by one or the other, though both spouses continue to live in the same house, and even although that be the house which has until then been the matrimonial home; provided that within that house the misconduct of one causes the break up of the matrimonial home. In that event, it is the breaker-up of the home who is the deserter. The essence of the offence is dereliction from matrimonial duty of so serious a kind as to disrupt the matrimonial home. And, it hardly needs saying, there must be no consent by the deserted. It is for this reason that the evidence must be examined critically, even in an undefended case, to enable the court to be sure that there has been no element of consent.

The question of law to be decided on the facts of this case is whether the right of each spouse to have the co-operation of the other in normal marital intercourse for the procreation of children occupies so important a place in the totality of the marriage relationship that a definite and unqualified refusal, expressed and intended to be permanent, constitutes " desertion " within the meaning which I have ventured to assign to that term. Any such dereliction from marital duty as even temporarily breaks down the marriage relationship constitutes the act of desertion; and it is necessary to remember that the offence of itself imports no element of duration in time. The continuance of the offence is in England merely a statutory condition attaching to statutory relief—either for the two years under the Matrimonial Causes Act, 1857, s. 27, which was the condition of an order for judicial separation, or the three years entitling the deserted spouse to a decree of divorce under the 1937 Act. It is the continuance of such "malicious and obstinate defection," as Scots' law calls it (see *Bell* v. *Bell* (2), [1941] S.C., [H.L.], 5; *per* Lord Merriman, at pp. 38, 39), for the statutory period of three years which constitutes the ground for divorce.

The real question, therefore, to be answered by us must be: "Does the evidence of the wife's refusal coupled with her invitation to her husband to act upon her proferred acquiescence in an adulterous association by the husband with another woman, involve such a breach in the fundamentals of true married life as to disrupt the marriage home?" And that question in turn depends on what is the true conception of marriage in English law. Whether it be celebrated in an established church or in a registry office, it is primarily a Christian marriage which in England receives recognition by English law as true marriage.

The marriage service in the Book of Common Prayer calls upon the congregation to consider the causes for which matrimony was ordained:

> . . . first the procreation of children . . . secondly for a remedy against sin and to avoid fornication . . . and thirdly for the mutual society, help and comfort that the one ought to have in the other.

If those be the essentials of marriage, and I cannot but think they are, the conduct of the wife in the present case seems to me to have repudiated all three.

The *Encyclopaedia Britannica*, 11th Edn., Vol. 17, p. 753, contains this definition of " marriage ":

> A physical, legal and moral union between man and woman in complete community of life for the establishment of a family.

In both analyses, the religious and the secular, the physical union takes first place—as is right for the maintenance of our nation. On it depends the creation of the family. On the family depends the welfare of the nation.

The judicial view of the importance of the physical union for the purpose of procreation of children is brought out prominently in the legislative history of the procedure for the restitution of conjugal rights: see, especially, the review by Sir Samuel Evans, P., in *Dickinson* v. *Dickinson* (3) ([1913] P. 198, at pp. 205 to 208). He there held that where there has been no initial consummation, wilful and persistent refusal is a sufficient ground for a decree of nullity. His review of the law goes far towards establishing the proposition that the mutual rights of sexual intercourse for the purpose of procreation are fundamental in marriage. On that aspect strong support is afforded by the recent decision of this court in *Cowen* v. *Cowen* (4) that coition accompanied by the use of contraceptives, where there is no physical reason for such use, is not consummation, and consequently that wilful insistence on a practice which prevents procreation will constitute wilful refusal under sect. 7 of the Act of 1937.

In the Ecclesiastical Courts before 1813 the sanction for enforcing restitution of conjugal rights was excommunication. In that year six months' imprisonment was substituted by Parliament. In 1884 payments took the place of imprisonment, but at the same time failure to comply was, by sect. 5 of the Act of 1884, deemed to be desertion. " Desertion " had first appeared in the statute book in 1857 when, by the Matrimonial Causes Act, s. 27, for two years' desertion without reasonable excuse the deserted spouse was enabled to get a decree of judicial separation.

In *Synge* v. *Synge* (5), the headnote reads as follows :

> A wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, and is herself in such circumstances guilty of desertion without reasonable cause.

SIR FRANCIS JEUNE, P., said this ([1900] P. 180, at pp. 190, 191) :

> The parties had lived together in 1889 as husband and wife ; they had again lived together, under the conditions I have mentioned, not as husband and wife, but agreeing to the state of things, in 1891 ; but on his return from West Africa it is clear that the respondent wished to live with his wife as her husband, and it is equally clear she was willing to live with him, but not as his wife. The result was a separation ; and from that time the separation, so begun, continued. Ever after the husband was willing to cohabit if, and only if, marital rights were allowed to him ; and the wife was willing to cohabit if, and only if, such marital rights were not insisted on.

He continued (*ibid.*, pp. 195, 196) :

> The objects of married life, as expressed in the marriage service, are not the less true because they are the utterances of a more plain-spoken age than the present ; and while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it . . . The result, therefore, is that, in my opinion, the respondent did not desert the wife, but rather she deserted him ; or if he did desert her, that he did so with reasonable excuse within the meaning of the Act of 1857.

Again, (*ibid.*, at p. 207) he indicated his view, though only *obiter*, that refusal of marital intercourse constitutes desertion.

His decision was affirmed by the Court of Appeal, although the court did not attempt to decide the question whether refusal of intercourse of itself constitutes desertion, because that issue was not before the court.

In *Pulford* v. *Pulford* (6), SIR HENRY DUKE, P., emphasised the aspect of dereliction from matrimonial duty as being the essential feature of desertion, although there it was a case of withdrawal not only from intercourse but from cohabitation.

The strongest expressions of judicial opinion against the view of desertion which I am indicating are to be found in the case of *Jackson* v. *Jackson* (1). The facts there were these. The marriage took place in 1903. Burnley was the matrimonial home. Two boys and one girl were born of the union. In 1918 the wife went to Huddersfield for war work. In February, 1920, she went back to her husband at Burnley and after some ten days there marital relations were resumed ; but about March, 1923, the husband refused to sleep with his wife because she insisted on the little girl, aged 5, who then had whooping cough, sleeping in her bed. Thenceforward the spouses lived in the same house, but apart, and neither approached the other for marital intercourse. On Aug. 1, 1923, the wife took out a summons for maintenance and custody of the girl. It was adjourned by the magistrates for three weeks in order that the parties might come to an agreement ; but, on Aug. 20, the wife left her husband. On Aug. 23, the summons came on again ; the principal matter relied on was the husband's refusal of marital intercourse. The magistrates held that there had been desertion by the husband.

SIR HENRY DUKE, P., said ([1924] P. 19, at p. 22) :

> The underlying material fact . . . is that during the whole period these parties were living together though with differences between them and perhaps breaches of duty on one side or the other. It seems to me that it would be a false pretence to make a judicial finding that one of these parties had in point of fact deserted the other at any time which is in question in this case.

In the result the court held that the parties were not really living apart : that the husband had never been invited by the wife to resume marital intercourse ; and that in the circumstances of the case the husband had not deserted the wife. I do not think that case is any authority on the question we have to decide ; but if there are *obiter dicta* in it which are inconsistent with my judgment, I cannot agree with them.

There is no decision directly in point, and still less one binding on this court. As the question before us has not come up for decision as a plain issue, I do not think it worth while to discuss the cases where there have been incidental expressions of opinion ; but it is perhaps worth while to refer to *Beevor* v. *Beevor* (7). In that case, a son had been born to the marriage, but as from that time the wife totally refused marital intercourse. The husband told her he would leave if she persisted. She did persist, and he did leave her. After the necessary period he filed a petition against her for divorce, on the ground of her desertion of him. She counter-petitioned against him, alleging that he had deserted her. HENN-COLLINS, J., held that from the time of the child's birth the wife conceived an invincible repugnance to marital intercourse ; and added ([1945] 2 All E.R. 200 at p. 201) :

> It is . . . as though the wife had been rendered structurally incapable of intercourse by some accident or disease.

and, as that would not have justified the husband's leaving her, he held that the husband, and not the wife, was the deserter. I assume that the medical evidence justified that view ; if it did, the decision has no relevance to the present case ; if it did not, it was, in my opinion, an erroneous decision. The wife's refusal of marital intercourse in the present case was such a repudiation of essential marriage duties, as, in my view, to constitute desertion. I would allow the appeal.

TUCKER, L.J. : This is an appeal from a decision of BUCKNILL, J., dismissing a husband's petition for divorce on the ground of desertion. The petition was dated Feb. 22, 1945, and alleged desertion from Nov. 24, 1941, onwards. The facts as found by the judge were that the parties were married on May 17, 1941, the husband being then a sergeant in the Royal Air Force, aged 22, and the wife a spinster of 30. After the marriage sexual intercourse took place every week-end in May and June of that year and during the husband's periods of six days leave in each of the months of July, August and October. When the husband came on leave in November, 1941, the wife informed him she had prepared another bed for him, that she could not sleep if they shared the same bed and that she had finished with sexual intercourse, which she thought horrid and beastly, and she did not want any more of it. They continued, however, to share the flat which constituted the matrimonial home ; she prepared his meals for him when on leave ; they had their meals together and visited their social club together. They continued on these terms during his various periods of leave until June 1, 1943, when he asked her, at a restaurant to which he had taken her, to resume normal married relations. She refused, and thereafter he had nothing more to do with her.

In his evidence the petitioner stated that when his wife refused intercourse in November, 1941, she said that she thought it was very hard on him, and, if he wanted that sort of thing, he could have it with some other woman. He also said that he kept going back to their flat after November, 1941, when on leave, in the hope that he might be able to get her to alter her opinion. The judge does not expressly refer to these two pieces of evidence in his judgment, but I have no reason to suppose that he did not accept them as true. He dismissed the petition on the ground that he was precluded from granting it by *Jackson* v. *Jackson* (1), to which I shall refer later. He added that in a case of this kind, where the parties lived together such a short time under the unusual circumstances of the war, and where the wife had agreed to afford the husband his marital rights for a considerable period of time, it would not be desirable to dissolve the marriage for mere refusal. He expressed the view that the wife might well change her mind.

The question for our decision is, therefore, whether the wilful and unjustifiable refusal by one spouse to continue sexual relations coupled with an intimation to the other spouse that he or she is at liberty to seek sexual gratification elsewhere is by itself capable in law of constituting desertion without cause within the meaning of the Matrimonial Causes Act, 1937, s. 2. This is the first occasion upon which the Court of Appeal has been required to decide this point.

Prior to 1857 the only remedy in cases of desertion was a decree for restitution of conjugal rights. Under the Matrimonial Causes Act, 1857, a decree of judicial separation could be obtained by husband or wife for desertion without cause for two years and upwards, and a wife could obtain a divorce on the ground of adultery coupled with desertion. By the Matrimonial Causes Act, 1923, the wife, for the first time, could petition for divorce on the ground of adultery alone, and by the Matrimonial Causes Act, 1937, desertion without cause for at least three years immediately preceding the presentation of the petition was made a ground for divorce.

Although desertion has, therefore, since 1937 assumed greater importance in the administration of the law in the Divorce Division, it had for many years before, both in that Division and the Ecclesiastical Courts from time to time required judicial consideration, but on no occasion has the court ever attempted to formulate an exhaustive definition.

In *Forster* v. *Forster* (8) which was a husband's suit for divorce on the ground of adultery, LORD STOWELL used these words (1 Hag. Con. 144, at p. 154):

> Most certainly what Dr. Harris has said is true, 'That the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may.' This species of malicious desertion is a ground for divorce in some countries—certainly not so here—and still less will it justify a wife in a resort to unlawful pleasures, that lawful ones are withdrawn.

In *Orme* v. *Orme* (9) the decision is correctly stated in the headnote as follows:

> The Ecclesiastical Court can only interfere, in the way of restitution, where matrimonial cohabitation is suspended. The single duty which it can enforce by its decree in a suit of this nature is that of married parties 'living together'; it cannot attempt to enforce any in super-addition to this. Hence it is incompetent to the wife to sue the husband, or the husband the wife, for 'restitution of conjugal rights,' pending cohabitation.

In *Fitzgerald* v. *Fitzgerald* (10) LORD PENZANCE said (L.R. 1 P. & D. 694, at p. 698):

> No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse.

LORD PENZANCE is not here using the word "intercourse" as meaning sexual relations.

In *Synge* v. *Synge* (5) SIR FRANCIS JEUNE, P., held that a wife who without cause, refuses to permit marital intercourse to her husband, cannot allege desertion by him without reasonable cause if in consequence he refuses to live with her. This decision was affirmed by the Court of Appeal. SIR FRANCIS JEUNE, P., however, also expressed the view that in such circumstances the wife herself was guilty of desertion. On this point the Court of Appeal said no decision was necessary and they refrained from expressing any opinion thereon. This dictum of SIR FRANCIS JEUNE, P., is the high water mark of the petitioner's case so far as judicial pronouncement is concerned.

Desertion received full consideration again in 1923 and 1924 by SIR HENRY DUKE, P., and HILL, J., in *Pulford* v. *Pulford* (6) and *Jackson* v. *Jackson* (1). In the first of these cases the President refused to attempt any new definition. He said definitions were dangerous and pointed out that the misapprehension in the argument for the husband was that it treated the dictum of LORD PENZANCE in *Fitzgerald* v. *Fitzgerald* (10) as a comprehensive definition of desertion. The court held in *Pulford's* case (6) that there may be a complete renunciation of conjugal duty and an intention to put an end to cohabitation though there may be no then existing matrimonial home.

In *Jackson* v. *Jackson* (1) the precise question involved in the present appeal fell to be decided by the same two judges. It was an appeal from a decision of justices making an order for maintenance against a husband on the ground of desertion, the desertion relied upon being the husband's refusal to sleep or have sexual relations with his wife in the year 1922, the parties having been married in 1903, and having lived together since then, except for a period of two years between 1918 and 1920, and there being three children of the marriage. The court held that such evidence could not justify a finding of desertion. The basis of the decision was that, to constitute desertion, there must be living apart and abandonment, and that mere refusal of or abstinence from sexual intercourse when the parties are in all respects living normally together, though a breach of one of the obligations of marriage, cannot alone amount to desertion.

SIR HENRY DUKE, P., says ([1924] P. 19, at p. 23) :

> I will refer in a moment to the authority. I am better content to deal with the subject first upon grounds of principle. How does it stand in point of principle ? Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation or living apart.

He then proceeds to consider the authorities, including those I have referred to above, and says (*ibid*, at p. 26) : A

> So, this contention advanced for the respondent is bare of authority, and the decision of the magistrates cannot be supported in my view upon any ground of principle, and is inconsistent with the elementary grounds upon which the question of desertion must be decided.

This statement of the law has stood unchallenged and unquestioned for 22 years until today, but in my view the material date to be considered is 1937. B In that year the Legislature passed the Matrimonial Causes Act, 1937, and for the first time provided that desertion alone should constitute ground for divorce. I think the Legislature in so acting and in refraining from defining desertion must be taken as accepting the tests which had hitherto been applied in the courts, including this well known and emphatic pronouncement by SIR HENRY DUKE, P., in the year 1924, that although no precise and comprehensive definition of the word had ever been given or was desirable, mere refusal of sexual intercourse could not by itself constitute desertion. C I therefore think that the word in the Matrimonial Causes Act, 1937, s. 2, should be construed with that limitation.

It is, moreover, not without significance that, in passing the Act of 1937, Parliament had in mind the question of wilful refusal to consummate the marriage and gave to the aggrieved party the remedy of a decree of nullity in such cases. It is difficult to suppose that had the Legislature intended to afford a remedy D for wilful refusal to continue sexual intercourse it would not have done so in express terms rather than by relying on the courts to give the word desertion an interpretation it had never previously received.

Apart, however, from any limitation in the interpretation of the word to be attributed to Parliament, I find myself so completely in agreement with the reasoning and decision of SIR HENRY DUKE, P., and HILL, J., in *Jackson* v. *Jackson* (1) that I am content to accept that case as authoritative of the question E at issue in the present appeal, which in my opinion fails.

I would add that if I am wrong in the conclusion at which I have arrived, I think the desertion could, in any event, only date from the time when the matrimonial home was in fact disrupted by the husband's departure, and cannot be ante-dated to the first refusal of sexual intercourse by the wife. In the present case three years had not elapsed between the date of the disruption and F the presentation of the petition. So long as the husband continued to live with his wife, even though for the purpose of persuading her to change her decision, it seems to me impossible for him to say that he has been deserted.

EVERSHED, J. : This is an appeal from BUCKNILL, J., dismissing a petition by a husband for dissolution of his marriage on the ground that his wife had deserted him without cause for at least three years immediately preceding the G presentation of the petition on Feb. 21, 1945. The facts as found by the judge have already been fully stated, and I need not repeat them.

The judge dismissed the petition on the ground that the only acts proved which could be said to amount to desertion were wilful refusals of sexual relations and that such wilful refusals for the statutory period *per se* did not amount in law to desertion, following in this respect the views of SIR HENRY DUKE, P., and HILL, J., in *Jackson* v. *Jackson* (1). I read the last paragraph of the judge's H judgment as intimating some feeling of doubt in his mind whether in all the circumstances of the case, including war-time conditions, it would be right to treat the wife's proved refusal of sexual relations as wholly beyond recall but for the purposes of this appeal I assume that such refusal has been continuous throughout the period assigned by the petition and should be taken as having been deliberate, without excuse and intended to be final—a view supported by a letter read to us which was written by the wife since the hearing of the petition. There were, however, no other circumstances in regard to the wife's conduct which, whether taken alone or in conjunction with her refusal of sexual relations, could in my judgment be said to constitute desertion. The appeal raises, therefore, the single and clear cut issue, does such a refusal, without excuse, and persisted in for the requisite period of time, amount, without more, to desertion? The respondent to the petition has not appeared on the appeal or taken any part in the proceedings ; but by the direction of this court the King's Proctor was notified of the appeal and has been represented at the hearing by counsel.

The argument on behalf of the King's Proctor, submitted with care and fairness by counsel, has been substantially on the petitioner's side, so that we have had no argument addressed to us in support of the decision of the court below. Having regard to the far reaching importance of the present appeal, I confess that in my judgment the proposal to reverse what has, as I think, been the consistent view of the judges of the Divorce Division for many years, ought in the circumstances to be received with considerable caution.

The argument for the appellant has, if I may briefly summarise it, been founded on the propositions, first, that the rights and duties in regard to marital relations are an essential attribute of the conception of marriage, as understood by our law and by our society ; and accordingly, second, that a wilful refusal of such relations by one or other of the spouses involves such a fundamental breach or severance of the union contemplated by marriage that it should properly be described and treated by the court as "desertion." I shall return briefly to this aspect of the matter hereafter ; and I do not doubt that the spouse guilty of such refusal does his or her partner a serious and perhaps a cruel wrong. But, in my judgment, however great may be one's sympathy with the victim of such a wrong, and however strong may be the argument for making such wilful refusal if sufficiently maintained a ground for divorce (as formulated, for example, by Bishop's Law of Marriage and Divorce, (1891) Vol. I, p. 696), it does not constitute desertion according to our present law.

It is not necessary for me to travel through all the cases referred to by my Lords and cited in the course of the argument. I turn at once to the decision of *Jackson* v. *Jackson* (1), relied upon by the judge, a decision of two highly experienced judges of the Divorce Division sitting as a Divisional Court, namely Sir Henry Duke, P., and Hill, J. The question presented for the determination of the court was thus stated, in the course of the President's judgment ([1924] P. 19, at p. 22) :

> The proposition is that refusal of, or purposeful abstinence from, sexual intercourse on the part of one of the spouses towards the other is a matter upon which desertion may be found, that it may be found either upon that fact in conjunction with other facts which do not establish desertion, or by the force of that very fact.

In the circumstances of the case as reported in the Law Reports it may no doubt be argued that the decision might have been rested upon a shorter and simpler basis of fact, *viz.*, that there had never been any such refusal. However that may be, the case proceeded upon the basis of the propositions which I have quoted, and both judges gave reasoned judgments in answer to the question so posed. The case is therefore beyond doubt, in my judgment, a direct authority upon the precise point raised in this appeal ; and though it is not an authority binding upon this court, it has subsequently been followed as I understand, consistently by judges of first instance. Sir Henry Duke, P., dealt with the matter in the course of his judgment, both on principle and on authority. On the point of principle, the President (*ibid*, at p. 23) referred to the phrase of Lopes, L.J. (in *R.* v. *Leresche* (11) [1891] 2 Q.B., 418, at p. 420 :

> A husband deserts his wife if he wilfully absents himself from the society of his wife in spite of her wish.

a phrase which I note is quoted in the Shorter Oxford Dictionary to illustrate one of the primary meanings of the word "desert." He then proceeded as follows ([1924] P. 19, at pp. 23, 24) :

> Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation or living apart . . . Reflection upon the manifold duties of the married state must, I think, convince any reasonable mind that this refusal of itself by one of the parties, while the parties remain living together and discharging the other duties of the married state, cannot be said to amount to desertion.

It is not abandonment; it is not living apart. If it is a refusal of a duty it does not purport to conclude the matrimonial relationship.

As regards authorities, the President cited both *Forster* v. *Forster* (8) and *Orme* v. *Orme* (9), decided respectively in 1790 and 1824, and referred to by counsel on the present appeal. He concluded ([1924] P. 19, at p. 25) :

> . . . this ground for a finding of desertion against one of the spouses was stated just upon one hundred years ago to have been unprecedented and there is no precedent for it now . . . A

HILL, J. uses this language (*ibid* at p. 27) :

> It [*i.e.*, wilful refusal of sexual intercourse] may be a circumstance which ought to be taken into account, but at the best it is only a circumstance which may be taken into account along with others, and in my view it would be entirely wrong to suppose that, taken by itself and independent of anything else, it would ever be possible to base upon it a finding of desertion. No case has ever said anything of the sort. None of the cases relied upon says anything of the sort. B

For myself, I respectfully agree with SIR HENRY DUKE, P., and HILL, J., that there is no warrant in authority extending over one hundred and fifty years for assigning to the word "desertion" any such meaning as is contended for on this appeal. On the contrary, the inclination of the cases is consistently the other way. The only exception cited to us was a dictum of SIR FRANCIS JEUNE, P., in *Synge* v. *Synge* (5) referred to and commented upon by both C the judges in *Jackson* v. *Jackson* (1). That was a wife's petition for divorce on the ground of her husband's adultery and desertion. The husband denied the wife's charges but did not himself counter claim for any relief. Adultery was established, but as regards the alleged desertion it was proved that the wife sought to impose the condition upon the husband's resuming cohabitation (as he wished to do) that she would have no sexual relations with him. On these facts it was held by SIR FRANCIS JEUNE, P., and the Court D of Appeal either that there was no desertion or that, if there was desertion, there was reasonable cause. In the course of his judgment, SIR FRANCIS JEUNE, P., used the expression ([1900] P. 180, at p. 196) :

> . . . rather she [the wife] deserted him [the husband.]

The phrase was, in my opinion, plainly *obiter* and, in my judgment, amounted E to no more than a forceful expression of the view that on this part of the case the wife was more to blame than the husband.

It is true that at the date of the earlier cases, *e.g.*, of *Forster* v. *Forster* (8) and *Orme* v. *Orme* (9) desertion, either alone or in conjunction with adultery, formed no ground for divorce. But this consideration is, in my judgment immaterial. The ordinary English word "desertion," in relation to the conception of marriage, is not *prima facie* differently understood when used as a ground F for restitution of conjugal rights or for judicial separation and when used as a ground for divorce.

It follows, therefore, in my judgment, that there was, at the least, prior to 1924, no authority to support the appellant's contention; and *Jackson* v. *Jackson* (1) in 1924, was an authoritative pronouncement to the contrary which has since been followed by the courts. In this state of the law was passed the Act of 1937, containing in sect. 2, without any explanation or qualification, G the same phrase "desertion without cause" which had occurred in the earlier statutes, *e.g.*, sect. 16 of the Act of 1857. I refer to the principle of interpretation of statutes formulated by LORD COLERIDGE, C.J. in *Barlow* v. *Teal* (12) (15 Q.B.D. 403, at p. 405) :

> . . . that where cases have been decided on particular forms of words, in courts, and Acts of Parliament use those forms of words which have received judicial construction, H in the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that Parliament did so use them.

Applying this principle to the present case, the court cannot, in my judgment, do other than hold that by the word "desertion" in sect. 2 of the Act of 1937 was intended desertion as the word had been judicially interpreted, and that accordingly wilful refusal of marital relations was not *per se*, meant to amount to desertion.

Our attention was drawn to the report of the Royal Commission on Divorce and Matrimonial Causes (known as the Gorrell Commission) in the year 1912. It was argued that on the authority of the *Eastman Photographic Materials* case (13) it is permissible for the court, in interpreting a statute, to refer to a Royal Commission report for the purpose of discovering what were the evils or defects the remedy of which might be taken to have been intended by the statute. Assuming, but without deciding, that it is permissible for us to refer to the report of this Commission, the document, in my judgment, so far from assisting the appellant, increases his difficulties. In para. 260 of the majority report it is stated :

> . . . it has been considered that wilful refusal to permit of marital intercourse without reasonable excuse may put an end to cohabitation and amount to desertion. It should clearly be expressed that such refusal should be treated as amounting to desertion and if persisted in for the period aforesaid [*i.e.*, three years] should be ground either for divorce or for judicial separation.

and reference was made in the paragraph to the dictum of Sir Francis Jeune, P., to which I have already referred. Again, in para. 327 of the same report occur the words :

> We have already suggested that refusal to permit of intercourse without adequate reason, if persisted in for three years, should be treated as desertion.

In face of the language of the commissioners drawing attention to the very point now under discussion, and notwithstanding the later decision of *Jackson* v. *Jackson* (1) declaring the law to be that which the commissioners disapproved, the Act of 1937 is found to contain no such declaration or expression as the commissioners had recommended : yet wilful refusal to consummate the marriage was for the first time made a ground for nullity.

I add that although the question whether there has been desertion is, generally speaking, one of fact, and although the question whether there has been wilful refusal of sexual intercourse is certainly a matter of fact, it is, in my judgment, incorrect to say that the question now before the court can equally be regarded as one of fact. The question is whether, assuming that such wilful refusal as was proved in this case has been found as a fact, the result is that the offending party has "deserted" his or her spouse within the meaning of sect. 2 of the Act of 1937.

The considerations which I have stated would be sufficient to dispose, in my view, of this appeal, but I desire to add a few observations on the general matters addressed to us in argument. I accept it as true that sexual relations constitute a most important attribute of the conception of marriage. But it is also true that they do not constitute its whole content, nor can the remaining aspects of the matrimonial consortium be said to be of a wholly unsubstantial or trivial character. As Sir Henry Duke, P., observed in *Jackson* v. *Jackson* (1) ([1924] P. 19, at p. 24), refusal of sexual relations does not purport to conclude the matrimonial relationship. I respectfully endorse the whole of that passage in his judgment, which I have already read and of which I have repeated the conclusion.

I cite also the following language from Shelford on Marriage and Divorce (1841), p. 3 :

> Besides the procreation and education of children, marriage has for its object the mutual society, help and comfort, that the one ought to have of the other both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third parties ; to the benefit of their common offspring, and to the moral order of civilised society.

It is, moreover, plain that the significance of the physical relations between the spouses must vary with many circumstances (*e.g.*, the ages of the spouses) ; and, as Tucker, L.J., pointed out during the course of the argument, if marital relations are to be considered as fundamental to the marriage union and their refusal constitutes desertion, the question might well arise whether a spouse could avoid the penalty of desertion by submitting to such relations only upon rare, and if so how rare, occasions.

I attempt no rash definition, but reference to the Shorter Oxford English Dictionary indicates that the word " desert " imports the conception of forsaking or abandonment. Though I agree that no exclusive emphasis should be put upon the idea of place, nevertheless, the proposition that one spouse who refuses sexual relations but otherwise lives in amicable cohabitation with the other, who has perhaps strenuously in all other respects furthered his or her health and interests, has nevertheless deserted, that is, forsaken and abandoned, the other, requires a significance to be given to the word which, to my mind, it cannot easily or naturally bear. And if this is right, then the appellant's difficulties are greatly magnified ; for he must show not merely that Parliament intended by its reference to desertion to ignore the judicial interpretation of the word, but meant to give to it, without the assistance of any authority, explanation or context, a strange and unusual meaning.

We were pressed by an argument addressed to the alleged illogicality of a result contrary to the appellant's contention. It was said that since wilful refusal of marital relations at the time of or immediately after the marriage would be a ground (under the express terms of the statute) for nullity, it was therefore sensible that such wilful refusal arising for the first time after the marriage had been consummated should equally be a ground for putting an end to the married state by divorce ; and, further, that such refusal on the part of one spouse would be a complete answer to a claim by that spouse against the other for desertion, and so ought by itself to constitute, after the requisite period of time, desertion. But it is clear that other conduct than wilful refusal of marital relations may provide an answer to a claim for desertion which does not itself give grounds for a divorce or any other relief. And though incapacity at the time of marriage is a ground for nullity, incapacity arising after the marriage is no ground for its dissolution. The truth is that if it is requisite that our marriage laws should conform to a logical coherence, that is a matter which the legislature must declare and provide.

In this connection attention was drawn to the recent decision of this court in *Cowen* v. *Cowen* (4). But if the principle of that decision is invoked to support the appellant's reasoning, it must drive him to contend not only that wilful refusal of all marital relations for the prescribed period would be desertion, but that wilful refusal of marital relations, save on condition of the use of one form of contraceptive, would have the same effect. Such a conclusion imposes a still greater strain—to my mind an intolerable strain—on the meaning of the word.

In the result, I agree with Tucker, L.J., for the reasons which I have attempted to state and which he has given, that the judge was right in dismissing the present petition ; and, in my judgment, this appeal fails and the petition should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : *Henry I. Sydney & Co.* (for the appellant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WILKIE, NECK AND SMITH *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Wrottesley, J.), April 9, 1946.]

Revenue—Excess profits tax—Standard profits—"Working proprietor"—More than one-half of chargeable accounting period—Seasonal trade—Finance Act, 1937 (*c.* 54), *s.* 20—*Finance* (*No.* 2) *Act,* 1939 (*c.* 109) *s.* 13 (2)—*Finance Act,* 1940 (*c.* 29), *s.* 31.

The appellants carried on, at a seaside resort, a seasonal trade which consisted of selling refreshments at lock-up shops rented by them for that purpose. The shops were opened for trade at Easter in each year. Trade was carried on at Easter for a week or ten days, thereafter on Sundays only up to Whitsuntide and thereafter daily (including Sundays) up to the end of Sept., when the shops were closed and trade ceased. The appellants, who carried on no other trade or business, each worked full time in the actual management and conduct of the trade every day on which the shops were open for trade. During the relevant years, the appellants worked full time, in the actual management or control of the business, 160 days in 1940, 138 days in 1941 and 146 days in 1942. The accounts of the trade were made up for the successive periods of twelve months ended Dec. 31, 1940, Dec. 31, 1941, and Dec. 31, 1942 respectively, and no question was raised as to the correctness of those chargeable accounting periods. The question at issue was whether, under the Finance (No. 2) Act, 1939, s. 13 (2), as amended by the Finance Act, 1940, s. 31 (1), the appellants were "working proprietors," i.e., proprietors who had during more than one-half of the chargeable accounting period in question worked full time in the actual management or control of the trade or business. It was contended, *inter alia,* on behalf of the appellants that, on the basis of a normal working week, credit for the extra days worked by the appellants each week end would aggregate a number of days which would amount to more than one-half of a normal working year or a normal working chargeable accounting period:—

HELD: the section did not deal with such a contingency and there were no grounds for reading into the section language appropriate to such a state of affairs; on a true construction of the relevant language the appellants had not worked full time during more than one-half of any of the chargeable accounting periods in question and accordingly none of the appellants was a "working proprietor" as defined by the section.

[**EDITORIAL NOTE.** The provisions relating to excess profits tax do not provide for the contingency of a seasonal trade which necessitates working during part only of the year or "chargeable accounting period." The expression "more than one-half of the chargeable accounting period" means precisely what it says. If the period, as in this case, is a year, then it means 183 days or more. *Qu.*: whether, the trade being seasonal, if the accounts had been made up for the period during which the trade was carried on, *i.e.*, Easter to the end of September, the appellants would have qualified as "working proprietors"?

FOR THE FINANCE ACT, 1937, s. 20, see HALSBURY'S STATUTES, Vol. 30, p. 358; FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (2), see *ibid.*, Vol. 32, p. 1195; and FOR THE FINANCE ACT, 1940, s. 31, see *ibid.*, Vol. 33, p. 183.]

Case referred to:

*(1) *Inland Revenue* v. *Alexander Stirling, Ltd.* (1944), S.L.T. 79.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are fully set out in the judgment.

Roy Borneman for the appellants.

Terence Donovan, K. C., and *Reginald P. Hills* for the respondents.

WROTTESLEY, J.: In this case the court has to deal with excess profits taxation in connection with seasonal trade carried on by three ladies who had a refreshment business at New Brighton, which is seasonal in its nature. It may be said that such a trade does not fit very conveniently from the point of view of the owners into the exceptions to the general provisions of excess profits tax legislation. But one must look at it from this point of view. Its purposes was to ensure that nobody should make a greater profit in a time of great crisi in this country than he or she had been in the habit of making in a fairly peak period antecedent to the war. It was to prevent, in this war, that there should arise from it the war contractors' profits such as had arisen, I suppose, in every war down to this one.

There are provisions which might have availed these ladies carrying on a seasonal trade because it appears from the Finance Act, 1937, s. 20, which deals with accounting periods, that where the accounts of the trade or business are made up for consecutive periods of 12 months, 12 months is the accounting period: then subsect. (2) (*c*) says:

> In any other case [that is, where they are not made up for 12 monthly periods] the accounting period, of a trade or business shall be such periods not exceeding 12 months as the Commissioners of Inland Revenue may determine.

It may be—I express no opinion about it, but this is indicated by counsel for the respondents in his argument—that an application might have been made in this case by these appellants whereby, instead of making up their accounts for 12 monthly periods, they should have made up their accounts for the period for which they traded and applied to the Commissioners, this being " any other case " within sub-para. (*c*), for the period to be determined; but that has not happened.

Therefore, I have to approach this matter upon the facts stated in the case. It is clearly and definitely stated there that no question has arisen over what were the chargeable accounting periods. As a result, the facts amount to this. Taking the 3 years 1940, 1941 and 1942, these ladies only worked 160 days in 1940, most of them consecutive but not all of them. They worked at Easter for a time and on Sundays only between Easter and Whitsuntide. Then from Whitsuntide until the end of Sept. daily, including Saturdays and Sundays. The result was that in 1940 they worked 160 days, in 1941, 138 days, and in 1942, 146 days. The importance of that is this. Having had some success in their business, these ladies were desirous, I suppose, of availing themselves of the provisions of the substituted sect. 13 (2) of the Finance (No. 2) Act, 1939, which is set out in sect. 31 of the Finance Act, 1940. If it had been possible to apply that section to this case, there being here three ladies each of them working in the business, and, when they worked, working full time, they might have derived the advantage that the standard profits allotted to them would not have been the mere minimum of £1,000, but would have been such greater sum not exceeding £6,000, as is arrived at by allowing £1,500 for each working proprietor in a trade or business.

That raises the point whether these three ladies were working proprietors. " Working proprietor " is a fairly technical phrase which is defined in the Finance Act, 1940, s. 31, as follows:

> The expression " working proprietor " [and these three ladies were all " proprietors " as they are partners] means a proprietor who has, during more than one-half of the chargeable accounting period in question [that is to say, a year] worked full time in the actual management or conduct of the trade or business.

It is perfectly plain from the findings of fact that each of these ladies worked full time when she worked. That is quite definite. It is equally clear from what I have said with regard to the working days that not one of them could be said to have worked more than half of the year which was the chargeable accounting period in question, provided the ordinary meaning is given to the word " year." Accordingly, the Commissioners decided that these ladies were not working proprietors, and, therefore, the partnership could not be given the advantage of the sum of £1,500 in respect of each working proprietor.

Counsel for the appellants has challenged the correctness of that decision in three ways. He says that the Commissioners went wrong for three reasons. The first is that if you find, as you do in this case, persons occupied full time when they are working, they ought to be covered by the section. I am bound to say I find some difficulty in comprehending how I, in the position in which I am here, could tell the Commissioners that they ought to accept any such argument. The language is plain enough. It is what I have read. They must find, before they can allow the larger minimum amount, that the persons concerned are persons who " during more than one-half " of the year, " worked full time in the actual management or conduct " of this trade or business.

The second argument on which he based himself was that, properly looked at, the trade which these ladies pursued was in being for the whole of the year. That may or may not be so. The premises were there, and the urns and other paraphernalia were there locked up, and I daresay, from time to time, one or other of these ladies inspected the premises to see if they were all right. Unfortunately, that is not the test. The test is not whether the trade went on or existed during the whole of the year, but whether these individual persons, personally, worked full time " during more than one-half of the year."

Perhaps the most taking argument of the three was the last one, because there is a finding that these ladies, unlike most people, worked not merely every week-day, including Saturday, but also Sunday ; so that they worked 7 days, whereas the average man or woman works only five and a half days, and some people only work five days. It is suggested in that way that, if you were to give them credit for the two extra days that they worked in every week, you would very rapidly aggregate a number of days worked, by adding up those hours, which would amount to more than half a normal working year or a normal working chargeable accounting period. The principal difficulty in the way here is that the Act has not provided for such a contingency. The language appropriate to dealing with that state of affairs so as to bring it within the beneficial part of the section would have been some such phrase as " the normal working year," or " a year consisting of normal working days and hours," or something like that. But nothing of the kind appears in the Act, and it is quite impossible for me to read it into the Act. It would be very mischievous if I were to try to do so because I feel pretty certain that it would result in my bringing about one of the things which this section is undoubtedly intended to prevent, and that is, that the same person should be able to qualify for this allowance twice through working in two different undertakings. One person would then be able to qualify for these allowances by working very actively in one half of the year in one concern, and equally actively in the other half of the year in another concern, and aggregate those hours, and so defeat what I conceive to be one particular object of this Act.

My attention has been called to the only decided case on the subject, which is a Scottish case, *Inland Revenue* v. *Alexander Stirling, Ltd.* (1). That is a case where a lady who worked only part time every day sought by aggregating all that part time with one month, when she worked full time, to bring about the result that she be credited with having worked more than half the year. The court were unanimous in deciding that that could not be done. That case is of no assistance to me here because it is on another point ; but LORD MONCRIEFF, in giving judgment, did say this ((1944) S.L.T., 79 at p. 81) :

> . . . had she worked full time during days scattered through the year, those days might have been aggregated. . . .

I do not know whether LORD MONCRIEFF's opinion will prevail or not—it was *obiter*. It may be that is quite right, but, even so, that decision does not carry the appellants in this case any further. I may put it in this way. Upon the facts found by the Commissioners, it not only seems to me that they were at liberty to draw the conclusion they did draw, but, as I understand the plain meaning of the relevant language, it was impossible for them to find otherwise ; and so the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Caporn & Campbell* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

MARSHALL CASTINGS LTD. AND CINDAL ALUMINIUM LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Wrottesley, J.), April 4, 5, 12, 1946.]

Revenue—Excess profits tax—Transfer or acquisition of shares in company—Main purpose of transaction—Avoidance or reduction of liability to tax—Main benefit accruing—Benefits weighed against avoidance—Whether confined to benefits to company—Transferees of shares rendered working proprietors—Standard profits raised—Finance Act, 1941 (*c.* 30), *s.* 35—*Finance Act,* 1944 (*c.* 23), *s.* 33.

The first appellant company was a company with issued capital of £8,352 out of a nominal capital of 10,000 shares of £1 each. In Jan., 1941, it increased its capital by the issue of 2,100 preference shares of £1 each, which were allotted to T., who sold 525 of these shares to each of four employees of the company (subsequently appointed directors and thereby rendered working proprietors of the company) at half their par value, to be satisfied out of directors' fees subsequently to be received. The second appellant company was a wholly owned subsidiary company of the first appellant company, who held all except 2 shares of the total issued capital of £252, the remaining shares being held by the two directors of the company as qualifying shares. In Nov., 1940, the first appellant company transferred its shares in the second appellant company in equal parts to the two directors, and the second appellant company then became an independent director-controlled company entitled to its own minimum standard profit, *viz.*, £1,000. In Jan., 1941, the second appellant company increased its capital by the creation of £1 preference shares and 525 of these shares were allotted to T., who sold them to an employee (subsequently appointed a director) at half their par value, to be satisfied out of directors' fees subsequently to be received. In Apr., 1941, two other employees were allotted 50 preference shares each paid for at par, and became directors on the same date. In an appeal against directions made by the Commissioners of Inland Revenue under the Finance Act, 1941, s. 35, as amended by the Finance Act, 1944, s. 33, the Special Commissioners, weighing, against avoidance of tax, benefits that accrued to the company only, held that the tax benefit from the transactions far outweighed the other benefits accruing to the company, and directed that the second appellant company should continue to be treated as a subsidiary company of the first appellant company and that the three of the four new directors should not be regarded as working proprietors of the company :—

Held : (i) viewing the general structure and scope of the relevant legislation, the Special Commissioners were right in confining their attention to benefits accruing to the company and in excluding benefits to individuals, except in so far as they were reflected in benefits to the company.

(ii) on a true construction of the words " transaction . . . which involves . . . a transfer or acquisition of shares " in the Finance Act, 1944, s. 33 (3), since the section applied to two or three related transactions, only one of which involved a transfer or acquisition, there was no reason why it should not apply to one transaction only, part of which consisted of a transfer or acquisition.

[**EDITORIAL NOTE.** The tax avoidance which the Commissioners have to counteract by adjustment under the Finance Act, 1941, s. 35, as amended by the Finance Act, 1944. s. 33, is tax avoidance by the company. It is held, therefore, that the benefits to be considered are benefits accruing to the company, including in that term benefits to individuals so far as they are beneficial to the company.

For the Finance Act, 1941, s. 35, see HALSBURY'S STATUTES, Vol. 34, p. 131 ; and for the Finance Act, 1944, s. 33, see *ibid.*, Vol. 37, p. 329.]

Case Stated under the Finance (No. 2) Act, 1939, s. 21 (2), the Finance Act, 1937, Sched. V, Pt. II, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court. On appeals by the appellants against directions made by the Commissioners of Inland Revenue under the Finance Act, 1941, as amended by the Finance Act, 1944, the following facts were found by the Commissioners :

Both the appellant companies carried on the business of castings in aluminium and other metals. The Marshall company was incorporated in 1925, with a nominal capital of £10,000 in ordinary shares of £1 each. In Oct., 1939, its issued capital was £8,352, and was held by Noakes and Oakley, the only directors, and two others. On Jan. 1, 1941, its issued capital was increased by the issue on Jan. 1, 1941, of 2,100 6 per cent. preference shares of £1 each. These 2,100 shares were first allotted to T. for cash at par, and T. then sold them as to 525 shares each to Cadam, Jones, Deeley and Aspin, employees of the company for 10*s.* per share to be satisfied out of directors fees subsequently to be received. In order to qualify as a working proprietor the holding of shares in excess of 522 was necessary. Cadam, Jones, Deeley and Aspin were elected directors on Jan. 1, 1941. No share qualification was necessary for a director. Each share carried one vote.

The Cindal company was incorporated in 1938, with a nominal capital of £5,000 in ordinary shares of £1 each. In Oct., 1939, its issued capital was £252 and was held as follows: the Marshall company, 250 shares; Noakes, 1 share; Oakley, 1 share. Noakes and Oakley were the only directors. The qualification of a director was the holding of one share. For the purposes of excess profits tax it was a wholly owned subsidiary of the Marshall company at this time. On Nov. 29, 1940, Noakes and Oakley each purchased 125 shares previously held by the Marshall company at 30*s.* per share. They thus owned the whole of the issued capital. The Cindal company therefore ceased to be a wholly owned subsidiary of the Marshall company and became a director-controlled company for the purposes of excess profits tax. In Jan., 1941, the capital was increased by the creation of preference shares and 525 preference shares of £1 each were allotted to T., who in turn sold them to Watkins, an employee, who was appointed a director. The consideration payable by Watkins to T. for these shares was 10*s.* per share to be met from directors' fees as received in the future. On Apr. 8, 1941, 50 preference shares were allotted to two employees, Freeman and Lisle, respectively, which they paid for at par. Both became directors on the same date. The issued capital at this date was 625 preference shares of £1 each, and 252 ordinary shares of £1 each.

Each share carried one vote. In order to qualify as a working proprietor the holding of shares in excess of 43 was necessary.

By reason of the shareholdings prior to Nov., 1940, the Cindal company was a wholly owned subsidiary of the Marshall company and the standard for both companies was £1,500, *viz.*, one working proprietor. The excess profits tax benefit which might be expected, as the result of the transfers of 125 shares in the Cindal company to Noakes and Oakley respectively, causing the Cindal company to cease to be wholly owned subsidiary of the Marshall company, was £1,000 to the Cindal company as a standard. The benefit to the Marshall company, which might be expected as a result of the transfers of the 525 preference shares in Jan., 1941, to Cadam, Jones, Deeley and Aspin, was £4,500 (less the total remuneration paid to the four persons concerned which would otherwise be an allowable deduction to be added to the standard in respect of three additional working proprietors). Oakley was already a working proprietor, and four constituted the maximum allowable. The benefit to the Cindal company, which might be expected in respect of the transfer to Watkins of 525 preference shares in Jan., 1941, and the transfer to Lisle and Freeman of 50 preference shares in Apr., 1941, was an addition of £500 and £3,000 (less the total remuneration payable to the three persons concerned in a full year which would otherwise be an allowable deduction) to the standard of that company respectively.

The evidence of Oakley which was accepted by the Special Commissioners was as follows:

In the autumn of 1940 he pointed out to Noakes that it was time to implement promises given to Cadem, Watkins, Deeley, Jones and Aspin. The appointments to directorships and the transfers of shares to them were effected. Aspin and Jones had not been promised directorships. He desired all the persons, to whom shares were transferred, to have a stake in the company concerned. The benefit to the Marshall company of the transfers was that the transferees would be better servants with a stake in the company, and that he would be able to leave some of the responsibility of managing the business to them. The same applied to the Cindal company. Excess profits tax was not in his mind at the time the transfers were made.

The evidence of Noakes which was accepted by the Special Commissioners was as follows:

The transfer of the shares in the Cindal company from the Marshall company to himself and Oakley was of no benefit, other than that of excess profits tax, to the Marshall company. He, in fact, did not have excess profits tax in mind when the transactions were agreed or effected.

The decision of the Special Commissioners was in the following terms:

... We consider it desirable to set out the manner in which we construe the Finance Act, 1944, s. 33 (3) ... On an appeal to us, when subsect. (3) is in question, we ... take up our stand at the time when the transaction or transactions were effected, and, having regard to the law relating to the tax in force at the time, ascertain whether the main benefit, expected to accrue during the currency of the tax to the business, is an excess profits tax benefit, or a benefit or benefits to the business other than excess profits tax. In contrasting these benefits, we are clearly of the opinion that, like the excess profits tax benefit, the benefit or benefits, other than excess profits tax, must be to the business and not to an individual or individuals. It is the business which is assessed to and bears the tax: Finance (No. 2) Act, 1939, s. 12 (1) (2) . . . Applying this construction of the subsection to the present case, we have no hesitation in finding, on the evidence as a whole, that the excess profits tax benefit to the appellant companies, in respect of all the transactions, far outweighed the other benefit or benefits to be expected to accrue to those companies and is, therefore, the main benefit. Some benefit, other than excess profits tax, no doubt might be expected to accrue to the appellant companies as a result of the transactions challenged; benefits also accrued to the various persons to whom the shares were issued or transferred. It is, however, to be noted that the appointments to directorship are not challenged, the number of shares issued and transferred in each case forms the subject of the directions. To qualify as a director of the Marshall company it was unnecessary to hold any shares. To qualify as a director of the Cindal company it was necessary to hold one share.

We hold that the benefits, which might be expected to accrue to the appellant companies as a result of the appointments of the various persons to directorships, were not benefits accruing from the issue or transfer of the shares in question.

The result of the conclusions we have reached on the evidence is as follows: (1) The Cindal company shall continue to be treated as a subsidiary of the Marshall company; the position of Watkins and Lisle and Freeman does not, therefore, arise. (2) Jones, Deeley and Aspin shall not be regarded as working proprietors of the Marshall company.

With regard to Cadam, who had been with the Marshall company since the age of 15, and, after a short absence, had been persuaded to return to the company's service on the promise that he would be made secretary of the company and director as soon as financially possible, the Commissioners, in the exercise of their discretion, discharged the direction in respect of his not being treated as a working proprietor of the company; otherwise the directions stood confirmed.

J. Millard Tucker, K.C., and *John Clements* for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

WROTTESLEY, J.: The first question in this case is one which it is easier to ask than to answer. The Finance Act, 1944, s. 33 (3), omitting parts immaterial to this case, is as follows:

> If it appears in the case of any transaction or transactions, being a transaction which involves, or transactions one or more of which involve: (*a*) the transfer or acquisition of shares in a company . . . that, having regard to the provisions of the law relating to excess profits tax, other than the said section thirty-five [of the Finance Act, 1941], and this section, which were in force at the time when the transaction or transactions was or were effected, the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax was avoidance or reduction of liability to the tax, the avoidance or reduction of liability to excess profits tax shall be deemed for the purposes of the said section thirty-five to have been the main purpose or one of the main purposes of the transaction or transactions.

On the Special Commissioners, therefore, in the event of an appeal under the Finance Act, 1941, s. 35, the above-mentioned sect. 33 casts the burden of saying with regard to any particular transaction whether the main benefit which might have been expected to accrue from it was the avoidance of liability to excess profits tax. (Throughout this judgment a reference to avoidance of tax must be taken to include reduction of liability). In investigating any such transaction they will, therefore, almost certainly have to weigh other benefits which might accrue.

The Special Commissioners have held that the only benefits which they ought to weigh against avoidance of tax are benefits accruing to the company. The appellant says that this is too narrow a view of the meaning of the section and that there should be weighed any benefit which might accrue from the transaction to any person interested or concerned in it.

The second question is whether the phrase "transaction which involves . . . the transfer or acquisition of shares in a company" has the meaning "transaction which consists of the transfer or acquisition of shares" or has a wider connotation so as to cover a transaction part of which was the transfer or acquisition of shares.

As to the first question the Act does not say in terms that the main benefit which might have been expected to accrue from the transaction is a benefit to the company, still less that any benefit from tax avoidance is to be weighed by considering only other possible benefits to the company. The case can, therefore, only be answered by threading one's way through the legislation on the subject and looking at the history, object and scope of it.

The whole matter begins in 1939 in the Finance (No. 2) Act of that year, passed on Oct. 12, about a month after the outbreak of war. Sect. 12 (1) and (2) and sect. 13 (1) and (2) are as follows:

> 12. (1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this Part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess. (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom. 13. (1) For the purposes of this part of this Act, the standard profits of a trade or business shall, in relation to any chargeable accounting period, be taken, if the person carrying on the trade or business so elects, to be the minimum amount specified in subsect. (2) of this section, and, in the absence of such an election, to be the amount of the standard profits for a full year computed in accordance with the provisions of subsects. (3) to (9) of this section: Provided that in relation to a chargeable accounting period which is less then twelve months, the standard profits shall be taken to be the amount in question proportionately reduced so as to correspond with the length of the period. (2) The minimum amount referred to in subsect. (1) of this section is one thousand pounds, or, in the case of a trade or business carried on by a partnership or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding three thousand pounds, as is arrived at by allowing seven hundred and fifty pounds for each working proprietor in the trade or business. In this subsection—(*a*) the expression "working proprietor" means a proprietor who has, during more than one-half of the chargeable accounting period in question, worked full time in the actual management or conduct of the trade or business; (*b*) the expression "proprietor" means, in the case of a trade or business carried on by a partnership, a partner therein, and, in the case of a company, any director thereof owning not less than one-fifth of the share capital of the company.

At this stage, therefore, the profits of persons or companies carrying on trade or business in this country might not exceed those of the standard period by more than two-fifths, and any profit greater than that was excess profit and passed in the form of tax to the state.

By June 27, 1940, even this increase of profit was prevented by the Finance Act of that year, which by sect. 26 substituted for the words "equal to three-fifths of the excess" the words "equal to the excess." Generally speaking, therefore, after this, at any rate, those who carried on a trade or business in this country must either so arrange their expenditure and prices as not to make any excess profit, or if, by accident or design they made any excess profit, it was taken from them. That, at any rate, was the general design of the legislation, although of course it had to contain numerous exceptions in order to deal with cases where the result of the pre-war trading had been a loss or where fresh capital had had to be issued which must be rewarded, or in the case of a new company or a new business, or where for any reason the standard of pre-war years could not or ought not in fairness to be adopted. This aspect of this legislation is, I think, important as a good deal of use was made in the course of the argument of the word "penal" in order to describe some of the legislation under consideration. What Parliament enacted was, it is true, in form a tax, but it was not taxation in the ordinary sense so much as the machinery employed by the Legislature in a crisis in the nation's affairs, in order to prevent persons from making a greater profit during the war than they had made before; and looked at from this point of view it was no more penal than was the legislation which compelled persons of all ages to give their services to the country, either in the fighting forces or in some other capacity.

Among the numerous exceptional cases for which provision had to be made were those where the standard profits were so small as to be negligible or non-existent, and these cases were dealt with by granting as standard profit to the person concerned the minimum amounts set out in sect. 13 (2) of the Act of 1939. The Finance Act, 1940, by sect. 31, substituted for that subsection the following :

> (2) The minimum amount referred to in subsect. (1) of this section is one thousand pounds, or, in the case of a trade or business carried on by a single individual, or by a partnership, or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding six thousands pounds, as is arrived at by allowing one thousand five hundred pounds for each working proprietor in the trade or business.

I need not read the proviso : it deals with a possible increase in a special case where the nature or size of the business justified it. Sect. 31 of the 1940 Act went on :

> In this subsection—(*a*) the expression " working proprietor " means a proprietor who has, during more than one-half of the chargeable accounting period in question, worked full time in the actual management or conduct of the trade or business ; (*b*) the expression " proprietor " means, in the case of a trade or business carried on by a partnership, a partner therein, and, in the case of a company, any director thereof owning more than one-twentieth of the share capital of the company.

As a result of this subsection the profit which a trader would be allowed to keep would be increased in the case of a company, the directors of which had a controlling interest, up to £1,500 yearly for each working proprietor up to four. Thus, in the case of the Marshall company the increase of capital in 1941, the issue of that capital in blocks of 525 six per cent. preference £1 shares each to Cadam, Jones, Deeley and Aspin and their appointment as directors rendered them working proprietors and raised the standard profits to the highest figure at which it could ordinarily stand, namely, £6,000. The number of shares necessary to qualify the entry as a working proprietor was 522 shares, so each of them got three more shares than the necessary number.

The Cindal company was a wholly owned subsidiary company of the Marshall company, which held 250 shares out of the total issued capital of £252. The directors in the case of this company must each hold one share in order to qualify. As a result, the standard profit of the Marshall company included that of the Cindal company and no separate standard profit could be claimed for the latter company : sect. 17 (3) of the Act of 1939. In Nov., 1940, the Marshall company transferred half of its shares to one of the directors and the other half to the other director of the Cindal company. Up to then each of these directors had only held one share. The Cindal company thus became an independent director controlled company and entitled to its own minimum standard profit, namely, £1,000. Then in Jan., 1941, 525 preference shares were created and issued to Watkin, who was appointed a director. In Apr., 1941, Freeman and Lisle were each allotted 50 preference shares, 7 shares more than were necessary to qualify them as working proprietors. There were now three working proprietors, and the minimum standard profit of this company had gone, as a result of these steps, from nothing to £4,500.

As counsel for the appellants pointed out, once all profits above standard profit became excess there was, in many cases, no longer any inducement to economy, and it was for this reason that by the Finance Act, 1940, s. 32, the Commissioners were given power to disallow expenses which were not reasonable and necessary. In addition, as he pointed out, there was every inducement to those who controlled a business to take advantage of the provisions permitting minimum standard profits in order to increase the standard profit of a company, the standard profit of which, apart from these provisions, would be less than the minimum : for instance, a father would be found taking his son into partnership, or making his son and daughter directors so as to make them working proprietors, for by this means the company would be enabled to make and keep increased profits which were not treated as excess profits. Hence Parliament found it necessary to enact, first of all, the Finance Act, 1941, s. 35, and finally the Finance Act, 1944, s. 33, the section set out at the outset of this judgment, which amended and strengthened it. The Finance Act, 1941, s. 35, reads :

> (1) Where the Commissioners are of opinion that the main purpose for which any transaction or transactions was or were effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions. (2) Without prejudice to the generality of the powers

> conferred by subsection (1) of this section, the powers conferred thereby extend—(a) to the charging with excess profits tax of persons who, but for the adjustments, would not be chargeable with any tax, or would not be chargeable to the same extent; (b) to the charging of a greater amount of tax than would be chargeable but for the adjustments. (3) Any person aggrieved by a direction of the Commissioners under this section may appeal to the Special Commissioners, whether on the ground that the main purpose of the transaction or transactions was not the avoidance or reduction of liability to tax or on the ground that no direction ought to have been given or that the adjustments directed to be made are inappropriate.

I have already read the Finance Act, 1944, s. 33 (3), at the outset of this judgment. Moreover, in its amended form this section was by the Finance Act, 1944, s. 33 (1), to be deemed always to have had effect.

The general effect of this legislation is pretty clear. Those who enter into such transactions having as one of the main purposes the avoidance of tax fall within the jurisdiction of the Commissioners who are empowered to take the steps described in the original section in order to counteract the avoidance. Before, however, the Commissioners could make use of these very stringent powers, they had to be satisfied that one of the main purposes was avoidance, and in neither of the cases with which we are concerned were the Commissioners satisfied of this. Here the Finance Act, 1944, s. 33 (3), comes in and makes it unnecessary for the Commissioners to be satisfied or to satisfy the Special Commissioners that the main object was avoidance. In the first place it is to be noted that the transactions to which this section applies are limited. If a single transaction it must involve, and if more than a single transaction one at least must involve, the transfer or acquisition of shares in a company. This language supplies the answer to the point taken by counsel for the Commissioners as to the meaning of the words "transaction involving a transfer or acquisition of shares." Since the section applies to two or three related transactions, only one of which involves a transfer or acquisition, there is no reason why it should not apply to one transaction, one part of which consists of a transfer or acquisition. This interpretation has this additional advantage, that it gives to the word "involve" its ordinary grammatical and literal meaning.

In the course of the argument counsel for the appellants pointed out that these powers were far-reaching and came perilously near exposing the subject to such taxation as the Commissioners of Inland Revenue might choose to impose. Regarding the tax as a tax, the powers granted to the Commissioners are an apparent delegation of a discretion ordinarily reserved by Parliament to itself; for they enable the Commissioners by adjustment to charge with tax persons who otherwise would not be chargeable and to charge a greater amount of tax than would be chargeable but for the adjustments. On the other hand, these powers are confined to what is necessary in order to counteract the avoidance or reduction of liability to tax which would otherwise be effected by the transaction.

From the foregoing provisions it would appear to be reasonably clear that the real object to be attained by the Commissioners under the Finance Act, 1941, s. 35, as amended and added to in 1944, was to neutralise the effect of two different classes of transaction: firstly, transactions a main purpose of which was demonstrably to avoid liability to tax. That is not this case. But in its amended form the legislation went far beyond this: the Finance Act, 1944, s. 33 (3), dealt, secondly, with transactions where the main purpose could not be proved to be avoidance of tax. To such transactions a new test was to be applied: Was the main benefit which might have been expected to accrue during the currency of the tax avoidance of liability to the tax? If it was, then the Commissioners must treat it as a transaction a main purpose of which was avoidance of tax and make the appropriate adjustments to counteract this avoidance. It is no longer incumbent on the Commissioners of Inland Revenue to satisfy themselves or to prove to the Special Commissioners on appeal that tax avoidance was in fact a main purpose of the transaction. It is sufficient that a reasonable man with knowledge of the circumstances and the law should expect it to follow; moreover, the Commissioners are to confine their outlook to what may be expected during the currency of the tax.

Turning back now to the facts of these cases, the Special Commissioners, in weighing the various benefits other than tax avoidance which might have been expected to accrue from the above transactions, thought themselves not at liberty to weigh any benefits other than those which accrued to the company. Thus in one case there were, as the Special Commissioners point out, benefits which accrued to the various persons to whom the shares were transferred at half issue price. These the Commissioners excluded from their consideration. In addition there were, at the same time as the share transactions, appointments of persons as directors. These appointments either entailed no share transactions or else the issue or transfer of a single share. Accordingly the Special A Commissioners held that any benefits which might accrue to the company from these appointments were not benefits accruing from the issue or transfer of the shares with which they had to deal.

With reference to the first question, I have come to the conclusion, viewing the general structure and scope and object of this legislation, that the Special Commissioners were right to exclude from their consideration benefits accruing not to the company but to the individuals concerned. The tax avoidance B which the Commissioners of Inland Revenue have to counteract by adjustment is clearly tax avoidance by the company. For in the case of a company, the tax if not avoided would be assessed on and raised from the company. On this side of the scales, therefore, is to be placed the benefit which might be expected by a reasonable man to accrue to the company in the form of tax avoidance flowing from the transaction. Then in order to see whether this benefit was the main benefit to the company, it seems to me that the Commissioners must C next look at the other benefits which might be expected, by a reasonable man, to accrue to the company during the currency of the tax from the transaction : for instance, greater zeal in production, a greater incentive to care and economy in the use of the company's plant on the part of the employees, the retention or enlistment of a particularly skilful man who is not willing to remain a wage or salary earner merely. These are the kind of benefits to which the Commis- D sioners are intended to have regard, in my opinion, although it is true that none of them is mentioned except by implication in the Finance Act, 1940, s. 32, dealing with unreasonably high expenses. From this point of view benefits to individuals may be taken into account, but only in so far as they are likely to advantage the company. I note in passing that it was from this point of view that benefits to individuals were mentioned in the appellant's contentions. If benefits to the individuals concerned in the share transactions are to be taken E into account as such, then I see no reason why benefits to individuals which were at the expense of the company's efficiency should not be taken into account ; and this would cut clean across the whole object of the legislation.

As to the directorship, in so far as they formed an integral part of any transaction investigated, the Special Commissioners are not precluded from considering them merely because they did not entail any acquisition or transfer of shares or else so small a transfer as to be negligible. On the other hand, it is F for the Commissioners to say what are the transactions which they challenge, providing they do not split up artificially what is really one integral transaction, and it appears from the case that they have not challenged these appointments. There seems to be reason in the argument used, which is that in this case the appointment of the directors was not dependent on the share transactions ; so that the company could have got that benefit, if it be one, without issuing G the shares which they issued to the persons concerned.

In the result, the Special Commissioners have not misdirected themselves in the construction they place upon the subsection. In particular, they are right in confining their attention to benefits accruing to the company and in excluding benefits to individuals, except in so far as they are reflected in benefits to the company. As to the appointments of persons as directors, in the circumstances of this case and seeing that the Commissioners had not purported to interfere H with these appointments the Special Commissioners were at liberty to find what was a fact, that any benefits flowing from these appointments were not benefits accruing from the share transactions and could not have been expected to accrue.

In the result, therefore, the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Ward, Bowie & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

DELANEY *v.* T. P. SMITH, LTD.

[COURT OF APPEAL (Tucker and Cohen, L.JJ., and Wynn-Parry, J.), March 14, 29, 1946.]

Trespass—Verbal tenancy agreement subsequently cancelled—Occupation of premises without consent of owner—Forcible ejectment by owner—Pleading—Liberum tenementum—Law of Property Act, 1925 (*c.* 20), *s.* 40.

The appellants were the owners of a damaged dwelling-house which was being repaired. In April, 1944, an oral agreement was entered into between the respondent and the appellant's agent, whereby the respondent was to become tenant of the house, when ready for occupation, at a weekly rental, two instalments of which were payable in advance. The repairs were effected and the house was ready for occupation by the second week in Dec., 1944. Meanwhile, however, the appellants had decided to sell the estate on which the house was situated and so informed the respondent by letter, dated Dec. 4, 1944. The respondent obtained a key of the house, and, on Dec. 11, 1944, entered into possession of the premises. On Dec. 20, 1944, the appellants forcibly ejected the respondent and his effects. In an action for damages for trespass the respondent alleged that he was tenant of the house and as such protected by the Rent Restrictions Acts. The appellants pleaded, *inter alia*, that there was no note or memorandum in reference to the alleged tenancy as required by the Law of Property Act, 1925, s. 40. The county court judge, notwithstanding the absence of any memorandum in writing to satisfy the section and the inapplicability of the doctrine of part performance found in favour of the respondent. The grounds upon which the judge so found were that the appellants had to justify the eviction of the respondent; that in their attempt at justification, they were frustrated by proof of the agreement; and that the respondent, being in possession, relied on the agreement not as a cause of action, but to defeat the plea that the trespass was justified:—

HELD: although the respondent's possession was sufficient to support an action against a wrongdoer, it was not sufficient as against the lawful owner; the respondent was bound to rely on the agreement for a tenancy, not merely to defeat the plea that the trespass was justified, but as an essential part of his cause of action; and, there being no sufficient memorandum in writing, the Law of Property Act, 1925, s. 40, was an answer to his claim.

[**EDITORIAL NOTE.** Where a plaintiff in trespass admits the title of the defendant but pleads a lease from him, it must be strictly proved and there must be compliance with the Law of Property Act, 1925, s. 40, because, owing to the course of the pleadings, he is, in effect, bringing an action on a contract relating to land. This is equally the case if the plaintiff traverses the defendant's title and pleads a demise in the alternative; the demise or agreement is an essential part of his case, and sect. 40, which requires a written contract, or memorandum or note thereof, must be complied with.

AS TO A CLAIM OF RIGHT AS A DEFENCE TO AN ACTION OF TRESPASS, see HALSBURY, Hailsham Edn., Vol. 33, p. 18, para. 29; and FOR CASES, see DIGEST, Vol. 43, pp. 405-407, Nos. 281-299.

Cases referred to:

*(1) *Ryan* v. *Clark* (1849), 14 Q.B. 65; 43 Digest 407, *299*; 18 L.J.Q.B. 267; 13 L.T.O.S. 300.

(2) *Wilkins* v. *Boutcher* (1842), 3 Man. & G. 807; 30 Digest 361, 241; 4 Scott, N.R. 425; 11 L.J.C.P. 104.

(3) *Browne* v. *Dawson* (1840), 12 Ad. & El. 624; 43 Digest 384, *100*; 4 Per & Dav. 355; Arn. & H. 114; 10 L.J.Q.B. 7.

*(4) *Roberts* v. *Taylor* (1845), 1 C.B. 171; 43 Digest 407, *294*; 3 Dow. & L. 1; 14 L.J.C.P. 87; 4 L.T.O.S. 314.

APPEAL by the defendants from a decision of His Honour JUDGE FORBES given at Coventry County Court on Dec. 4, 1945. The facts are fully set out in the judgment of TUCKER, L.J.

A. P. Iliffe for the appellants.

W. L. James for the respondent.

Cur. adv. vult.

Tucker, L.J.: Cohen, L.J., desires me to say that he has read the judgments which are about to be delivered and concurs in them.

This is an appeal by the defendants from a decision of His Honour Judge Forbes, sitting at Coventry, given on Dec. 4, 1945, whereby he gave judgment for the plaintiff for £70 damages and costs in an action for trespass.

The defendants were the owners of a dwelling-house—No. 102, Allesley Old Road, Coventry. It had been damaged by enemy action and was being repaired in the year 1944. The plaintiff was anxious to obtain the tenancy thereof when repaired. The county court judge has found as a fact that in Apr., 1944, an oral agreement was made between the plaintiff and one Kelly, acting on behalf of the defendants, that he should become tenant of this house at a rent of 24*s*. 6*d*. a week, the first two weeks to be paid in advance, and that he could go into occupation as soon as the house was ready. The repairs were thereafter effected and the judge has found that the house was ready for occupation by the second week in Dec., 1944. Before this, however, the defendants had changed their minds and decided to sell all the houses on the estate on which 102 Allesley Old Road was situate and they so informed the plaintiff by letter dated Dec. 4, 1944. The plaintiff subsequently had an interview with one of the directors of the defendant company at which he was informed that they adhered to their decision and could not let him a house. Thereafter the plaintiff managed to obtain a key of the premises from somewhere and took possession of the premises on Dec. 11. On Dec. 20, the defendants forcibly ejected him and his effects, this being the trespass complained of. By his particulars of claim the plaintiff alleged that he was tenant of the dwelling-house in question and as such was protected in his occupation under the Rent and Mortgage Interest Restrictions Acts, 1920-1939, and claimed damages for trespass. In response to a request for further particulars he stated that he was unable to give the exact date on which the agreement to let was made but it was in the latter part of Apr., 1944. The defendants by their defence pleaded *inter alia* that there was no note or memorandum in reference to the alleged tenancy as required by the Law of Property Act, 1925, s. 40.

The county court judge in a careful reserved judgment, having held that there was no memorandum signed by the defendants' lawfully authorised agent sufficient to satisfy the statute and that there had been no act of part performance, dealt with the defendants' plea as follows:

> The question then arises whether the plaintiff brings this action upon the contract so that the action is within the ambit of the statutory provision. He alleges a tenancy, which is not quite the same thing as the agreement for the tenancy, but which arose out of it, and therefore I think that upon this part of his claim he seeks to charge the defendants upon the agreement. But he also alleges that the defendants unlawfully entered the house and ejected him from it; and I think he is entitled to treat this as a separate and independent claim. At the time that T. P. Smith (who, I need hardly say, was acting as the agent of the defendants) entered the house, the plaintiff was in possession of it. Possession is *prima facie* lawful, and in this case it seems to me that the plaintiff's possession was taken in pursuance of an agreement by which the defendants were bound, not the less because Smith had repudiated it. The plaintiff does not need to enforce the agreement by action; he had already enforced it by entry into possession; and, the agreement being proved, in the course of the trial of the plaintiff's claim for trespass, it is the defendants who say that they were entitled to eject the plaintiff because the agreement was not in writing. If the defendants had brought an action against the plaintiff for possession, they would have been met, and defeated, by the plea that they had made an agreement with the present plaintiff for a tenancy. In such an action, it would have been no answer for them to say that the agreement was not in writing or evidenced by writing, because the agreement would not be set up as a cause of action. I think that the true position is this: the plaintiff, being in possession of this house, is evicted by the defendants. He brings his action in trespass. The defendants admit the eviction. They have to justify it, by showing that he was a trespasser. In their attempt at justification, they are frustrated by proof of the agreement. The plaintiff relies on the agreement, not as a cause of action—his cause of action in trespass *prima facie* is complete without it,—but to defeat the plea that the trespass was justified.

I think the judge came to an erroneous decision. It is clear that the plaintiff was in fact founding his claim on the tenancy agreement pleaded by him. It is no doubt true that a plaintiff in an action of trespass to land need only in the first instance allege possession. This is sufficient to support his action against a wrongdoer, but is not sufficient as against the lawful owner, and in an action against the freeholder the plaintiff must at some stage of the pleadings set up a title derived from the defendant. The true position is illustrated in the old forms of pleadings: see BULLEN & LEAKE'S PRECEDENTS OF PLEADING, 3rd Edn., pp. 802, 803, and the cases there referred to dealing with the plea of *liberum tenementum*. It is sufficient, I think, to refer to the judgment of PATTESON, J., in *Ryan* v. *Clark* (1), where he explained the nature of this plea as follows (14 Q.B. 65, at p. 71):

> . . . it admits such a possession as would maintain the action against a wrongdoer, but asserts a freehold in the defendant with a right to the immediate possession.

SUTTON, in PERSONAL ACTIONS AT COMMON LAW, I think, correctly states the position at p. 185, where he explains that the plea of *liberum tenementum* might be thought to infringe the rule that a plea in confession and avoidance must either expressly or by necessary implication confess the plaintiff's claim and says:

> . . . but it was construed as admitting that the plaintiff had possession of the close in question, which was sufficient to support his action of trespass against a wrongdoer, but was not sufficient to support it against the lawful owner of the property.

This being the nature of the plea where the plaintiff relied on a demise from the defendant he had to plead it in his replication and any defence thereto had to be set up by way of rejoinder: see *Wilkins* v. *Boutcher* (2).

Considerable latitude is no doubt allowed with regard to pleadings in the county court and it may appear at first sight that the technicalities of pleadings prior to the Common Law Procedure Act can have little bearing upon an appeal from a county court in the year 1946. None the less, the Law of Property Act, 1925, s. 40, deals with procedure. It must be pleaded and has been pleaded in the present case, and one way in which its efficacy can be tested is by examining precisely what has to be proved by a plaintiff in an action for trespass against the freeholder. I think the plaintiff was at some stage bound to rely on the oral agreement of tenancy. He has elected to do so in his particulars of claim and in my view the Law of Property Act, 1925, s. 40, as pleaded, is an answer to this claim. For these reasons I am of opinion that this appeal succeeds.

WYNN-PARRY, J.: I need not re-state the facts. They are stated at length in the judgment of the county court judge, and have been summarised by TUCKER, L.J.

The county court judge found that there was no sufficient memorandum of the agreement on which the plaintiff relied to satisfy the Law of Property Act, 1925, s. 40, and that there was no evidence of any act of part performance such as would have taken the case out of sect. 40 of the above Act; indeed it was not argued before us with any force that the doctrine of part performance applied in this case. Notwithstanding, however, the absence of any memorandum in writing sufficient to satisfy the section, and the inapplicability of the doctrine of part performance, the judge has found in favour of the plaintiff. The material part of his judgment, which was a reserved judgment, has already been quoted by TUCKER, L.J., and I need not repeat it. I am unable to agree with the reasoning of the judge. In my view the plaintiff must rely on the agreement for the tenancy not merely "to defeat the plea that the trespass was justified," but as an essential part of his cause of action.

The reasoning of the judge raises a question of principle and, for the purpose of testing the matter, it is desirable to disregard any criticisms which might be levelled against the form of the particulars of claim.

The alternative cause of action on which the judge held that the plaintiff was entitled to succeed was a claim in trespass to land. In BULLEN & LEAKE'S PRECEDENTS OF PLEADING, 3rd Edn., at p. 417, the note, citing, among other cases, *Browne* v. *Dawson* (3) reads as follows:

> In order to maintain an action for this wrong the plaintiff must have a present possessory title . . . Actual possession as owner is presumptive proof of property, and is sufficient against a mere wrongdoer who cannot show any better title or authority.

Under the old form of pleading the count, in such an action as this, would have taken some such form as: "That the defendant broke and entered certain land of the plaintiff. . . .": see BULLEN & LEAKE'S PRECEDENTS OF PLEADING, 3rd

Edn., p. 415, and compare the count in *Browne* v. *Dawson* (3) which was " trespass for breaking and entering a certain room or apartment of the plaintiff, called the school-room." To the above count the plea of the defendant would have been a plea of *liberum tenementum*, " That at the time of the alleged trespass the said land was the freehold of the defendant " : see Bullen & Leake's Precedents of Pleading, 3rd Edn., p. 802. The plea of *liberum tenementum* was construed as admitting the actual possession of the plaintiff, but as containing by implication an assertion of a right of possession in the defendant as owner of the freehold. By way of replication to a plea of *liberum tenementum*, the plaintiff might plead a demise from the defendant to the plaintiff : see Bullen & Leake's Precedents of Pleading, 3rd Edn., p. 803. Under the modern form of pleading a plaintiff, met with the defence that the land in question was the freehold of the defendant, can raise a corresponding plea of demise from the defendant by way of reply.

It is clear upon the facts in this case, as found by the judge, that if the pleadings had proceeded strictly (a hypothesis which must be assumed for the purpose of testing the matter) the plaintiff would have been compelled to plead the oral agreement for a tenancy by the appropriate proceeding analogous to a reply in the High Court, because he was not in a position to deny the defendant company's freehold title.

Now it is to be observed that the plea of *liberum tenementum*, and the corresponding modern defence that the land was the freehold of the defendant involve a confession and avoidance. The plea admits the possession of the plaintiff, but asserts a title to the freehold. If issue were joined at that stage of the pleadings, the defendant would have to assume the onus of proving his title. In *Roberts* v. *Tayler*, Cresswell, J., said (1 C.B. 117, at p. 126) :

> In trespass *quare clausum fregit* the possession of the plaintiff is the foundation of the action; and the defendant is considered sufficiently to deny the plaintiff's right of possession by pleading *liberum tenementum* in himself or a third person ; in the latter case justifying as the servant and acting by the command of such third person : and by this anomalous plea the plaintiff is put to show how he has a possession in himself consistent with the freehold being in another, unless he chooses to traverse the title set up by the plea.

So where a plaintiff by his reply admits the title of the defendant, but pleads a demise from him, there is a true confession and avoidance. The plaintiff is concluded by his confession and must fail in his action unless he proves the case set up by his reply, namely, a demise from the defendant. The onus is thrown upon him to prove the matter set up by way of avoidance, and it has become an essential part of his case to do so. Where, therefore, in such circumstances he relies on a demise or a tenancy, he must prove it, and in order to do so he must comply with the Law of Property Act, 1925, s. 40, because as a result of the position into which he has been forced by the course which the pleadings have taken, he is, in my judgment, bringing an action upon a contract for the disposition of an interest in land. It is as if he had amended his statement of claim : because, where the allegation in question goes to the root of the matter, he cannot by introducing the allegation into his reply place himself in a better position than he would have been in had he pleaded it in his statement of claim.

The question then arises : Does a different result flow if, instead of admitting the defendant's title, the plaintiff by his reply denies the defendant's title, but as an alternative pleads a demise from him ? In my judgment the result is the same. In such an event the plaintiff sets up an alternative case : in the event of his failing successfully to traverse the title of the defendant at the trial he is, to quote again the words of Cresswell, J., in *Roberts* v. *Tayler* (1 C.B. 117, at p. 126) :

> . . . put to show how he has a possession in himself consistent with the freehold being in another.

Thus the proof of the demise or agreement for tenancy becomes, equally in such a case, an essential part of the plaintiff's case, without which he could not succeed. Assuming that I am right in my conclusion that the plaintiff must satisfy sect. 40 of the above Act in a case where he admits the defendant's title, it would be strange if he could avoid that obligation by merely traversing the defendant's title in his reply. In my judgment the true view is that the pleadings must be looked at as a whole ; and if it appears that, in order to succeed upon a sole or alternative cause of action, he must prove a demise or an agreement for a tenancy, then he must satisfy sect. 40 of the above Act, or prove such part performance as will take the case out of the section. If this were not so, then it would follow that a person in the plaintiff's position, who has nothing more than an oral agreement to grant a tenancy, upon which, therefore, he cannot bring an action either for specific performance or damages, may, if he is able to effect a clandestine entry, upon eviction successfully bring trespass; provided he takes the precaution of not relying upon the unenforceable agreement in his statement of claim, but relies upon the allegation that the defendant "broke and entered premises of the plaintiff," an allegation which he must know to be unsupportable in law; confident that by so framing his pleadings he will be enabled to do by his reply that which he could not hope to do by his statement of claim, namely, to obtain relief against the defendant upon the footing that a binding agreement of tenancy existed between them. So to hold would be in my view to defeat the section.

For these reasons I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Griffith & Son*, agents for *John Varley*, Coventry (for the appellants); *Julius White & Bywaters*, agents for *Penman, Johnson & Ewins*, Coventry (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LEOPOLD HIRSCH AND OLGAR HIRSCH *v.* RT. HON. SIR DONALD SOMERVELL, RT. HON. HERBERT MORRISON AND RT. HON. JAMES CHUTER EDE

[CHANCERY DIVISION (Roxburgh, J.), April 16, 30, 1946.]

Aliens—Enemy aliens—Action by German nationals against officers of the Crown alleging wrongful arrest, detention and threatened deportation—State of war with Germany still continuing—No right of action—Striking out statement of claim.

Practice—Pleading—Striking out statement of claim—Inherent jurisdiction of the court—Action by enemy aliens against officers of the Crown alleging wrongful arrest, detention and threatened deportation—No cause of action.

On July 2, 1945, the plaintiffs L.H. and O.H. issued a writ in an action complaining of their arrest, detention and threatened deportation, and claiming relief in respect of these matters against the defendants who were, at the material dates, officers of the Crown. In earlier proceedings, which took place in July, 1944, the court had held that L.H. and O.H. were German nationals and therefore could not challenge their arrest and detention. The statement of claim in the present action did not admit that L. H. and O.H. were German nationals at the date of the earlier decision and then make allegations showing that they had ceased to be German nationals. It merely stated: "Until the entry of the Germans into Austria the plaintiffs were Austrian nationals. Since then their nationality has been undetermined save that they now claim to be Austrian nationals as formerly." The defendants applied to have the statement of claim struck out by the court in the exercise of its inherent jurisdiction:—

HELD: (i) the plaintiffs having been held to be German nationals in July, 1944, they were still German nationals at the time the writ was issued, on July 2, 1945, because the war with Germany was still continuing.

R. v. *Bottrill, Ex parte Kuechenmeister* (3) followed.

(ii) as the plaintiffs were alien enemies, they could not challenge the legality of their arrest, detention or threatened deportation.

R. v. *Home Secretary, Ex parte L.* (2). *R.* v. *Bottrill Ex parte Kuechenmeister* (3) and *Netz* v. *Chuter Ede* (4) followed.

(iii) since the cause of action was obviously and incontestably bad, the statement of claim must be struck out.

Netz v. *Chuter Ede* (4) followed.

[**EDITORIAL NOTE.** This is another attempt by German nationals to challenge the validity of internment and deportation. In *Netz* v. *Ede* (4) Wynn Parry, J., struck out the statement of claim, by virtue of R.S.C., Ord. 25, r. 4. Roxburgh, J., makes a similar order in this case, acting under the inherent jurisdiction of the court.

As to Position of Enemy Aliens, see HALSBURY, Hailsham Edn., Vol. 1, pp. 455-457, paras. 771-774, and pp. 461, 462, para. 780; and for Cases, see DIGEST, Vol. 2, p. 147, Nos. 200-202, pp. 154-158, Nos. 250-280, and pp. 193-198, Nos. 540-563, and Supplement.

As to Inherent Jurisdiction of Court to Strike out Pleadings, see HALSBURY Hailsham Edn., Vol. 25, p. 256, para, 420; and for Cases, see DIGEST, Pleading and Practice, pp. 82-84, Nos. 691-703.]

Cases referred to:

*(1) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; Digest Pleading 75, *645*; 81 L.J.K.B. 217; 105 L.T. 753.

*(2) *R.* v. *Home Secretary, Ex parte L.*, [1945] K.B. 7; 114 L.J.K.B. 229.

*(3) *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 1 All E.R. 635.

*(4) *Netz* v. *Chuter Ede*, [1946] 1 All E.R. 628.

Procedure Summons by the defendants asking the court, in the exercise of its inherent jurisdiction, to strike out the plaintiffs' statement of claim and dismiss the action. In the action the plaintiffs complained of their arrest, detention and threatened deportation by the defendants who were, at the material dates, officers of the Crown. The facts are fully set out in the judgment.

H. O. Danckwerts for the applicants (defendants).

Harold Brown for the respondents (plaintiffs).

Roxburgh, J.: This is an action by Leopold Hirsch and Olgar Hirsch, his wife, against the Rt. Hon. Sir Donald Somervell, the Rt. Hon. Herbert Morrison and the Rt. Hon. James Chuter Ede. In this action the plaintiffs complain of three separate things: (i) their arrest; (ii) their detention; (iii) their threatened deportation; and founded upon these complaints they claim relief against these three defendants who, at the material dates, were servants of the Crown.

These defendants have applied to me to strike out the statement of claim and to dismiss the action in the exercise of the inherent jurisdiction of the court. This is a jurisdiction which must be most sparingly exercised and I have in my mind at this moment the words of Fletcher Moulton, L.J., in *Dyson* v. *A.-G.* (1) He said ([1911] 1 K.B. 410, at pp. 418, 419):

> Now it is unquestionable that, both under the inherent power of the court and also under a specific rule to that effect made under the Judicature Act,the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed upon the form of legal process when there could not at any stage be any doubt that the action was baseless . . . To my mind it is evident that our judicial system could never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

Therefore, the question which I have to consider is whether in this case "the cause of action is obviously and almost incontestably bad."

It has been admitted during the course of the argument that the plaintiffs, Leopold Hirsch and his wife, are the persons who were the applicants for a writ of *habeas corpus* in the proceedings reported under the name of *R.* v. *Home Secretary, Ex parte L.* (2). It has, therefore, been decided against them that they were German nationals at the date of that judgment. The original detention of the plaintiffs took place at Port-of-Spain in Trinidad under an order of detention, the lawfulness of which was disputed by the plaintiffs in the former proceedings. They were then brought to the United Kingdom where they have since been interned. They failed in their application for a writ of *habeas corpus* on the ground stated by Viscount Caldecote, L.C.J. in these words ([1945] K.B. 7, at p. 10):

> That being so [*i.e.*, they having the status of German nationals] it is not necessary to go into the circumstances which have been detailed to us as to the detention of the applicants at the Port-of-Spain in Trinidad. Whatever may be the rights or the wrongs of the question that has been raised, there is an impediment at the very outset of the applicants' motion, namely, that they being enemy aliens, and retaining their status of enemy aliens notwithstanding the German decree [which is referred to in that case] are not in a position to apply for a writ.

So far, therefore, as the original arrest and detention of the plaintiffs at Port-of-Spain is concerned, it has been decided that they could not challenge it at the date of that judgment because they were German nationals.

The war with Germany was still continuing at least up to Apr. 2, 1946, as has been decided in the proceedings in *R.* v. *Bottrill, Ex parte Kuechenmeister* (3). Therefore, as the war was still continuing at least up to Apr. 2, 1946, the plaintiffs were certainly German nationals on July 2, 1945, when the writ in this action was issued. It is to be noted that the statement of claim does not admit that they were German nationals at the date of the former decision and then make allegations designed to show that they have ceased to be German nationals. It says:

> Until the entry of the Germans into Austria the plaintiffs were Austrian nationals. Since then their nationality has been undetermined save that they now claim to be Austrian nationals as formerly.

It seems to me that that pleading cannot possibly stand with the decision in *R.* v. *Home Secretary, Ex parte L.* (2). If they were German nationals at that date, I cannot think that they have ceased to be so by this date, but if there be any circumstances which have brought about that change, nothing in this judgment will preclude those circumstances from being properly pleaded and, if they can be, proved.

Upon the footing that the plaintiffs still are German nationals, it seems to me that it has been so plainly determined by a long line of authorities that they cannot, while a state of war continues, challenge the legality of their arrest, detention or threatened deportation that I am bound to say that their form of action is "obviously and almost incontestably bad." As regards deportation, Wynn-Parry, J., recently had to consider, in *Netz* v. *Ede* (4), almost the precise question which I have to consider. The only difference is that he was being asked to strike out the statement of claim and to dismiss the action, not under the inherent jurisdiction of the court, but under R.S.C. Ord. 25, r. 4. Having considered the authorities most exhaustively and having travelled to the question of deportation through the cases dealing with detention, Wynn-Parry, J., said (at p. 634, *ante*):

> In my judgment, holding the view that I do that on the statement of claim as it stands the plaintiff must be regarded as an alien enemy, I have no alternative but to take the view that there cannot be at any stage any doubt that this action cannot possibly succeed.

He struck out the statement of claim subject to the possibility of it being amended. If I may say so, I entirely agree with Wynn-Parry, J., The matter appears to me to be settled beyond any possible doubt.

As regards the arrest and detention of the plaintiffs, *R.* v. *Bottrill* (3) is the latest of a long line of authorities. That was an application for a writ of *habeas corpus* before Lord Goddard, L.C.J., Croom-Johnson and Lynskey, J.J., and judgment was delivered on Apr. 3, 1946. On that application, which was for a writ of *habeas corpus* on the ground of detention, it was held that the war with Germany was then still continuing and it was admitted that the applicant was a German national. The authorities were then investigated with great thoroughness and Lord Goddard, L.C.J., concluded his judgment with these words (at p. 637, *ante*):

> His Majesty can always allow any alien, the subject of any state with which he is at war, to remain in this country, carry on his business and live as an ordinary citizen. One knows during the Napoleonic Wars and other wars in which this country has been engaged very frequently it was done. French subjects lived in this country and were allowed to live in this country, carry on their business and reside as ordinary citizens. So long as they are doing that it is presumed they are doing so by the licence of the Crown, but the Crown can withdraw that licence at any time. When the Crown thinks it necessary, in the interests of the safety of this country, to deprive an alien enemy of that right, the Crown withdraws the licence to live in the way he has been living and, by imprisoning him, the Crown considers, in the interests of the State, the alien enemy should no longer be allowed to remain here in the position he has been in and restores him (if one may so put it) to the status of an alien enemy and a person who should be put under restraint for the safety of the State. In those circumstances it seems to me the decisions which are binding on this court—and, as it seems to me, also on the Court of Appeal—show perfectly clearly that once the Crown has taken that step with regard to an alien

enemy the alien enemy is debarred from applying for a writ of *habeas corpus* and this court has no power to grant a writ.

It has been submitted to me that, even although the Crown may lawfully imprison a German national while a state of war is in existence between this country and Germany, the servants of the Crown may, nevertheless, be liable in civil courts for carrying out the lawful orders of the Crown. Of that argument I feel bound to say that it is "obviously and . . . incontestably bad."

Therefore, in my judgment, I must strike out the statement of claim in this action, but that is subject to this, that I will always be willing to grant leave to amend if an application for that purpose is made and the amendment is one which is not "obviously and almost incontestably bad."

Statement of claim struck out and the proceedings stayed. Leave to appeal granted.

Solicitors: *Treasury Solicitor* (for the applicants, the defendants in the action); *Waller, Neale & Houlston,* agents for *Marsh & Ferriman,* Worthing (for the respondents, the plaintiffs in the action).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Re GREYCAINE, LTD.

[Court of Appeal (Morton, Bucknill and Cohen, L.JJ.), April 15, 16, 1946.]

Companies—Receivers—Remuneration—Receiver appointed at agreed remuneration by trustees of trust deeds securing debentures—Compulsory winding up—Application by liquidator for remuneration to be fixed by the court—From what date court can fix remuneration—Law of Property Act, 1925 (c. 20), *ss.* 101 (1) (iii), 109 (6)—*Companies Act,* 1929 (c.23), *s.* 309.

Under a trust deed securing debentures issued by a company, the trustee was empowered in certain events to appoint a receiver at a remuneration payable out of the mortgaged premises "at such rate not exceeding that provided in the Law of Property Act, 1925, s. 109," as the trustee might determine. The deed further provided that the receiver, out of the moneys received by him, was to pay all costs and expenses incurred in carrying on the business of the company, retain his remuneration and pay over the balance to the trustee. The Law of Property Act, 1925, s. 109 (6) provides: "The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding 5 per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of 5 per centum on that gross amount." In 1936, a receiver was appointed by the trustee and was authorised to retain, out of the mortgaged premises and moneys to be received: (*a*) for remuneration, a commission at the rate of £5 per cent. of the gross amount of all moneys received by him, and (*b*) all costs and expenses. In 1937, an additional receiver was appointed and it was provided that the remuneration payable to the first receiver was to be divided between the two receivers. In 1938, an order was made for the compulsory winding up of the company. The receivers carried on the business of the company until Sept., 1940, when the company's works were destroyed by enemy action. There had been heavy claims for war damage. The receivership was still on foot, and the receivers had already received nearly a million pounds. On May 25, 1945, the liquidator applied to the court, under the Companies Act, 1929, s. 309, to fix the remuneration of the receivers. On a motion by the receivers to discharge the order of the registrar, the judge held (*a*) that the court had jurisdiction under sect. 309 to fix the remuneration of a receiver even when he had been appointed at an agreed remuneration; (*b*) that the jurisdiction could be exercised only as respects the future and that the date of the liquidator's application was the date from which the court could fix the remuneration. On appeal by the liquidator to the Court of Appeal, the questions to be determined were (i) whether the remuneration of the receivers was validly fixed by the trust deed and the deeds of appointment; (ii) assuming that the court had jurisdiction to fix the remuneration where it had already been fixed by contract, as from what date the court could fix it:

Held: (i) upon the true construction of the trust deed, the remuneration of the receivers was not in excess of that authorised thereunder. The provisions of the trust deed differed from those of the Law of Property Act, 1925, s. 109 (6) in that, under the trust deed, the receiver was entitled to pay the costs and expenses incurred by him before retaining his remuneration. Sect. 109 was only referred to in the trust deed, for the purpose of specifying the "rate" at which the trustee should be remunerated, and the reference was, therefore, only to the latter half of sect. 109 (6), *i.e.*, "a commission at such rate, not exceeding 5 per centum on the gross amount of all money received, as is specified in his appointment." The receivers' remuneration had, therefore, been validly fixed by the trust deed and the deeds of appointment.

(ii) upon the true construction of the Companies Act, 1929, s. 309, the court could only fix remuneration as from the date of its order.

Order of Lord Uthwatt, *sitting as an additional judge of the Chancery Division* ([1946] 1 All E.R. 329) *varied.*

[**EDITORIAL NOTE.** The Court of Appeal affirm Lord Uthwatt in the court below in holding that sect. 309 of the Companies Act, 1929 enables the court on the application of a liquidator to fix remuneration for a receiver notwithstanding any agreement for remuneration made at the time of appointment. Lord Uthwatt held that this power was exercisable from the date of the application of the receiver, but the Court of Appeal take the view that if the words "to be paid" in the section refer to the future, the logical conclusion is that the court can fix remuneration only as from the date of the order of the court. The order of Lord Uthwatt is accordingly varied to this extent.

For Application of Liquidator to Fix Remuneration of Receiver; see HALSBURY, Hailsham Edn., Vol. 5, p. 516, para. 837.]

Cases referred to:

*(1) *River Wear Comrs.* v. *Adamson* (1877), 2 App. Cas. 743; 36 Digest 105, *705*; 47 L.J.Q.B. 193; 37 L.T. 543.

(2) *Heydon's Case* (1584), 3 Co. Rep. 7a; 42 Digest 614, *143*.

Interlocutory appeal by the liquidator from an order of Lord Uthwatt, sitting as an additional judge of the Chancery Division, dated Jan. 30, 1946, and reported ([1946] 1 All E.R. 329). The facts are fully set out in the judgment of Morton, L.J.

Andrew Clark, K.C., and *V. R. Aronson* for the liquidator.
Gerald Upjohn, K.C., and *J. W. Brunyate* for the receiver.
C. W. Turner for the personal representatives of the joint receiver.

Morton, L.J.: This is an appeal by the liquidator of a company now called Greycaine, Ltd., from a decision of Lord Uthwatt, who was Uthwatt, J., when he heard the case, but Lord Uthwatt when he gave his judgment. The respondents are Brigham, who is the present receiver appointed under a power in a debenture trust deed, and the legal personal representatives of Wilcock, the deceased receiver. The appeal raises certain important questions as to the construction of the Companies Act, 1929, s. 309, and the matter has been very fully and well argued before this court. I think it really comes down in the end to a short, though by no means easy question of construction. The section itself is in the following terms:

> The court may, on an application made to the court by the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company, and may from time to time, on an application made either by the liquidator or by the receiver or manager, vary or amend any order so made.

The first question raised by the appellant, though it seems doubtful whether this point was argued in the court below, was whether the remuneration of the receivers was validly fixed by the trust deeds (to which I must refer shortly) and the deeds of appointment of receivers. I think Lord Uthwatt assumed that the remuneration was validly so fixed, but we have given leave to the appellant to raise that argument in this court, it being an argument based on the construction of documents, and counsel for the receiver raised no objection to that question of construction being argued.

That being the first question, the second is whether, if the remuneration has been so fixed, the court has jurisdiction to re-open the matter at all under sect. 309, and to re-fix, so to speak, the remuneration. The judge held that the court had that power, and there is no cross-appeal by the respondents from that decision. That is a matter which has been discussed in certain text books. We were referred to Buckley on the Companies Act, 11th Edn., p. 200, and Halsbury's Laws of England, Hailsham Edn., vol. 5, p. 516, note (*e*). We have not heard an argument on that point, and I do not propose to express any view upon it. The judge has held that the court has that jurisdiction, and there is no appeal from his decision. I propose to leave the matter there in the absence of any argument, or any appeal, and to assume in favour of the appellant that the court has power to fix the remuneration under sect. 309, notwithstanding that the remuneration was duly fixed on the receiver's appointment.

The third question is, assuming that the court has jurisdiction to fix the remuneration where it has already been fixed by contract, as from what date can the court fix it. There are four possible dates suggested. The first (and this is the primary contention of the appellant) is that the court can fix the remuneration as from the appointment of the receiver. The second and alternative contention which he puts forward is that the court can fix the remuneration to be paid as from the commencement of the winding up. The third possible date is as from the date of the application made by the liquidator under sect. 309. That is the date which the judge thought was the right date. The last possible date is that the court can only fix the remuneration as from the date of the court's order. There was no argument before the judge as to which one of the two last mentioned dates is right, assuming that one of them is the right date, because it would appear that there was no change of circumstances between those two dates in the present case. I think it is necessary, in arriving at a conclusion as to what the section means, to choose between those two dates, assuming that the court cannot accept either the date of the appointment of the receiver or the date of the commencement of the winding up.

Before considering the questions before us, it is necessary for me to state the facts of the case. The company was incorporated under the name of F. Gruneisen and Co., Ltd., on Oct. 25, 1912. The capital was originally £55,000, but was subsequently increased to £75,000, and the company carried on business as book binders, stationers and publishers. The name was subsequently changed to Greycaine Book Manufacturing Co., Ltd., and later to Greycaine, Ltd. In July, 1929, the company issued a series of first mortgage debentures. There were 100 of them at £1,000 each. On July 8, 1929, a trust deed was executed to secure that series of debentures. The trust deed was made between the company (under its then name) of the one part, and Century Insurance Co., Ltd. as trustee of the other part, and we were told that Century Insurance Co., Ltd. and a subsidiary of that company held all the debentures secured by that trust deed. Cl. 6 of the trust deed contains a charge of all the assets with the payment to the trustee of all moneys owing under the debentures in a not unusual form. The clause which deals with the appointment of a receiver and the remuneration of a receiver is cl. 17 which is as follows :

> The trustee at any time after this security becomes enforceable may by writing appoint a receiver of the mortgaged premises or any part thereof. . . (3) Unless otherwise directed by the trustee such receiver may exercise all the powers and authorities vested in the trustee by cl. 11 and 12 hereof.

I pause there to say that cl. 11 contains a power for the trustee to enter upon and take possession of the mortgaged premises and to sell them, and other powers relating to the same matter, whereas cl. 12 contains, amongst other things, a power to the trustee at any time after the security has become enforceable to carry on, or concur in carrying on, the business of the company. Cl. 17 (5) is as follows :

> The remuneration of such receiver shall be payable out of the mortgaged premises and shall be at such rate not exceeding that provided in the Law of Property Act, 1925, s. 109, as the trustee may from time to time determine.

The mortgaged premises, of course, in this case are not merely income but capital. With cl. 17 (5) I think one should read cl. 17, which is as follows :

> The receiver shall out of the moneys received by him pay all costs and expenses

> incurred by him in carrying on the business of the company or otherwise in exercise of his powers and his remuneration and shall pay over the balance to the trustee to be applied by it as hereinbefore provided.

It seems to me that those two sub-clauses contemplate that the receiver shall do two things out of the moneys received by him, whether by way of capital or income. He is to pay all costs and expenses incurred by him in carrying on the business of the company or otherwise in exercise of his powers, and he is to retain his remuneration. Then he is to pay over the balance to the trustee. Going back to cl. 17 (5), we find that the remuneration, which, as I read the clause, is a separate thing from the costs and expenses :

> . . . shall be payable out of the morgaged premises and shall be at such rate not exceeding that provided in the Law of Property Act, 1925, s. 109, as the trustee may from time to time determine.

I shall return to the Law of Property Act, 1923, s. 109, when I have finished stating the facts.

In Nov., 1934, five second debentures of £1,000 each were issued. Again they were all taken up by Century Co. and its subsidiary, and a trust deed was executed on Nov. 16, 1934, to which I need only refer quite briefly. Cl. 7 of that trust deed provides :

> All the covenants and provisions of the first debenture trust deed in relation to the first debentures. . . shall extend and apply to the security hereby constituted for the second debentures and to such second debentures in like manner as if the same were herein set out and specifically made applicable thereto with such modifications as the differences in the amounts and series of the first debentures and second debentures may require.

Again Century Insurance Co. was the trustee of that deed.

On Nov. 20, 1936, Century Co., as trustee, appointed Brigham, one of the present respondents, to be receiver under both deeds, and I must now refer to two clauses in that appointment. Curiously enough, although it is only an appointment of Brigham, he is defined as "herein called 'the receivers'". Cl. 2 provides :

> The receivers and each of them shall have and may exercise all the powers and authorities vested in the trustee by cl. 11 and 12 of the trust deed first mentioned in the schedule hereto.

That was the first debenture trust deed. Cl. 5 (2) provides as follows :

> The trustee authorises the receivers to retain out of the mortgaged premises and/or the moneys to be received by the receivers hereunder : (*a*) for their remuneration a commission at the rate of £5 per cent. of the gross amount of all moneys received by them : (*b*) all costs charges and expenses reasonably and properly incurred by them in the exercise of their powers as receivers.

As regards the insertion of the word "charges" in that clause, it is admitted by counsel for the receiver that that goes beyond what is authorised by the terms of the debenture trust deeds. I understand that at one time a claim was made by the receivers to retain something in respect of the remuneration of their staff, but that claim has now been dropped. I think that for all practical purposes I can treat this appointment as if it referred in cl. 5 (2) (*b*) only to costs and expenses. Counsel for the liquidator has very fairly said that he makes no point of the insertion of the word "charges" now that the receivers have dropped their claim to charges in respect of their staff ; he concedes that the insertion of that word makes no difference, as it should merely be treated as surplusage.

On Apr. 8, 1937, the trustee appointed Brigham and Wilcock joint receivers, and cl. 2 of that deed provides as follows :

> All the provisions powers and discretions contained in or conferred by Mr. Brigham's appointment shall extend and apply to the appointment hereby made and all the powers and discretions of the receivers under Mr. Brigham's appointment and this deed shall be exerciseable either by the receivers jointly or by either of them severally. .

Cl. 3 is :

> The remuneration provided in Mr. Brigham's appointment shall be divided between the receivers in such proportions as they shall agree.

No question turns upon cl. 3.

On Aug. 18, 1937, a winding-up petition was presented, and on Mar. 8, 1938, an order was made for the compulsory winding up of the company. On Apr. 22, 1938, the appellants, White and Robins, were appointed joint liquidators. On July 27, 1944, Robins died, and White is now the sole liquidator. On Oct. 30, 1944, Wilcock, the joint receiver, died, and the respondents, John and Margery Wilcock, are his legal personal representatives. The receivers carried on the business of the company until Sept. 27, 1940, when the conpany's works were destroyed by enemy action, and there have been certain heavy claims for war damage. The receivers have received up to date close on a million pounds, so that, if their remuneration is to be allowed at the rate specified in the trust deeds and the appointments, it will be a very substantial sum indeed.

On May 29, 1945, the liquidator took out a summons under the Companies Act, 1929, s. 309, asking that the court should direct what amount of remuneration by way of commission, percentage, or otherwise, should be paid to Brigham and Wilcock as joint receivers, and to Brigham as the surviving receiver, and on what proportion such remuneration should be distributed between them. Then it was asked that certain accounts and inquiries be taken and made and vouched. On Oct. 23, 1945, that summons came before Sir Arthur Stiebel, and he made this order :

> It is ordered that the remuneration of the said Bernard Harry Brigham and Frederick Wilcock deceased as such receivers as aforesaid be and the same is hereby allowed at the sum of £15,000.

It is to be observed that that order does not state the period in respect of which the registrar allowed this sum of £15,000, but I think probably his intention was that that remuneration should cover everything done by the receivers from the date of their appointment down to the end of the receivership. The registrar has stated that he made a slip in the calculation of the amount, and it is common ground that that order must be discharged, although there are certain other matters which are hotly in dispute.

On Nov. 6, 1945, the respondents launched a notice of motion to discharge the order of the registrar. They asked for a declaration that the receivers were, and are, entitled to keep the remuneration already paid to, or retained by, them pursuant to the trust deeds and appointments. That motion came before Uthwatt, J., and on Jan. 30, he made the order from which the liquidator now appeals. It is in the following terms, so far as material :

> This court doth order that the said order dated Oct. 23, 1945, be discharged [*i.e.*, the order of Sir Arthur Stiebel] and this court doth order that the matter be remitted to the registrar but any order made by him is not to relate to remuneration which pursuant to the terms of the trust deed and the instruments appointing the receivers has prior to the date of the liqudator's application accrued payable to the receivers.

I think it is clear that the words " accrued payable " would apply to any sums which the receivers had acquired a right to retain prior to the date of the liquidator's publication. For instance, if they had received certain proceeds of sale, then the agreed percentage on those proceeds of sale would have " accrued payable " to the receivers.

I shall turn back now to the first question argued by counsel for the liquidator : was the receiver's remuneration validly fixed by the trust deeds and the appointments ? In my view it was, and I cannot find any conflict between the provisions of the trust deeds and the appointments. Counsel for the liquidator has pointed out that the statutory power under the Law of Property Act, 1925, sect. 101 (1) (iii) refers to the appointment of a receiver :

> . . . . of the income of the mortgaged property, or any part thereof ; or, if the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof ; . . .

Then sect. 109 (3) provides :

> The receiver shall have power to demand and recover all the income of which he is appointed receiver . . .

Certain means are specified by which he may do that. Sect. 109 (6) (which is the most relevant subsection) is as follows :

> The receiver shall be entitled to retain out of any money received by him, for his

> remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, than at the rate of five per centum on that gross amount, or at such other rate as the court thinks fit to allow, on application made by him for that purpose.

Reading the first trust deed in conjunction with the Law of Property Act, 1925, sect. 109 (6) I think the effect is as follows: first, the receiver was to be entitled to pay the costs and expenses incurred by him. That is expressly provided for by the first trust deed, and in that respect the provisions of the first trust deed differ from the provisions of sect. 109 (6) where the "commission" is to cover the costs, charges and expenses of the receiver. Then, in addition to paying those costs and expenses, the receiver is to have remuneration at such a "rate" not exceeding that provided in the Law of Property Act, 1925, s. 109, as the trustee may from time to time determine. In my view, the reference to a "rate" refers to the latter part of sect. 109 (6) which begins with the words:

> . . . a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment . . .

I do not think one brings in at that point the first part of subsect. (6). Subsect. (6) is only referred to for the purpose of specifying the rate. Then when one comes to the actual appointment, we find that it specifies that the receivers are to receive:

> . . . for their remuneration a commission at the rate of £5 per cent. on the gross amount of all moneys received by them.

In addition they are to have:

> . . . all costs [I omit the word "charges" for the reason already specified] and expenses reasonably and properly incurred by them . . .

In my view, the remuneration so fixed is not in excess of that authorised by the trust deed, on its true construction, and the remuneration of these receivers has been validly fixed by the trust deed and the appointments.

It being common ground that the order of the registrar must be discharged, and that the matter must be remitted to him, I now come to the question: what is the direction which should be given to the registrar? Counsel for the liquidator has contended that the direction should be that he is to fix the remuneration of the receivers from the date of their appointment, or, alternatively, that the direction should be that the receivers are entitled to remuneration from the date of their appointment, to the commencement of the winding up in accordance with the scale of remuneration fixed by their appointment, and as from the commencement of the winding up the remuneration is to be fixed by the court.

The construction of this section, short though it is, is not free from difficulty, but after carefully listening to the arguments addressed to us, I have come to the conclusion that I agree with LORD UTHWATT in thinking that the court cannot go back further than the date of the liquidator's application. I base that conclusion, as LORD UTHWATT did, primarily on the words "to be paid." LORD UTHWATT said (at p. 332, *ante*):

> . . . these words point to regulating the course of events in the future, not to the possibility of reviewing the past.

With that observation I entirely agree. It is, however, a matter which has caused me some difficulty to understand why LORD UTHWATT, taking that view, should have taken the date of the application by the liquidator as the date from which the court can fix the amount of the receiver's remuneration. It seems to me that, if the words "to be paid" are words referring to the future, the logical conclusion is that the court can only fix the remuneration of receivers as from the date of its order. I do not propose to go further into that matter because the respondents have not argued against that part of the order which allows the registrar to go back to the date of the application by the liquidator. That part of the order, I understand, will make no practical difference to them. All that was said by LORD UTHWATT on that subject (*ibid.*, at p. 333) is:

> Nor again are they [the parties] concerned with the question whether what I have called the future means the date of the application or the date of the order, but it is, in my view, clear that the date of the application is the material date.

The judge did not, however, give any reasons for that conclusion.

Turning again to the Companies Act, 1929, s. 309, I think one must bear in mind that there has *ex hypothesi* been an appointment of a receiver before the court exercises its power. The section refers only to any person who has been appointed as receiver under the powers contained in an instrument, so that the section is dealing with a case in which there has been a bargain between the company and the trustee for the debenture holders, and between the trustee and the receiver. I think it is not unfair to describe it, as counsel for the receiver did, as a penal section, if the effect of it is that the court can take away from the receivers remuneration which they have already earned in pursuance of their bargain. Ordinarily, a receiver takes his remuneration out of the moneys which he has received. He may work hard and try to sell a property and fail, in which case, on a percentage remuneration, he gets nothing. On the other hand, if he does sell, directly he has received the proceeds of sale he has a right to his percentage. There is no difficulty at all in treating the section as referring only to the future. You merely find out what moneys the receiver has received up to the date of the order, and what remuneration he is entitled to retain under his bargain, and the court then says what is " to be paid " in the future. To my mind, the very fact that there is no date mentioned in the section as the date from which the court may fix the amount of the receiver's remuneration is a strong indication that the court is not to go back to any earlier date than the order itself. The order is to deal with the future and only with the future. The intention is, I think, to leave undisturbed that percentage which has already accrued to the receiver on the moneys collected by him.

Counsel for the receiver relied upon other portions of the section in respect of his argument, but, for my part, I think that the vital words are " to be paid," and it is on those words I found the view at which I have arrived. There are certain other matters which were referred to in argument which I think are of considerable importance. To my mind, if the legislature had intended to empower the court to take away remuneration already earned by a receiver, it would have made provision for that remarkable power in plain terms by words which plainly conferred that power. Counsel for the liquidator agrees that his argument must imply that the receiver may be called upon to pay back moneys already received, and rightfully received, by him. It is, of course, possible that the legislature intended to give such a power, and the power is a discretionary one, but for my part I should not feel inclined to construe the section so, unless the words were reasonably plain, and to my mind they are reasonably plain the other way. One can easily think of circumstances where it would be a very great hardship on a receiver to have the whole matter suddenly re-opened. For example, a receiver might have been carrying out his duties in accordance with his bargain for ten years. He might have expended a large part of his remuneration in paying sur-tax and income tax thereout, and in paying his staff and other expenses of every kind. He might then be faced with a demand for the repayment of the sums so received by him. Again, supposing a receiver had died, his executors would always have hanging over them this possible claim as a result of the exercise of its powers by the court under sect. 309. Furthermore, if the section has the construction for which counsel for the liquidator contends, it is a striking fact that persons who were engaged in receiverships before the passing of the 1929 Act would suddenly find that remuneration which they had contracted to receive, had retained and had possibly spent, could be taken away from them by the court. All these consequences would not deter me from giving that construction to the section if I thought it was the construction which the words most naturally bear, but I do not take that view.

Counsel for the receiver referred us to the manner in which the legislature has made provision for the cases where persons are to be called upon to repay moneys already received by them. He referred in particular to the misfeasance section, sect. 276. There a very careful provision indeed is made in regard to the repayment of moneys by officers of the company under certain circumstances which I need not describe. The only provision in the Act which was suggested as having any application to the case of repayment of moneys received by a receiver was sect. 311 (1) (*b*), but that is a section which deals with a case where a default has arisen on the part of the receiver in failing to render proper accounts of his receipts and payment. I doubt very much whether that subsection could be invoked for the suggested purpose, but however that may be, I cannot believe that the legislature would have given a power to recall moneys from the receivers without making some clear provision as to how these moneys were to be recalled.

To my mind, the construction which best fits the words of the section is that the court can only fix remuneration as from the date of its order. The other possible alternative which may be the right one, but which does not commend itself so much to my mind, is that the court can fix the remuneration as from the date of the application by the liquidator. To my mind the court is not empowered by the words of this section to go any further back. The construction A I have put on the section, as it seems to me, follows exactly the wording of the section; there is no need to imply anything, and no difficulty arises as to the date to which the court can go back. The section is dealing, and dealing only, with the future.

BUCKNILL, L.J.: I agree that this appeal should be dismissed for the reasons given by MORTON, L.J., in his judgment, and I have nothing to add.

B COHEN, L.J.: I agree, and I only desire to add a word on one point. Counsel for the liquidator bases his argument in substance on a passage from the speech of LORD BLACKBURN in *River Wear Comrs. v. Adamson* (1) where LORD BLACKBURN said (2 App. Cas. 743, at p. 764):

> As long ago as *Heydon's* case (2) LORD COKE says that it was resolved "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered; C 1st. What was the common law before the Act? 2nd. What was the mischief and effect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy."

He says that the mischief with which Parliament was trying to deal arises from events which happened before a winding up supervened, and that when a D winding up supervened the interests of the unsecured creditors who had been unable to protect themselves became paramount. He adds that this mischief could not be wholly removed unless we accept his construction and construe the section as enabling the court to review the remuneration of the receiver as from the date of the first appointment of a receiver. This may be true. But I think there are a number of other considerations which may have weighed with Parliament. E I will not go through them in detail. They have been mentioned by MORTON, L.J. It is enough to say that, amongst the considerations that Parliament may have taken into account, was the undesirability in principle of disturbing bargains possibly acted on for many years before the commencement of the winding up. I cannot help feeling that, if we were to put that forced construction—and I think it would be a forced construction—on the language of this section in order to remove completely the mischief defined by counsel for the liquidator, we should F be neglecting that part of the speech of LORD BLACKBURN which immediately follows the passage which I have read. LORD BLACKBURN went on to say (*ibid.*, at p. 764):

> But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the court injudicious . . .

G I am not saying that in this instance that criticism would be justified; I do say that I think the only construction to be placed on this section is that which has been indicated by my Lord, and I cannot find anything in the circumstances justifying us in making that departure which the argument of counsel for the liquidator required from the natural meaning of the words.

For these reasons, I agree that, subject to the question of the form of the order, the appeal should be dismissed.

H *Appeal dismissed. Order of* LORD UTHWATT, *sitting as an additional judge of the Chancery Division, varied by the substitution of the words "prior to the date of the order" for the words "prior to the date of the liquidator's application." Leave to appeal to the House of Lords granted.*

Solicitors: *Cosmo Cran & Co.* (for the liquidator); *F. C. Hampshire*, Harpenden (for the receiver); *Roney & Co.* (for the personal representatives of the joint receiver).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

YOXFORD AND DARSHAM FARMERS' ASSOCIATION, LTD. *v.* LLEWELLIN.

[Court of Appeal (Scott and Tucker, L.JJ., March 22, 25, April 10, 1946.]

Emergency Legislation—Egg marketing—Voluntary compensation fund—Failure of packer to contribute—Direction transferring producers to other packers—Validity—Bill of Rights, 1688 (*sess.* 2, *c.* 2)—*Defence* (*General*) *Regulations,* 1939 (*S.R. &.O.,* 1939, *No.* 927) *regs.* 54c., 55—*Eggs* (*Control and Prices*) (*Great Britain*) *Order,* 1944 (*S.R. & O.,* 1944, *No.* 502) *arts.* 3, 14.

Under an egg-marketing scheme brought into operation by the Minister of Agriculture and Fisheries in 1941, the appellants, who for a number of years had carried on the business of marketing eggs within a wide area, became licensed packers for an area restricted to within a few miles of their packing station, the producers in that area being compelled to sell their eggs to the appellants. At the invitation of the Minister a voluntary compensation fund was set up within the industry to which the surviving packers, who had made a proportionate gain in business, could make contributions, and out of which these packers who had been put out of business or had suffered a proportionate loss of business could be compensated. The trade association which administered the fund called upon the appellants, who had made a proportionate gain out of the scheme, to contribute to the fund. The appellants did at first contribute but after a time refused to make any further contributions. After due warning, the Minister directed a re-transfer from the appellants to other packers of sufficient producers to bring the appellants to the point at which no net contributions would be due from them into the compensation fund :—

Held : (i) the direction was a proper exercise by the Minister of the discretionary powers conferred upon him by the Defence (General) Regulations, 1939, regs. 55 and 54c.

(ii) there had been no levying of money for or to the use of the Crown and the Bill of Rights, 1688, therefore, had no application.

[**EDITORIAL NOTE**. In *A.-G.* v. *Wilts United Dairies* (4) a charge was made by the Minister for granting a licence, which was held to be a levying of money for the use of the Crown, but in this case the direction by the Minister did not contain any demand for payment of money to the Crown.

For the Bill of Rights, 1688, see HALSBURY'S STATUTES, Vol. 3, p. 149 ; and for the Defence (General) Regulations, 1939, regs. 54c, 55, see *ibid.*, Vol. 37, pp. 739, 741.]

Cases referred to :

(1) *R.* v. *Comptroller-General of Patents, Ex p. Bayer Products, Ltd.*, [1941] 2 All E.R. 677 ; [1941] 2 K.B. 306 ; 165 L.T. 278.

(2) *Point of Ayr Collieries, Ltd.* v. *Lloyd-George*, [1943] 2 All E.R. 546.

(3) *Carltona, Ltd.* v. *Works Comrs.*, [1943] 2 All E.R. 560.

*(4) *A.-G.* v. *Wilts United Dairies* (1922), 91 L.J.K.B. 897 ; 25 Digest 132, *519* ; 127 L.T. 822.

Aitken Watson for the appellants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *Patrick Devlin*, for the respondent.

Cur. adv. vult.

Scott, L.J. : This is an appeal by the plaintiffs from a judgment of Croom-Johnson, J., in favour of the defendant sued as Minister of Food. The plaintiffs sought a declaration and injunction : (1) A declaration that the direction dated Mar. 15, 1945, or the direction of or about Apr. 3 to 6, 1945, or any of them issued on behalf of the defendant to the plaintiffs whereby the defendant as Minister of Food purported to exercise his powers in that behalf under the Defence (General) Regulations, 1939, reg. 55 and the Eggs (Control and Prices) (Great Britain) Order, 1944, para. 3 is not a *bona fide* exercise by the defendant of such powers and is not binding on the plaintiffs ; and (2) An injunction restraining the defendant and all persons acting under his authority from acting on the said directions or from requiring the plaintiffs or their present customers to act in accordance therewith.

On May 3, 1945, the action was disposed of upon a trial before Croom-Johnson, J., of the two following issues : (1) Whether the issue of the direction by the defendant of Mar. 15, 1945, or the directions of or about Apr. 3 to 6, 1945, or either of them is a proper exercise by the Minister of his powers having regard to the letters of Feb. 14, 1945, and Mar. 15, 1945, exhibited to the affidavit of Sir Herbert Guy Musgrave Hambling, Bart., sworn herein of Apr. 7, 1945; (2) Whether the said directions by reason of such letters contravene the provisions of the Bill of Rights, 1688.

Judgment was given for the defendant with costs. In a considered judgment, the judge held (1) that what the defendant had done was properly done by him within the discretionary powers conferred upon him by the Defence Regulations, regs. 55 and 54C.; and (2) that there had been no levying of money for or to the use of the Crown and that the Bill of Rights upon which the plaintiffs relied had no application. With both decisions we agree.

In June, 1941, the Minister of Food considered it necessary to regulate the whole trade of the country in home-produced fresh eggs. This under Defence Regulation 55 he had, as "the competent authority," power to do.

The material provisions of that regulation are as follows:

> (1) A competent authority, so far as appears to that authority to be necessary . . . for maintaining supplies and services essential to the life of the community may by order provide—(*a*) for regulating . . . the keeping, storage, movement, transport, distribution, disposal . . . of articles of any description . . . (*b*) for regulating the carrying on of any undertaking . . . and also make such provision . . . as the competent authority thinks necessary or expedient for facilitating the introduction or operation of a scheme of control . . . under this regulation; and an order . . . may prohibit the doing of anything regulated by the order except under the authority of a licence granted by such authority . . . (2A) A competent authority may, if it appears to that authority to be necessary . . . for maintaining supplies and services essential to the life of the community, make or give as respects any undertaking all or any orders or directions which might have been made or given under sub-para. (*a*) of para. (1) of Reg. 54C by an authority which is a competent authority for the purposes of that Regulation, if the undertaking had been a war production undertaking and had been declared . . . to be a controlled undertaking, . . .

The relevant words of reg. 54C (1) are:

> . . . the undertakers shall carry on the undertaking in accordance with orders made or directions given by a competent authority, and such orders or directions may, in particular . . .

The last mentioned power to give directions is thus both general and particular, and on the true interpretation of the provision the particular power does not, in our opinion, cut down the general power. Orders were made and from time to time amended from June, 1941, onwards, the relevant order at the time in question being No. 502, entitled "The Eggs (Control and Prices) (Great Britain) Order, 1944." Under it every producer keeping over 25 head of poultry was prohibited from selling except through the licensed packer with whom he was registered.

The appellants were licensed packers—art. 3 (1), (2), and (3); and by art. 3 (7) were prohibited from disposing of eggs except to the Minister. Art. 14 was as follows:

> (1) The provisions of this Order are subject to any directions which may at any time be given by or on behalf of the Minister, and to any licences or authorisations which may be granted by or on behalf of the Minister under this Order. (2) Every person holding a licence or authorisation granted under or continuing in force by virtue of this order, shall comply with every condition imposed by such licence or authorisation.

The appellants had for 20 years carried on the business of marketing eggs, collected within a wide area around Yoxford in Suffolk, and sold by them largely in London. When the Eggs Order came into force in 1941 they became licensed packers for the area lying within 10 miles of their packing station at Darsham, pursuant to a scheme brought into operation by the Minister. No fees or charges were payable under the licence. As a result of the scheme, some perhaps were put out of business, some licensed packers lost business and others gained. After the scheme had been running some time, the Minister invited all packers to set up a voluntary compensation fund within the industry to which surviving packers who had made a proportionate gain in business could make contributions, and out of which those packers who had been put out of business, or had suffered a proportionate loss of business, could be compensated. This fund was established and was run by a trade association, the National Egg Packers Association Ltd. Those administering the compensation fund took the view that the appellants had made a proportionate gain out of the scheme, and called on them to contribute to the compensation fund. For a time the appellants did so, but after a time they refused to make any further contributions. On Feb. 14, 1945, the directors of egg supplies, on behalf of the Minister, wrote to the appellants' chairman, pointing out that he had been asked many times to come and talk over the position, and that, as he would not come, and would not pay, the Minister would, under his powers, have to "re-transfer from you to other packers sufficient producers to bring you to the point at which no net contributions would be due from you into the compensation scheme," a re-transfer which as the letter said, would involve "a reduction of (the appellants') output to something less than half its present size."

After further correspondence, in which the appellants refused to budge from their position, the Minister on Mar. 15 wrote, saying that as from Mar. 22 all collections by the appellants from producers south of a named geographical line would be transferred to another licensed packer. Between Apr. 3 and 6 the Minister issued directions to 199 different producers accordingly, the appellants receiving one in their capacity of a producer within the area. Each direction purported to be given under the powers of reg. 55, which, as stated, incorporated the directive powers of reg. 54C, and not under any powers conferred by Order No. 502.

The judge was plainly right on both issues. On the first he was right for these reasons: (1) The Emergency Powers (Defence) Act, 1939, s. 1, gave powers to His Majesty in Council to make regulations. Subsect. (1) is expressed in the widest terms possible and subsect. (2), which confers particular powers, begins "without prejudice to the generality of" subsect. (1). (2) Reg. 55 incorporating 54C confers both legislative power to make orders and executive power to give directions. The principle of interpretation of the regulations in regard to powers of both types is plain and has been affirmed time after time in this court and also in the House of Lords in appeals relating to orders under reg. 18B. It is unnecessary to repeat what was said by this court in *R.* v. *Comptroller of Patents, Ex p. Bayer Products Ltd.* (1). CLAUSON and GODDARD, L.JJ. agreed with me. The same principle was enunciated by LORD GREENE, M.R., in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (2), and in *Carltona, Ltd.* v. *Commissioners of Works and Others* (3).

On the second issue it is enough to point out that no payment was demanded on behalf of the Crown or made to the Crown. It was contended for the appellants that the decision of the House of Lords in *Attorney-General* v. *Wilts United Dairies* (4), affirming the Court of Appeal, supported their contention before us that the Minister, by asking the licensed packers to help him to even out the losses and gains of the packers party to his scheme by joining in the voluntary compensation fund, had acted in a way expressly forbidden by the Bill of Rights. We do not agree. In that case the Food Controller, purporting to act under the powers conferred upon him by the Defence of the Realm Regulations during the first German War, had required dairy farmers in certain districts to make a payment direct to him of 2d. per gallon in respect of milk supplied by them. As he had been given no such authority either by Parliamentary or by delegated legislation, the charge was held to be invalid; see *per* LORD BUCKMASTER, (91 L.J.K.B. 897, at p. 900):

> The powers so given are no doubt very extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes.

That decision has no relevance to the facts of the present case.

It is perhaps right to add that in the present case we have no ground whatever for thinking that there was any want of *bona fides* in the action taken by the Minister.

The appeal must be dismissed with costs.

TUCKER, L.J., agreed.

Appeal dismissed with costs.

Leave to appeal to the House of Lords refused.

Solicitors: *Durrant, Cooper & Hambling* (for the appellants); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BARCLAY DAVIT CO., LTD. *v.* SAMUEL TAYLOR AND SONS (BRIERLEY HILL), LTD.

[Chancery Division (Romer, J.), April 2, 3, 8, 1946.]

*Practice—Discontinuance of action by plaintiff—Written statement delivered by plaintiff after delivery of defence—Statement delivered pursuant to an order made on an interlocutory application by plaintiff—Delivery of statement a "proceeding in the action"—Subsequent notice of discontinuance invalid—R.S.C., Ord. 26, r. 1—R.S.C., Ord. 53*A*, r. 21*A.

In an action by the plaintiffs alleging the infringement of their letters patent, the defence was delivered on May 30, 1945. On an interlocutory application by the plaintiffs under R.S.C., Ord. 53A, r. 21A, an order was made by the master on Nov. 6, 1945, and, pursuant to that order, on Feb. 4, 1946, the plaintiffs delivered a written statement signed by counsel. On Feb. 12, 1946, the plaintiffs served notice of discontinuance. Under R.S.C. Ord. 26, r. 1, a notice of discontinuance delivered by the plaintiff after receipt of the defendant's defence is valid only if delivered before the plaintiff has taken "any other proceeding in the action (save any interlocutory application). It was contended by the defendants that the service of the written statement was a "proceeding in the action" within the meaning of R.S.C., Ord. 26, r. 1, and that the notice of discontinuance was, therefore, invalid. On behalf of the plaintiffs, it was contended that compliance with an order was not in itself a separate proceeding in the action and that, although the delivery of the written statement together with the order under which it was delivered constituted a "proceeding," such proceeding was protected from the operation and scope of R.S.C., Ord 26, r. 1, because it was made on an interlocutory application :—

Held : (i) an act which had some degree of formality and significance and which was done by the plaintiff in furtherance of the action was a "proceeding" within the meaning of R.S.C., Ord. 26, r. 1. The fact that the act was done in pursuance of an order made on an interlocutory application was immaterial where the order was made on the application of the plaintiff and there was no penalty for failure to comply with its provisions ; the exemption from the operation of R.S.C., Ord. 26, r. 1, given to interlocutory applications and orders made under them did not include everything done as a result of such an order.

(ii) the delivery of the written statement by the plaintiffs was a "proceeding in the action" within the meaning of R.S.C., Ord. 26, r. 1. The subsequent notice of discontinuance was, therefore, invalid.

[**EDITORIAL NOTE.** Notice of discontinuance cannot be given after taking a "proceeding" other than an interlocutory application. This appears to mean a proceeding which is intended to be in furtherance of the action, but it is argued that where the proceeding in question is taken in consequence of an interlocutory order, such as an order made under R.S.C. Ord. 53A, r. 21A, in patent proceedings, notice of discontinuance can still be given. This view is rejected.

As to Discontinuance of Action, see HALSBURY, Hailsham Edn., Vol. 26, pp. 76, 77, para. 129 ; and for Cases, see DIGEST, Pleading and Practice, pp. 499-503, Nos. 1736-1779, and Supplement.

For R.S.C., Ord. 26, r. 1, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 412.]

Cases referred to :

*(1) *Mundy* v. *Butterley Co., Ltd.*, [1932] 2 Ch. 227 ; Digest Supp. ; 102 L.J.Ch. 23 ; 148 L.T. 132.

*(2) *Spincer* v. *Watts* (1889) 23 Q.B.D. 350 ; Digest Practice 499, *1737* ; 58 L.J.Q.B. 383 ; 61 L.T. 711.

(3) *Vickers, Sons & Maxim, Ltd.* v. *Coventry Ordnance Works, Ltd.*, [1908] W.N. 12 ; Digest Practice 499, *1738* ; 25 R.P.C. 207.

Procedure Summons by the defendants, in a patent action, asking that the action stand dismissed for want of prosecution on terms that the plaintiffs should be precluded from bringing any further action in respect of infringements up to the date of the writ in this action. The facts are fully set out in the judgment.

P. J. Stuart Bevan for the applicants (the defendants).

James Mould for the respondents (the plaintiffs).

ROMER, J.: This is a summons taken out by the defendants in the action of Barclay Davit Co., Ltd., against Samuel Taylor & Sons (Brierley Hill), Ltd. The summons asks that the action stand dismissed for want of prosecution on certain terms which are then set out in the summons.

The action is a patent action and pleadings were delivered. The writ was issued on Feb. 26, 1945; the statement of claim was delivered on Apr. 5, 1945, and the defence was delivered on May 30, 1945. On Feb. 12, 1946, the plaintiffs served notice of discontinuance, and the date of that notice is, as will be seen, A some months after the date of the delivery of the defence. The validity of that notice is challenged by the defendants, and I am invited to say that, having regard to the circumstances of the case, it was not open to the plaintiffs on Feb. 12, 1946, to serve a notice of discontinuance and that the notice which, in fact, they did serve was a nullity and may be ignored.

The matter depends substantially on the language of R.S.C., Ord. 26, r. 1, the relevant part of which is as follows: B

> The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn . . . Save as in this C Rule otherwise provided, it shall not be competent for the plaintiff [to discontinue his action].

The defendants rely on two matters, each of which, they say, constitutes the taking of a proceeding in the action by the plaintiffs after May 30, 1945, upon which date the defence in the action was delivered. First, they say that on Aug. 14, 1945, the plaintiffs swore an affidavit of documents and filed that affidavit, and that the filing of that affidavit constituted the taking of a pro- D ceeding. The affidavit was filed pursuant to an order made on a summons for directions taken out by the plaintiffs on July 31, 1945. The second matter which they say constitutes the taking of a proceeding by the plaintiffs was the delivery on Feb. 4, 1946, of a written statement which was delivered by the plaintiffs pursuant to an order made on their application on Nov. 6, 1945.

The application was made under R.S.C. Ord. 53A, r. 21A, which provides: E

> (1) In any action for infringement of a patent or petition (otherwise than by way of appeal from the Comptroller) for the revocation of a patent, the plaintiff or petitioner shall, as soon as he becomes entitled to give notice of trial, apply as to the mode of trial, and if he fails to apply within 14 days of becoming so entitled, the defendant or respondent, as the case may be, may make such application. Any such application may be dealt with in chambers or in court, as the judge shall think fit. (2) Upon any such application the court or judge may give such directions:—(*a*) for the delivery of fur- F ther pleadings or particulars; (*b*) for the delivery of statements signed by counsel setting out all the contentions whether of fact or law (including contentions as to the construction of the specification or other documents) upon which the parties respectively intend to rely; (*c*) for the taking by affidavit of evidence relating to matters requiring expert knowledge, and for the filing of such affidavits and the delivery of copies thereof to the other parties; (*d*) for the making of experiments, tests, inspections or reports; (*e*) for the hearing, as a preliminary question, of any question that may arise (including any question as to the construction of the specification or other documents), and other- G wise as the court or judge may think necessary or expedient for the purpose of defining and limiting the issues to be tried [and other matters which are there mentioned].

The order which was made under R.S.C., Ord. 53A, r. 21A, was an order made in chambers. So far as it is an order upon the plaintiffs, it directs [by para. 2] that they:

> . . . do on or before Dec. 4, 1945, make and file a statement stating (*a*) Whether they H admit that the documents mentioned in para. 1 of the said particulars of objections were published in this realm before the date of the letters patent in suit. (*b*) Whether the plaintiffs will accept the King's printers' copies of the specification referred to in the pleadings or photostat copies thereof as evidence of the matters contained therein. (3) That within 4 weeks of the receipt of the statements in paras. 1 and 2 hereof referred to the plaintiffs and the defendants do respectively supply to the defendants and to the plaintiffs copies of any drawing model sample photograph blue print or other particular upon which the plaintiffs and the defendants respectively desire to rely at the trial.

Then there is a limitation as to the putting in of evidence at the trial by drawings, and so on, and other provisions, through which I do not propose to go, dealing in considerable detail with many matters which it was necessary or desirable should be dealt with and finalised with a view to getting ready for trial, and the conduct of the action at the trial., It was in pursuance of that order that the statement upon which the defendants rely, the written statement of the plaintiffs signed by their counsel, was put in and it contains certain admissions.

The defendants are plainly precluded from relying, as being proceedings in the action within the meaning of R.S.C., Ord. 26, r. 1, upon the applications which the plaintiffs made and which resulted, first, in the order for the filing of the affidavit of documents, and, secondly, in the order made by the master on Nov. 6, 1945, because both those applications were interlocutory applications and interlocutory applications are expressly taken out of the scope of R.S.C., Ord. 26, r. 1. But the defendants say, as I have already indicated, that the filing of the affidavit and the service of the written statement constitute the taking of a proceeding by the plaintiffs within the meaning of R.S.C., Ord. 26, r. 1.

I confess that it is a matter of considerable difficulty to arrive—at all events, unaided—at any satisfactory conclusion as to what precisely the draftsman of R.S.C., Ord. 26, r. 1, had in mind when he used the language which appears in that part of the rule which I have read. The object, as I conceive it, of R.S.C., Ord. 26, r. 1, is to save expense and trouble to those concerned in the defence of an action in the event of the plaintiff making up his mind that he wants to discontinue the proceedings which he has set upon foot, and that, if he desires so to discontinue, then he must do so before his opponent has been put to any substantial degree of expense. That being, (as I believe it to be), the underlying principle of R.S.C., Ord. 26, r. 1, does not in any marked degree facilitate the problem which is set before me of saying what precisely, in detail, is meant. What is said, in effect, is that a plaintiff may discontinue so long as he has not taken any proceedings in the action other than interlocutory applications. Aye or no, is the statement which was a signed written statement delivered by the plaintiffs a proceeding in the action, and if it was not, then was the affidavit of documents which they filed a proceeding in the action other than an interlocutory application ?

I will deal first, with the signed statement which was put in in response to the order of Nov. 6, 1945, and see whether that is a proceeding within the meaning of R.S.C., Ord. 26, r.1. Both counsel who argued the case seem to be satisfied that the only authority which is of any assistance on this matter is *Mundy* v. *Butterley Co., Ltd.* (1), where MAUGHAM, J., had to consider whether a particular document, *viz.*, a formal notice to deliver an affidavit of documents, which was given by the plaintiffs' solicitors after the receipt of the defence, was or was not " any other proceedings in the action " within the meaning of R.S.C., Ord. 26, r. 1. He came to the conclusion that it was not.

In his judgment, after referring to certain considerations (which are relevant only in this sense, that they show how clearly convenient the course is which the defendants have adopted on the present occasion in coming to the court with a view to getting the matter decided here and now rather than waiting until the trial), MAUGHAM, J., turned to the substantial point, which he said was not free from difficulty and continued as follows ([1932] 2 Ch. 227, at pp. 230-232) :

> The authorities which have been cited begin with *Spincer* v. *Watts* (2), where there is a judgment by LINDLEY, L.J., which has often been referred to. Unfortunately, I think, the ground on which the Court of Appeal decided that case is one which is not open to me here. It was an action by the holder against the acceptor and the drawer of a bill of exchange. The acceptor paid money into court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counterclaim. The plaintiff, after receipt of the defence, took the following step—a word I use without prejudice to what follows :—he paid into court the amount of the counterclaim and took out of court the amount paid in by the acceptor, and having done that, he gave the drawer notice of discontinuance. Then the question was whether that notice was good or bad, and that came before the court on a direction to tax. In the Court of Appeal, LINDLEY, L.J., after referring to Order 26, r. 1, and the facts in the case said this [23 Q.B.D. 350, at pp. 352, 353] : " It is said that it was then too late for the plaintiff to give a notice of discontinuance, because he had, after receipt of the defence, taken a ' proceeding ' in the action, not being an interlocutory application. I think that the exception throws some light upon the meaning of the words ' before taking any other

proceeding in the action.' and, having regard to it and the object of the rule, I think what is meant is, ' taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken.' In the present case no proceeding was taken by the plaintiff with that view after the delivery of the defence. I think therefore, that the plaintiff's technical objection fails, and it follows that he must pay the defendant Watts' costs of the action up to the date of the notice of discontinuance." Lopes, L.J., who was putting exactly the same point said this [23 Q.B.D. 350, at p. 353]: " I do not think that either of those steps is the kind of ' proceeding ' which was contemplated by r. 1 of Order 26. I think the rule intended a proceeding which has the effect of continuing the action—not a proceeding which has the effect of putting an end to the action. Therefore, I think the plaintiff was entitled to give the notice of discontinuance." That case does not seem to me to afford me very great assistance here, because the formal letter requiring a delivery of the defendants' affidavit of documents was not a letter intended to put an end to the proceeding in any way whatever ; it was a letter written in the ordinary course by the plaintiffs' solicitors on the footing that the action was going to proceed and without evincing any intention whatever of shortening or putting an end to the proceedings or any part of them.

" The next case cited is *Vickers, Sons & Maxim, Ltd.* v. *Coventry Ordnance Works, Ltd.* (3). There it is to be observed that after the notice of discontinuance, the defendants set the case down for trial, and when it came on for trial counsel for the plaintiffs submitted that the action had come to an end on the previous Oct. 1, the date of the notice to discontinue, and that point the learned judge had, therefore, to determine. He in fact determined that the notice to discontinue was bad, and accordingly the action had to be dealt with and was dismissed with costs, the plaintiffs not supporting the action. This instance, therefore, is one of very inconvenient procedure being adopted for the purpose of getting the point determined whether a notice of discontinuance is or is not good. What was decided to be the objection to the notice of discontinuance was the fact that after the delivery by the defendants of their defence and particulars of objection, the plaintiffs amended their statement of claim by adding parties and amended the averment of title, and delivered their amended statement of claim on July 29, and then on Oct. 1 they gave notice to discontinue. Warrington, J., said: " That was not a mere formal proceeding on their part but was done in order to enable them to prosecute successfully the action which without such amendment they could not have done." Then the report continues: " The delivery of that amended statement of claim was in his Lordship's judgment a proceeding other than an interlocutory application within Ord. 26, r. 1. The present case was not at all like *Spincer* v. *Watts* (2) as far as the facts were concerned, but the *dicta* of Findlay, L.J., applied."

It is quite plain, I think, with regard to the *Vickers* case (3) that it was not there merely a question of amending the statement of claim but of amending the writ as well. There was an amendment of the whole of the proceedings by bringing in additional parties, and then there was a further amendment, with regard to the statement of claim, relating to the averment of title.

Maugham, J., then proceeded ([1932] 2 Ch. 227, at pp. 232, 233 :

As I have said, he accordingly dismissed the action with costs. So far, therefore, I have only reached this stage in attempting to construe Ord. 26, r. 1 : that a step taken with a view to putting an end to the action is not a proceeding in the action, and that an amended pleading delivered after the delivery of the defendant's defence is *prima facie* another proceeding in the action and is clearly not an interlocutory application, which means an application to the court. It seems to me then I have to decide, without very much assistance from those authorities, whether such a letter, which clearly is not an interlocutory application, is a proceeding in the action, the word " proceeding " being one which certainly does suggest something in the nature of a formal step, either an application to the court which for the purposes of this rule would not be an interlocutory application, or at least a step taken by a litigant in prosecution of the action being a step which is required by the rules. In saying that, I am not attempting a complete definition, but merely a kind of approximation to the sort of proceeding which is probably pointed to by the terms of the rule. I do not think on the whole that a letter written by a solicitor stating that he intends to set the action down for trial at a future date would be a proceeding in the action ; I do not think a mere appointment to examine documents which had been offered for inspection would be a proceeding ; I do not think that conferences between solicitors or either informal or *quasi* informal letters or conversations could be regarded as a proceeding. I should add that I am not even sure that a formal application under the summons for directions for delivery of an affidavit of documents or for leave to administer interrogatories would be regarded as " proceedings in the action other than of an interlocutory nature," and, without deciding that, I may add it would be very strange if a mere letter saying the previous order must be complied with is a proceeding within the meaning of this rule, although an application for the order, or for similar relief, would not bar the right of the plaintiff to discontinue the action because of the exception in the rule " save any interlocutory application."

The judge then referred to a case which was decided under the Arbitration Act, 1889, and, though it was of obvious relevance to the case which was before him, I do not think I get very much assistance out of it myself in arriving at a conclusion upon the present case.

The guidance which is to be found in *Mundy* v. *Butterley Co., Ltd.* (1) is largely of a negative character, but, at all events, one does find this much, that a proceeding may take the form of a document and is not limited to a proceeding before the court (being a proceeding other than an interlocutory application). But there is further guidance, I think, in forming a view (at which I have to arrive before I can proceed further in the matter) as to whether this written statement is a proceeding notwithstanding that it was made under an order. Counsel for the defendants suggested that a proceeding or step must be (i) for the purpose of continuing litigation and not putting an end to it; (ii) something in the nature of a formal step; (iii) not an interlocutory application. Those, he said, are the three tests to apply to any matter which is being relied upon under R.S.C., Ord. 26, r. 1. On the other hand, counsel for the plaintiffs says that compliance with an order already made was not in itself a separate proceeding in the action, but was all part of obtaining and perfecting the order: if it were so, the drawing up of the order would be a separate proceeding. He said that one has to ask oneself whether the plaintiffs, after the receipt of the defence, had taken some fresh step, with a view to furthering the litigation, contrasted with merely carrying out the provisions of some antecedent order. In the present case he said the order and everything done under it were steps which together constitute a proceeding, but that such proceeding is protected from the operation and scope of R.S.C., Ord. 26, r. 1, by reason of the fact that it was made on an interlocutory application.

It seems to me that the principal assistance I get from *Mundy* v. *Butterley Co., Ltd.* (1) are the two passages from *Spincer* v. *Watts* (2) where Lindley and Lopes, L.JJ., expressly gave their views as to what R.S.C., Ord. 26, r. 1, meant. Lindley, L.J., after referring to the exception of interlocutory applications, said (23 Q.B.D., 350, at p. 353):

> I think that the exception throws some light upon the meaning of the words "before taking any other proceeding in the action," and, having regard to it and to the object of the rule, I think what is meant is, "taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken."

Lopes, L.J., said (*ibid*):

> I think the rule intended a proceeding which is to have the effect of continuing the action—not a proceeding which has the effect of putting an end to the action.

The views which I think that Lindley and Lopes, L.JJ., were indicating were to some extent in this sense: that, provided that you find that some act has been done by the plaintiff in the furtherance of the action towards its ultimate end, namely, trial, and that that act is not merely an informal one but is one which sustains some degree of formality and significance, that act is a proceeding within the meaning of R.S.C., Ord. 26, r. 1. I think that that view of the matter is very much the one which Maugham, J., himself was expressing in the *Mundy* case (1) when he pointed out that there must be, at all events, a real formality, and that the word "proceeding" certainly does suggest something in the nature of a formal step taken with a view to furthering the litigation. It is plain that informal discussions and informal documents, directed though they may be, and probably would be, to the advancement of the action towards trial, are not necessarily proceedings within the meaning of R.S.C., Ord. 26, r. 1. If, however, one finds something which has both formality and significance, and which is either taken or launched by the plaintiff with a view to bringing the action nearer to trial, it seems to me that that is a "proceeding" within the meaning of R.S.C., Ord. 26, r. 1; and I think that one would be cutting down the scope and intention of the rule if one were to accept the more limited interpretation which counsel for the plaintiffs seeks to put upon it in cases where what is done is done by virtue of the provisions of an order. It seems to me that the position in the present case was this. The plaintiffs applied for an order, and an order was made which dealt thoroughly and completely, both in matters of detail and procedure with this action down to and including the trial. The fact that the plaintiff got this order made on an interlocutory application and that the application itself, and the order made upon the application, are excepted from the operation of R.S.C., Ord. 26, r. 1, does not mean that the exemption which flows from R.S.C., Ord. 26, r. 1 in favour of an interlocutory application, results also in exemption of everything that follows as the result of the order on the interlocutory application being made.

As I have already said, the order was one of considerable importance and dealt with a variety of topics. Para. 2 of the order, which was the one upon which the plaintiffs acted, directed the filing of the statement which I am now considering. Para. 3 prescribed : A

> That, within 4 weeks of the receipt of the statements in paras. 1 and 2 . . . the plaintiffs and the defendants do respectively supply to the defendants and to the plaintiffs copies of any drawing model sample photograph blue print.

The order then dealt with the calling of expert witnesses at the trial, that being merely a matter of procedure, and then gave either party liberty to set down the action for trial at the expiration of the time therein indicated, and also went on to deal with discovery. It seems to me that action under para. 3 could not B fairly be regarded as anything other than a proceeding within the meaning of the rule. Action under para. 7 (which is the setting down for trial) obviously would be a proceeding within the meaning of the rule, and, in my view, action under para. 2 is equally an independent proceeding under the rule and it would be giving an unduly narrow interpretation to the word " proceeding " to regard the filing of a statement under para. 2 (which was, in fact, filed) as merely a step C in carrying out the order as distinct from a proceeding in the action.

Logically, it seems to me that the plaintiffs' argument goes to this, that they could have carried out the order in its entirety, except para. 7, and yet not have taken a proceeding in the action within the meaning of that word as used in R.S.C., Ord. 26, r. 1. It seems to me that the filing of this statement wholly differs from the informal kind of matter to which MAUGHAM, J., referred towards the end of his judgment in *Mundy* v. *Butterley Co., Ltd.* (1), and does in fact D possess the degree of formality and significance which would justify one in describing it as a proceeding other than an interlocutory application in the action.

The only other point upon which I might say a word is the question whether, assuming that, as I find it to be, the filing of the plaintiffs' statement is a proceeding, the fact that it was filed in pursuance of an order makes any difference. It occurred to me at one stage of the discussion that a possible view might be that R.S.C., Ord. 26, r. 1, was only directed to E proceedings of a purely and wholly voluntary character, such as, *e.g.* (although it is expressly exempted from the rule), the launching of an interlocutory application. But R.S.C., Ord. 26, r 1, does not say so ; it is quite unqualified in its terms and uses the expression " any other proceeding." Whether, in certain special circumstances, one might be justified in qualifying those words in some way, I do not think that I am justified in doing so in this case by saying that a proceeding made in pursuance of this particular order is F outside the scope of R.S.C., Ord. 26, r. 1, because it is to be observed that not only was the order made on the application of the plaintiffs themselves, but it carries with it nothing in the nature of a sanction or penalty for failure to observe or comply with its provisions. The plaintiffs might perfectly well have disregarded the order, without any pains or penalties being inflicted upon them, by serving notice of discontinuance the moment the order had been made. G

I am satisfied that, although there might be some ground in some cases for thinking that some act is of such an involuntary character as to be outside the scope of R.S.C., Ord. 26, r. 1, the filing of this statement by the plaintiffs in the manner contemplated by the order does not cease to be a proceeding, or is not prevented from being regarded as a proceeding, merely because it was done in pursuance of the order which the master made. Therefore, in my judgment, the filing of this statement is in fact a proceeding within the meaning of R.S.C., H Ord. 26, r. 1, and I so decide.

On that view, it does not become necessary for me to deal with the further ground upon which the defendants submitted that the plaintiffs had taken a step in the action, namely, the filing by them of an affidavit of documents, and I express no view as to whether that contention is or is not sound.

Consent order that the action be discontinued. Costs of the action down to and including the application (such costs to be taxed if not agreed) to be paid by the plaintiffs to the defendants. Plaintiffs to be precluded from bringing any further *action in respect of the infringement of which specific particulars were given in this action.*

Solicitors: *Peacock & Goddard*, agents for *Shakespeare & Vernon*, Birmingham (for the applicants, the defendants in the action); *Blundell, Baker & Co.* (for the respondents, the plaintiffs in the action).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law*].

A

REES *v.* HUGHES.

[COURT OF APPEAL (Scott, Morton and Tucker, L.JJ.), April 10, 11, May 10, 1946.]

B *Husband and Wife—Death of wife owning separate estate—Funeral expenses—Medical and nursing fees—Liability of executors—Common law liability of husband—Effect of married women's property legislation—Married Women's Property Act,* 1882 (*c.* 75), *s.* 1 (1)—*Administration of Estates Act,* 1925 (*c.* 23), *ss.* 32 (1), 33 (1), (2) *and* (7), 34 (1) *and* (3), 45 (1) *and* (2), 46 (1), *Sched. I, Pt. I—Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (*c.* 30), *ss.* 1, 2.

C *Burials—Expenses—Deceased wife—Common law liability of husband—Effect of married women's property legislation.*

The appellant's wife, who owned separate property, died at the home of the respondents, with whom she had been living for some months prior to her death, leaving a will of which the respondents were executors. The questions involved were whether the respondents could recover from the appellant (i) a sum which they, in their capacity as executors, paid in respect of medical attendance and nursing fees, without any request, express

D or implied, from the appellant and without legal compulsion so to do, and (ii) a sum paid in respect of funeral expenses, the will having contained no direction with regard thereto:—

HELD: (i) if the medical and nursing fees were the liability of the appellant's wife, they were properly discharged out of the estate and there was no liability on the appellant; if they were the liability of the appellant, they should not have been paid by the respondents, and as the respondents

E had paid them without any request from the appellant and without legal compulsion so to do, they could not recover the money so paid from the appellant.

(ii) the effect of the Married Women's Property Act, 1882, the Administration of Estates Act, 1925, and the Law Reform (Married Women and Tortfeasors' Protection) Act, 1935, was that there was now, as

F regards property of any kind, no difference between a married woman and a *feme sole*; the foundation for the old common law rule putting on the husband the public duty of burying his deceased wife had disappeared, and the wife's estate was liable for that which had previously been an obligation imposed on the husband, who had, by the marriage, acquired his wife's personalty; the respondents could not, therefore, recover from the appellant the sum paid by them, in their capacity as executors, in respect

G of funeral expenses.

[**EDITORIAL NOTE.** This case is an application of the maxim *cessante ratione legis, cessat ipsa lex.* The common law liability of a husband to pay his wife's funeral expenses arose from the fact that her personalty passed to her husband on marriage, she was unable to make a will of realty or personalty, and had no separate existence apart from her husband. When she had separate estate this might, indeed, be liable in equity for payment of funeral expenses, but this did not affect the common law

H position. Successive legislation, however, has now placed a married woman in every respect on the same footing as a *feme sole*, and the liability of the husband, therefore, no longer exists. The court refuses to express any opinion on the position arising if the wife left no estate.

AS TO THE DUTIES OF EXECUTORS AND OTHERS AS TO BURIAL, see HALSBURY, Hailsham Edn., Vol. 3, pp. 456-460, paras. 856-865; and FOR CASES, see DIGEST, Vol. 7, pp. 520-526, Nos. 1-62.]

Cases referred to:

*(1) *Willock* v. *Noble* (1875), L.R. 7 H.L. 580; 37 Digest 424, *326*; 44 L.J.Ch. 345; 32 L.T. 410; *affg.* S.C. *sub nom. Noble* v. *Willock* (1873), 8 Ch. App. 778.

*(2) *Bertie* v. *Chesterfield* (*Lord*) (1723), 9 Mod. Rep. 31; 27 Digest 83, *650*.
*(3) *Gregory* v. *Lockyer* (1821), 6 Madd. 90; 27 Digest 83, *651*.
*(4) *Willeter* v. *Dobie* (1856), 2 K. & J. 647; 7 Digest 523, *23*.
*(5) *Re M'Myn, Lightbown* v. *M'Myn* (1886), 33 Ch.D. 575; 7 Digest 523, *24*; 55 L.J.Ch. 845; 55 L.T. 834.
(6) *Edwards* v. *Edwards* (1834), 2 Cr. & M. 612; 7 Digest 525, *53*; 4 Tyr. 438; 3 L.J.Ex. 204.
(7) *Tugwell* v. *Heyman* (1812), 3 Camp. 298; 7 Digest 523, *28*.
(8) *Sharp* v. *Lush* (1879), 10 Ch.D. 468; 7 Digest 522, *16*; 48 L.J.Ch. 231. A
(9) *Green* v. *Salmon* (1838), 8 Ad. & El. 348; 7 Digest 523, *21*; 3 Ner. & P.K.B. 388; 1 Will. Woll. & H. 460; 7 L.J.Q.B. 236.
(10) *Williams* v. *Williams* (1882), 20 Ch.D. 659; 7 Digest 521, *8*; 51 L.J.Ch. 385; 46 L.T. 275.
(11) *Ashby* v. *White* (1703), 1 Bro. Parl. Cas. 62; 1 Digest 23, *187*; Holt K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith L.C., 12th Edn. 266.
(12) *Jenkins* v. *Tucker* (1788), 1 Hy. Bl. 90; 7 Digest 524, *39*. B
(13) *Ambrose* v. *Kerrison* (1851), 10 C.B. 776; 7 Digest 524, *38*; 20 L.J.C.P. 135; 17 L.T.O.S. 41.
(14) *Bradshaw* v. *Beard* (1862), 12 C.B.N.S. 344; 7 Digest 524, *41*; 31 L.J.C.P. 273; 6 L.T. 458.
(15) *Rogers* v. *Price* (1829), 3 Y. & J. 28; 7 Digest 522, *15*.

APPEAL by the defendant from an order of His Honour JUDGE EVANS, K.C., C made at Conway County Court, and dated Jan. 17, 1946. The facts are fully set out in the judgment of SCOTT, L.J.

Ralph Sutton, K.C., and *Carey Evans* for the appellant.

Gerald Gardiner for the respondents.

Cur. adv. vult.

SCOTT, L.J.: In this case the defendant appeals from the judgment of His D Honour JUDGE EVANS, finding him liable to repay to the executors of his wife's will certain payments made by them in that capacity, amounting in all to £51 15*s*. 0*d*., of which £32 17*s*. 6*d*. represented the cost of her funeral and burial and the balance, £18 7*s*. 6*d*., was for medical and nursing services in the lady's last illness. The defence was a denial of liability and a plea that "the payments were not made for or on the defendant's behalf." The wife had property of her own, shown in the account for estate duty at £1,063 8*s*. 3*d*. (gross) of per- E sonalty, and £1,200 (gross) of realty, with total debts (including the above items) of only £170 4*s*. 0*d*. For the last three months of her life the deceased had been living in the house of her brother-in-law and sister, the executor and executrix named in the will and plaintiffs in the action, her husband visiting her there regularly. The appellant and the deceased had been married in 1937. There was no evidence below of any request having been made to the respondents by the appellant to pay either of the debts. The solicitor for the defendant F below there submitted that the deceased was, as a result of modern legislation about married women, in exactly the same position as a *feme sole* or a man in regard to property rights and duties, and that therefore the claim by her personal representatives against the husband for burial and funeral expenses was bad in law. The cost of medical and nursing expenses was, he contended, either a debt of the deceased and not of the husband, or, alternatively, if it was the G husband's debt, there was no request by him to them to pay it, and no payment by the executors in mistake of fact. It was, therefore, a voluntary payment irrecoverable from him. The judge, however, seems to have held that the medical and nursing services were "necessaries," and that that fact of itself entitled the executors to recover from the husband—on what ground I do not understand. In regard to the funeral expenses, he relied on "a presumption of law in the absence of special circumstances" that the husband was liable, H that there were no special circumstances, and that, therefore, the husband must pay. In my opinion, he was wrong on both issues. I will take the funeral expenses first.

On this topic counsel for the husband, in an illuminating exposition of the position of married women, traced the early case history both at common law and in equity down to 1883, and thereafter the statutory history beginning with the Married Women's Property Act, 1882. His argument is, in my view, unanswerable.

There is an obligation at common law, in the nature of a public duty, which rests on certain persons, in whose possession a dead body may be—a husband being one—to bury it. And at common law, before modern legislation about married women, if a woman died covert, her husband was bound to discharge that duty, at his own expense, up to a reasonable amount, no doubt varying with his position in the world. So fundamental was his obligation that even a stranger, who as a volunteer carried out the funeral and burial of the dead wife at his own expense, was entitled to recover the amount (up to that reasonable limit) from the husband. It was this ancient duty of the husband, at common law, which the judge doubtless had in mind when he decided against the appellant. But, as the appellant's solicitor rightly submitted to the judge, that position has been completely changed by legislation. The very foundation of the duty, the foundation which gave rise to the common law doctrine, has completely gone, and has taken with it the superstructure which the common law had erected on it.

In order to demonstrate the change in the position, counsel for the appellant took the court through the relevant decisions, in logical sequence, beginning with *Willock* v. *Noble* (1), from which he cited Lord Cairns, L.C., (L.R. 7 H.L. 580 at pp. 589-591), Lord Chelmsford (*ibid.*, at p. 596), and Lord Hatherley (*ibid.*, at p. 603). The wife being by marriage completely identified with her husband and having at law no property of her own, and no separate power of disposition, the duty of burying her body inevitably fell at common law on her surviving husband. *Bertie* v. *Lord Chesterfield* (2) was an early recognition of the husband's duty at law, in which it was held that a power in equity of disposition over settled personalty could not extend to her own funeral expenses since that would mean that "she had given away more than she had to dispose." It not being proved in that case that the late Earl had requested the plaintiff, as executor of the countess's equitable estate, to pay the funeral expenses, his bill against the late Earl's estate was dismissed with costs. The executor of the Countess was not liable because he was not executor of property on which the liability for funeral expenses would or could legally fall.

No authority for the proposition, that, even in the pre-1883 period, the executor of a married woman, disposing by will of her equitable settled estate, had any liability at common law to pay for her funeral expenses, was called to our attention by counsel for the respondents, and counsel for the appellant submitted that there is none. That equity would give effect to a direction in the will of a married woman that her funeral expenses should be paid out of her settled estate does not touch the common law rule of the husband's obligation. In this context counsel for the appellant cited *Gregory* v. *Lockyer* (3); *Willeter* v. *Dobie* (4); *Lightbound* v. *M'Myn* (5).

Where a man dies possessed of personal property, the duty of burying his body falls primarily on his personal representatives: see Blackstone's Commentaries, Vol. 2, ch. 32, p. 508; and this duty entitles the personal representative to absolute priority of reimbursement out of the estate: see *Edwards* v. *Edwards* (6) (2 Cr. & M. 612)—a case of an insolvent estate. By an extreme application of the husband's liability the common law allowed even a stranger to recover from the estate his voluntary expenditure on funeral expenses: see *Tugwell* v. *Heyman* (7), and particularly the note to that case to the effect that a stranger who uses assets of the estate for that purpose does not thereby make himself an executor *de son tort*.

That funeral expenses fall within executorship expenses hardly seems to call for authority, but counsel for the appellant cited to us three plain cases: *Sharp* v. *Lush* (8), *Green* v. *Salmon* (9), and *Williams* v. *Williams* (10). Indeed, the executor is not only so entitled, but is bound thereto, because apart altogether from the will the law imposes that duty. There would thus in the old law seem to be a possible case of two persons falling under the duty of burying a deceased wife—first, the husband at common law and, secondly, the executors of the will of the wife disposing of her settled estate, containing a direction to her executors and trustees to pay for her funeral. But no case was brought to our attention in which the executors of the wife had ever attempted to recover from the husband their own expenditure on the funeral.

The modern statutory alteration of the married woman's position began on Jan. 1, 1883, when the Married Women's Property Act, 1882, came into force.

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Sect. 1 (1) says:

> A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will, or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

The next stage in the journey of the married woman to independence was brought about by the Administration of Estates Act, 1925. Sect. 32 (1) says:

> The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power . . . disposes by his will, are assets for payment of his debts . . . and liabilities . . .

Of course, in this subsection the masculine includes the feminine. Subsects. (1) and (2) of sect. 33, read together, provide that out of the real and personal estate of an intestate:

> . . . the personal representative shall pay all such funeral, testamentary and administrative expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act . . .

Subsect. (7) makes the provisions of the section subject to the provisions of a will. Sect. 34 (1) provides that:

> Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of the First Schedule to this Act.

And Sched. I, Pt. I, r. 1, says:

> The funeral, testamentary and administration expenses have priority.

Sect. 34 (3) is as follows:

> Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act.

The "order" there mentioned does not affect the present question. Sect. 45 (1) in effect abolishes all rules of distribution other than those contained in the Act, excepting only entailed interests (subsect. (2)). Sect. 46 (1) provides in detail for the distribution of the residuary of an intestate, and subsect. (1) (ii) says:

> If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate.

As the result of the above provisions read with the 1882 Act, counsel for the appellant submitted that husband and wife became entirely separate persons in law and were treated as being each in precisely the same position as the other for practically all purposes connected with the rights and obligations in connection with property. Whatever gaps were still left were filled in by the Law Reform (Married Women and Tortfeasors) Act, 1935. Sect. 1 provides that, subject to certain provisions not presently relevant:

> . . . a married woman shall (a) be capable of acquiring, holding, and disposing of, and property . . . in all respects as if she were a *feme sole*.

And sect. 2 (1) provides that (similarly subject):

> . . . all property which . . . (*b*) belongs at the time of her marriage to a woman married after the passing of this Act; or (*c*) after the passing of this Act is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly.

The amendments to previous Acts contained in the second column of Sched. I and the repeals contained in the second column of Sched. II, are consequential on the main provisions of the Act, and fill in the interstices in order to perfect the reform intended by Parliament—so that, for all questions of rights or liabilities relating to property of any kind, there should in future be no difference whatever between the position of a married woman and a *feme sole*—or, for that matter, of a man.

This being the effect of the express language of the three statutes, all the original reasons, which made the common law put on the husband the public duty of burying his deceased wife, have wholly ceased to operate. The contention of the appellant is that, if the wife is to be treated as a *feme sole* during her life, she also dies as a *feme sole*; the duty of burying her in that capacity necessarily falls on her personal representatives, to exactly the same extent and for the same reasons as on the death of her husband it is the duty of his personal A representatives to bury him. That contention is in my opinion well-founded, as resting on an express provision of statute law. But if there be any doubt as to the meaning of the express provisions, I regard it as a case where the maxim *cessante ratione legis, cessat ipsa lex* applies directly and obviously. BROOM, in his LEGAL MAXIMS, 9th Edn., p. 107 begins with the positive and complementary maxim *ubi eadem ratio, ibi idem jus*, which he paraphrases as:

> B The law consists, "not in particular instances and precedents, but on the reason of the law" . . .

quoting LORD HOLT, C.J., in *Ashby* v. *White*, (11). The negative maxim, which is the more relevant in the instant case, he paraphrases at p. 110 as follows:

> Reason is the soul of the law, and when the reason of any particular law ceases' so does the law itself.

C The legislation about married women has thus caused the law, requiring the husband to bury his dead wife, to cease—at any rate, where she leaves assets, as in the present case.

As regards the other heads of claim, for doctor's fees and nursing charges, there obviously can be no liability on the husband. The fact that both types of service might or would come within the description of "necessaries," if they had been rendered on the credit of the husband, is irrelevant. As the wife was D ill as a *feme sole* the *prima facie* presumption of law is that credit was given to her and not to her husband; and, there being no fact in evidence to support a finding that either doctor or nurse relied on the husband's credit, there was no possible foundation in law for the judge's conclusion. But in any case, if the wife's executors who paid did so because they thought the husband was liable —a most unlikely supposition—they were mere volunteers, paying under a mistake not of fact but of law, and "money paid at request" does not lie in E such a case.

Since writing this judgment I have read the judgments of my brethren and agree with them.

The appeal must be allowed with costs here and below—there on Scale C.

MORTON, L.J., [read by TUCKER, L.J.,]: I have had the advantage of reading the judgment which is about to be delivered by TUCKER, L.J. I agree F with that judgment, and I only desire to make a few brief observations.

In the present case the wife's estate was sufficient for payment of her funeral expenses. I am satisfied that in such a case the husband is now under no liability to pay these expenses. The question whether a husband still remains liable to pay his wife's funeral expenses if the wife leaves no estate, or if the wife's estate is insufficient to make this payment, does not arise in the present case, and I do not think that SCOTT L.J., has expressed, or that TUCKER, L.J., G intends to express, any opinion upon it. In these circumstances I propose to follow their example. This question may never come before the court for decision.

TUCKER, L.J.: There are two quite distinct questions involved in this appeal. The first is whether the executors of the deceased can recover from her husband the sum of £18 17*s*. 6*d*., being the sum which they in their capacity H of executors have paid in respect of medical attendance and nursing fees incurred during the last illness of the deceased lady. The second is whether they can recover the sum of £32 17*s*. 6*d*. which they have paid in respect of the funeral expenses, the will having contained no direction with regard thereto. The county court judge has decided both questions in favour of the executors and given them judgment for £51 15*s*. 0*d*.

The first question can, in my opinion, be very shortly disposed of. The medical and nursing fees must have been a liability either of the husband or the wife. If they were the wife's liability they have been properly discharged out of the estate and there is no liability on the husband. On the other hand, if they were the liability of the husband, they should not have been paid by the executors, and if the executors have paid them without any request from the husband and without legal compulsion so to do, they cannot recover the money so paid from the husband. There was no suggestion that there had been any such request, express or implied, or any compulsion in law and, consequently, this part of their claim should have been dismissed.

The funeral expenses raise very different considerations. It is common A
ground that at common law, before modern legislation altering the status of married women, the husband was liable for his wife's funeral expenses; and in the interests of public decency the law allowed a stranger who had voluntarily incurred and paid such expenses, without any request from the husband so to do, to recover them from him: see *Jenkins* v. *Tucker* (12), *Ambrose* v. *Kerrison* (13), and *Bradshaw* v. *Beard* (14). In such cases the law will imply a request on the part of the husband to do that which it is his legal and moral obligation B
to perform.

But counsel for the appellant contends that the effect of the Married Women's Property Act, 1882, the Administration of Estates Act, 1925, and the law Reform (Married Women and Tortfeasors) Act, 1935, has been to put married women as regards their property and contracts in the same position as *femes sole*, that is, on the same footing as men. Before considering the provisions C
of those statutes as affecting married women it may be convenient to state the position with regard to the burial expenses of a man. It has long been well settled that where a man dies possessed of property his funeral expenses must come out of that property. In BLACKSTONE'S COMMENTARIES, Vol. 2, ch. 32, p. 508, dealing with the powers and duties of an executor, it is said:

> He must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and D
> charges . . .

See also *Edwards* v. *Edwards* (6) where PARKE, B. (2 Cr. & M. 612, at p. 616) said:

> I take the rule to be, that the executor is entitled to be allowed reasonable expenses, and if he exceeds those he is to take the chance of the estate turning out insolvent.

In *Tugwell* v. *Heyman* (7), and *Rogers* v. *Price* (15), it was held that executors with assets in their hands were liable for payment of funeral expenses even E
where they had not ordered the funeral; and this was stated to be the law by JESSEL, M.R., in *Sharp* v. *Lush* (8) (10 Ch. D. 468, at p. 472).

It is contended by the appellant that the law as there stated is now equally applicable to the executors of a deceased married woman. The Married Women's Property Act, 1882, s. 1, provided that a married woman should be capable of acquiring, holding and disposing of any real or personal property as her separate property as if she were a *feme sole*. Then, in 1935, the Law Reform F
(Married Women and Tortfeasors) Act, 1935, s. 1, provided so far as material as follows:

> Subject to the provisions of this Part of this Act . . . a married woman shall—(*a*) be capable of acquiring, holding and disposing of any property; and (*b*) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation; and (*c*) be capable of suing, and being sued, either in tort or in contract or other- G
> wise; and (*d*) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were a *feme sole*.

Sect. 2 provides:

> Subject to the provisions of this Part of this Act all property which (*a*) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or (*b*) belongs at the time of her marriage to a woman married after the passing of this Act; or (*c*) after the passing of this Act is acquired by or H
> devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly . . .

A married woman having thus been put in these respects on the same footing as a *feme sole*, which is equivalent for these purposes to that of a man, the result is that the provisions of the Administration of Estates Act, 1925, are equally applicable to the estate of a married woman as to the estate of her husband. It is, I think, sufficient to refer to sect. 34, and to Sched. I. Sect. 34 (3) is as follows:

> Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act.

Sched. I, Pt. I, deals with the order of payment of debts where the estate is insolvent and provides that the funeral, testamentary and administration expenses have priority. It seems clear, therefore—and I do not understand this to be disputed—that the executors of a deceased married woman are now liable to pay her funeral expenses. But it is contended for the executors that the husband still remains liable as he was at common law and that his liability is the " primary " liability so that the executors can recover from him any sum which they have been called upon to pay as a result of their " secondary " liability. No authority for this proposition was cited and for my part I do not understand in this connection the notion of a "primary " and " secondary " liability. The executors, it is to be noted, are not claiming contribution. They are asking to be indemnified.

The true view is that contended for by counsel for the appellant, namely, that the basis of the husband's liability at common law was the status of a married woman and her limited power to make a will as described by LORD CAIRNS, L.C., in *Willock* v. *Noble* (1), where he says (L.R. 7 H.L. 580, at p. 589):

> Before the Wills Act a married woman was, as a general rule, incapable of making a will. Her will of land was declared void by statute. Her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her husband, and no separate disposing or contracting power.

He then goes on to refer to certain modifications which were engrafted on this general rule and points out that the Wills Act left her capacity to make a will exactly as it stood before the Act.

Counsel for the executors, relied upon certain cases where courts of equity have been called upon to decide whether the wife's separate estate or the husband should bear the funeral expenses. In *Gregory* v. *Lockyer* (3) where a decree had directed the funeral expenses to be paid out of the separate estate of a *feme covert*, SIR JOHN LEACH, V.-C., ordered the cost thereof to be repaid by the executor to the husband who had actually paid the bill, but expressed a doubt whether generally the husband has a right to throw the funeral expenses on the wife's separate estate. In *Willeter* v. *Dobie* (4) the wife, in exercise of certain powers of appointment given to her notwithstanding coverture in relation to her separate estate, appointed the residue among her nieces " after payment of her just debts, funeral and testamentary expenses." It was held that this was a good charge upon the residue. SIR W. PAGE WOOD, V.-C., said that the rule that a husband is liable to pay the funeral expenses equally with the debts of his deceased wife was not disputed but added (2 K. & J. 647, at p. 649):

> . . . the point is, whether, by this clause in her will, the wife has not relieved her husband out of her separate estate—whether she has not made him a present, in effect, of what her funeral expenses would have cost him.

In *Lightbown* v. *M'Myn* (5) (33 Ch.D. 575, at p. 576) CHITTY, J., said:

> In *Willeter* v. *Dobie* (4) it is true that there was a charge by the wife of her funeral expenses. It is also true that the law casts upon a husband the duty of burying his wife, but the law does not on that account cast upon the husband the burden of burying his wife at his own cost always. In most cases the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him to bury her out of his own moneys in a case like the present, where the wife exercised her power of appointment, and made the fund general assets for her creditors but has omitted to mention her funeral expenses, would be too hard. I think, therefore, that the husband is entitled to retain the sums expended on her funeral.

In *Bertie* v. *Chesterfield* (2) the executor under the will of a married woman, made in pursuance of a power to dispose of property the subject of separate maintenance, who had paid the funeral expenses of the married woman was allowed to be reimbursed out of assets of her deceased husband which he had devised to a third party subject to the payment of his debts,

These cases, in my view, merely indicate that the court in the exercise of its equitable jurisdiction was always careful to see that the separate estate of a married woman should not without sufficient reason be made to bear an obligation which was the husband's at common law. Now that the separate estate of a married woman has ceased to exist and she has in this respect the status of her husband, the very foundation for the old common law rule has disappeared and the wife's estate is, in my view, liable for that which had previously been an obligation imposed on the husband who had by the marriage A
acquired his wife's personalty.

For these reasons, I think the executors' claim against the husband was not maintainable and that this appeal succeeds.

Appeal allowed with costs.

Solicitors: *Rhys Roberts & Co.*, agents for *William George & Son*, Portmadoc (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Porter & Co.*, Conway (for the respondents). B

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SHAYLER *v.* WOOLF.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), C
May 9, 13, 1946.]

Waters and Watercourses—Sale of land—Contemporaneous agreement for supply of water—Vendor owner of adjacent land—Covenants by vendor to supply water from pump on vendor's land for use of purchaser in connection with house on conveyed land and to keep pump in repair—Whether benefit of agreement assignable to subsequent purchaser—Effect of arbitration clause— D
Arbitration Act, 1889 (*c.* 49), *s.* 4.

Contract—Agreement for supply of water—Arbitration clause—Whether contract assignable—Arbitration Act, 1889 (*c.* 49), *s.* 4.

On July 30, 1938, Mrs. W. conveyed a piece of land adjoining her own premises to Mrs. P., who covenanted to build thereon a bungalow for which she required a water supply. On the same day, an agreement was entered into between Mrs. W. and Mrs. P., whereby Mrs. W. agreed to supply E
from a pump on her premises water for the use of Mrs. P. in connection with the bungalow to be erected on Mrs. P.'s premises. Cl. 1 of this agreement provided: "[Mrs. W.] will henceforth supply to [Mrs. P.] from the aforesaid pump situate on the premises of [Mrs. W.] and so long as such pump shall continue to produce the same a regular and continuous supply of water for use in respect of all domestic purposes in connection with the F
said bungalow." By cl. 2, Mrs. P. was to pay 10*s.* a year to Mrs. W. for the water supply. Cl. 4 provided: "[Mrs. W.] hereby covenants with [Mrs. P.] for and with intent to bind so far as may be herself and her successors in title that she and they will henceforth maintain and keep the said pump and the pipes taps and apparatus thereto in good and proper working order and repair and so long as such pump shall continue to produce the same do all such things as may be necessary to insure a constant supply of G
water." The agreement was determinable at the option of either party after the expiration of 10 years from the date thereof and it contained an arbitration clause. When the agreement was made in 1938, the pump was producing water but was not in a good state of repair. Later, apparently owing to the accumulation of earth and debris in the well which surrounded the pipe, the pump ceased to deliver water. Since the necessary repairs H
would have been expensive at the time, it was considered more economical to construct a new pump. The old pump was, therefore, dismantled, a new bore-hole was sunk and a new pumping apparatus was installed. There would have been no difficulty in connecting the bungalow to the new installation, but this was not done. On Aug. 17, 1944, Mrs. P. conveyed the property and the bungalow, together with the benefit so far as assignable of the water supply agreement, to S. S. requested Mrs. W. to continue the supply of water to the bungalow, but she refused to do so. S. thereupon brought an action for specific performance of the agreement. On

behalf of Mrs. W. it was contended that there had been no breach of covenant because the proper repair of the well would have involved installing entirely new apparatus which could not be said to come within the covenant. It was further contended that the benefit of the contract was not assignable (*a*) because it was not the intention of the parties that it should be assignable; (*b*) because it contained an arbitration clause and such a clause was in its nature not assignable:—

HELD: (i) there had been a breach of covenant on the part of Mrs. W. by reason of her failure to keep the pump in repair. The covenant did not relate to the well, but to the pump and, on the facts of the case, the proper repair of the pumping apparatus would not have involved installing an entirely new piece of apparatus. Although the obligation to supply water was limited to the time when the pump "shall continue to produce" water, that phrase referred to a failure of the water supply owing to something other than a breach of covenant.

(ii) on the true construction of the contract, it was the intention of the parties that it should be assignable. Moreover, since the contract did not relate to personal services and there would be no increase in the burden of the contract if it were assigned, no objections to assignability arose.

(iii) if a contract were otherwise assignable, an arbitration clause did not prevent it from being assignable; the clause followed the assignment of the subject matter of the contract. It was clear from the Arbitration Act, 1889, s. 4, that an arbitration clause was in its nature assignable.

Cottage Club Estates v. *Woodside Estates Co.* (*Amersham*), *Ltd.* (2) *distinguished.*

(iv) since the contract was assignable by Mrs. P. and had been assigned by her in her conveyance to S., the benefit of the contract vested in S.

Decision of ROXBURGH, J. ([1946] 1 All E.R. 464) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal affirm the court below, holding that the covenant had been expressly assigned. They do not, therefore, deal with the point considered by ROXBURGH, J., as to whether the covenant in question ran with the land.

On the question of the assignability of a contract containing an arbitration clause both MORTON, L.J., and SOMERVELL, L.J., agree that an arbitration clause is not a personal covenant in the sense that it cannot be assigned, and that no such proposition is to be deduced from the words of WRIGHT, J., in *Cottage Club Estates, Ltd.* v. *Woodside Estates Co.* (*Amersham*), *Ltd.* (2).

AS TO ASSIGNEES OF CONTRACT CONTAINING ARBITRATION CLAUSE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 626, 627, para. 1074, and p. 639, para. 1086; and FOR CASES, see DIGEST, Vol. 2, p. 365, Nos. 334-336, and Supplement.]

Cases referred to:

(1) *Aspell* v. *Seymour*, [1929] W.N. 152; Digest Supp.

*(2) *Cottage Club Estates* v. *Woodside Estates Co.* (*Amersham*), *Ltd.*, [1928] 2 K.B. 463; Digest Supp.; 97 L.J.K.B. 72; 139 L.T. 353.

APPEAL by the defendant from an order of ROXBURGH, J., dated Feb. 6, 1946, and reported ([1946] 1 All E.R. 464). The facts are fully set out in the judgment of LORD GREENE, M.R.

M. G. Hewins for the appellant.

C. L. Fawell for the respondent.

LORD GREENE, M.R.: In spite of a gallant attempt by counsel for the defendant to get his case upon its legs, in my opinion this is a perfectly plain case and the judge was manifestly right.

The plaintiff, Shayler, is the owner of a bungalow, known as Pear Tree Cottage, which he acquired from a Mrs. Lawton, who, before her marriage to her present husband, was Mrs. Iris Ethel Peacock. The conveyance was dated Aug. 17, 1944. Pear Tree Cottage had, in fact, been built by Mrs. Peacock, as she then was. She had acquired the land and a building previously erected thereon which she was under contract to pull down and replace with the bungalow, Pear Tree Cottage. She had purchased from the defendant, Mrs. Dorothy Gladys Irene Woolf. That transaction took place on July 30, 1938.

At that time Mrs. Woolf owned not merely the land on which Pear Tree Cottage was subsequently built, but adjoining land, known as Shottenden Lodge, at Herne Bay. She had upon that land an installation for procuring a water supply. It consisted of a pump, contained in a rising main and worked by a rod which, in its turn, was set in motion by a windmill. The pump had at an earlier date, apparently, for some reason failed to deliver water. In order to get at the supply again, a bore had been sunk into the lower ground and that was connected by a suction pipe to the installation which contained the pump. The result was that one unit was made, consisting of the overground works, the windmill and so forth, the rising main, containing the pump, and the bore below it with the suction pipe. By that means the flow of water was procured. A

By July 30, 1938, which was the date on which Mrs. Peacock purchased the land, the position of the pump was as follows. It had originally been placed in what had previously been a well. That well had suffered various misfortunes in the course of its history, and the state of affairs on July 30, 1938, was that, the walls of the well having broken down, the well was entirely filled up to within a few feet of the surface with bricks and earth. That by itself did not affect the operation of the pump. So long as the pump and the rising main and the other B underground apparatus was in working order, the mere presence of this debris surrounding it was unimportant. On the other hand, the presence of that debris was unquestionably a source of danger, although at the time possibly nobody realised it. The origin of the present dispute arose when the pump was found not to be delivering water; and that was caused, apparently, by the debris to which I have referred. I shall return to that in a moment.

On the occasion of the purchase by Mrs. Peacock and on the same day as the C conveyance of July 30, 1938, an agreement was entered into between the present defendant, Mrs. Woolf, and Mrs. Peacock. It was an agreement for the supply of water from the pump to the new bungalow, Pear Tree Cottage, when it should be built. In cl. 1 Mrs. Woolf agreed that she:

> . . . will henceforth supply to [Mrs. Peacock] from the aforesaid pump situate on the premises of [Mrs. Woolf] and so long as the pump shall continue to produce the same a regular and continuous supply of water [for all domestic purposes in connection D with the bungalow then in course of erection].

Under cl. 2 Mrs. Peacock was to pay 10*s*. a year for the water supply. Under cl. 3 Mrs. Peacock was given the right to lay mains and pipes for the purpose of getting the water supply from the pump connected with her bungalow.

Under cl. 4 Mrs. Woolf covenanted with Mrs. Peacock:

> . . . and with intent to bind so far as may be herself and her successors in title E that she and they will henceforth maintain and keep the said pump and the pipes taps and apparatus thereto (but except the mains pipes or apparatus laid or fixed [by Mrs. Peacock under the power conferred by cl. 3]) in good and proper working order and repair and so long as such pump shall continue to produce the same do all things as may be necessary to insure a constant supply of water of a quantity and quality hereinbefore mentioned . . .

Under cl. 5 there was a power of determination at the option of either party F (i), in the event of a main supply being brought within reasonable nearness to Mrs. Peacock's bungalow, or (ii), at the expiration of a period of 10 years from the date of the contract. Under cl. 6, on determination of the agreement Mrs. Peacock, if required, was to remove the mains and pipes, etc., which she might have put in and to make good any damage. Cl. 7 provided for the submission to arbitration of disputes arising under or out of the agreement.

When, on Aug. 17, 1944, the present plaintiff took the conveyance from G Mrs. Lawton (previously Mrs. Peacock), Mrs. Lawton assigned by the conveyance, so far as assignable, the benefit of the agreement of July 30, 1938. Consequently, if the benefit of that agreement was assignable, it was duly assigned to the present plaintiff.

As I have said, the pump ceased to deliver water. When the expert contractor desired to investigate the state of affairs and see whether repairs could be effected, he found that it was impossible to withdraw the rod which worked H the pump from the rising main. It was clear, therefore, that there was something wrong below and out of sight. That, in his opinion—whatever it was—had been caused by the presence of all this earth and debris in the well which surrounded the pipe and, although he could not possibly know what was the extent of the trouble, he, at any rate, thought that it was extensive or might well be extensive. On the other hand, it might (as I understand it) have meant nothing more than that the rising main was fractured and that that had the effect of making it impossible to withdraw the rod and the pump apparatus which it worked.

However that may be, it was perfectly clear that it would be impossible without digging down to the level of the trouble, whatever it should turn out to be, to repair the apparatus or, indeed, to find out precisely what damage had been caused; but the view which he took was that, whatever the damage was, it was due to the settling down and pressure of this mass of debris in the well. He pointed out that you ought not to have a pump in soil or ground of this description unless you have surrounding it some sort of protecting tube or something which will prevent the soil, or whatever it may be, from pressing on the pipe. Such a provision would also make it easier to effect repairs and withdraw broken parts. So long as the well was empty and in good condition, the lining of the well had that effect in relation to the pump, because, so long as the well was empty, the surrounding earth was kept away from the pump and there was no question of the pump being damaged by pressure of the earth; but directly the well was filled in there was the risk of that pressure affecting the pump and damaging it.

The cost of digging out the debris from the well and repairing the broken parts, whatever they might prove to be, would have been very heavy and the contractor advised—and, undoubtedly, soundly advised—that a new bore should be sunk in another place and the overground apparatus, which was in perfectly good condition, should be used; so that, in effect, there would be another pump. It is not said in this action that the obligation of the defendant, whatever it may be, applies to that new pump, which was, we are told, installed, some thirty yards away. A perfectly good supply was obtained from it and, incidentally, when it was sunk, the proper practice—of surrounding it with a tube to protect it—was followed. The defendant could, of course, had she chosen, have allowed the plaintiff to have a supply from that pump. For reasons which appeared to her to be good, she declined to do so. Had she done so, although the plaintiff, if he is right in this action, would have had a technical claim against her for breach of her covenants in respect of the original pump, the damages that he could have recovered would have been purely nominal, so long as she gave him an alternative supply from her new pump. She had it, therefore, in her power to mitigate damage. However, she did not do so and eventually this action was begun.

Two main questions are raised. The first one is that, on the true construction of this agreement, there has been no breach of covenant on the part of the defendant. It is said that the injury could only be made good by installing, in effect, an entirely new apparatus; and various cases were cited us relating to the principle applicable to landlord and tenant, under which, under a repairing clause, the tenant is not bound to present the landlord with a new house. Those cases, with respect, do not appear to me to assist us in any way. It is a perfectly clear covenant to maintain and keep the pump and the pipes, taps and apparatus thereto in good and proper working order and repair. It is quite impossible on the evidence to say that the proper reparation of this apparatus would involve the installing of an entirely new piece of apparatus. Various parts would no doubt have to be renewed. If the damage was caused by a break in the rising main, of course a new rising main would have had to be inserted; but there can be no question on the evidence in this case of treating the repairs which fell to be made to maintain and keep this pump in working order as being such as would have involved the substitution of an entirely new pumping apparatus. It seems to me to be beyond question that, on the facts, the covenant to maintain and keep the pump and pipes in proper order would cover what has happened.

The case of counsel for the defendant really was, I think, that the operation of clearing the well and putting in what he said would have been necessary to have put in, *viz.*, a new tube to cover the apparatus and protect it from pressure of earth, would have been substantially a novel type of apparatus, which could not be said to come within the covenant. But in point of fact the covenant has nothing to do with the well. Nor does the covenant require Mrs. Woolf to instal any kind of protection to the pipe. If she chooses not to do so, she runs the risk of having the pipe injured. If she did not make a proper repair and give proper protection, she would run the risk of being held liable in the event of a later breakdown. It seems to me that the language of this covenant is far too clear to admit of the argument which has been submitted to us.

I might add that the obligation to supply the water is, of course, limited to the time when the pump "shall continue to produce" water; but that phrase must, in my opinion, mean the pump as repaired and maintained in accordance with the covenants contained in the agreement; in other words, Mrs. Woolf would not be entitled to say: "The pump does not produce water; I am, therefore, not bound to supply you," when the failure to produce water was due to a breach of her own covenant. The phrase refers clearly to some failure in the water supply which might occur owing to something other than a breach of the covenant.

The next point that was argued was as to the assignability of this covenant. It was pointed out, quite properly, that the agreement is not in terms expressed to extend to bind assigns and it was also pointed out that there is a reference to the successors in title of Mrs. Woolf in cl. 4 and an express intention to bind them in regard to her repairing covenants. Those points are, of course, legitimate points to put forward; but the question that we have to decide is, first, on the true construction of this contract, when interpreted in relation to the surrounding circumstances and its own subject-matter, was it the intention of the parties that the contract should be assignable?

In my opinion, there can be only one answer to that question. There is nothing in the nature of personal services concerned in this agreement. Subject to one point which was argued on the arbitration clause which I shall mention later, there can be no possible suggestion that, in the case of an assignee of Pear Tree Cottage, the burden on Mrs. Woolf would have been any greater than it would have been in the case of Mrs. Peacock herself. None of those objections to assignability therefore arise. When one looks at the subject-matter of the agreement—a purchaser of land from Mrs. Woolf, erecting thereon a bungalow which has no water supply, and desiring to have a water supply—if the water supply is personal to the purchaser herself, what is to happen when she dies? What is to happen if she wants to sell? Obviously, the value of the newly erected bungalow would be very much lower unless she could pass to the purchaser the benefit of this agreement, because the bungalow would not have a water supply. Looking at the whole nature of the subject-matter, it seems to me impossible that any sensible persons could have intended in the circumstances that the right to this supply should be personal to Mrs. Peacock herself. I come to that conclusion quite clearly, notwithstanding the fact that in cl. 4 there is an express reference, for the purpose of the repairing covenant, to the assigns of Mrs. Woolf.

That only leaves one point and that is the arbitration clause. It is said that the contract cannot be assignable because of the existence of the arbitration clause, inasmuch as such a clause is in its nature not assignable or is only assignable (it is said) where the assigns are expressly mentioned in the clause itself or the contract which contains the arbitration clause is itself expressly declared to be assignable. In my opinion, those propositions are incapable of support in the wide way in which they are stated; nor does any of the authorities quoted to us in support of them really touch the point.

The question whether an arbitration clause prevents a contract from being assignable must depend on the intention of the parties, and the nature of the contract will, of course, be very important. Quite apart from an arbitration clause, if the nature of the contract is one which makes it incapable of assignment, owing to its personal nature, there is no question, of course, of the assignability of the arbitration clause; but that an arbitration clause is assignable in its nature seems to me to be quite clearly contemplated by the Arbitration Act, 1889, s. 4, and it has been recognised in this court in one of the authorities referred to, namely, *Aspell* v. *Seymour* (1).

As I have said, apart from this arbitration clause, the agreement in this case is, in my opinion, quite clearly assignable. That is because, on its true construction, it is an assignable contract, that being the intention of the parties gathered from the document when read in the light of its subject matter and the surrounding circumstances. It seems to me that the result of that must necessarily be that the arbitration clause also follows the assignment of the subject-matter of the contract. There is nothing, I conceive, in principle or authority which would prevent that from taking place.

The consequence is that, in my opinion, this was a contract assignable by

Mrs. Peacock and, as it was assigned by her in her conveyance to the present plaintiff, the benefit of the contract is now vested in him and he is entitled to sue upon it.

The judge, in my opinion, was perfectly right and this appeal must be dismissed with costs.

MORTON, L.J.: I entirely agree with the judgment which has been delivered and I only wish to add a few words upon one submission made by counsel for the defendant. He submitted boldly as a general proposition that the benefit of an arbitration clause could never be assigned; and this view appears to be put forward in RUSSELL ON ARBITRATION AND AWARD, 13th Edn., p. 46, where the authors say:

> A submission is defined as " a written agreement to submit present or future differences to arbitration " . . . It is a personal covenant and cannot be assigned . . .

They then go on to deal with a more limited matter.

That general statement appears to be based upon an observation of WRIGHT, J., in *Cottage Club Estates, Ltd.* v. *Woodside Estates Co.* (*Amersham*), *Ltd.* (2), where he said ([1928] 2 K.B. 463, at p. 466):

> The arbitration clause is a personal covenant, and cannot be transferred; nor indeed was it transferred in any sense in this case.

In my view, in that sentence WRIGHT, J., was dealing with the facts in the case before him and did not intend to lay down any such general proposition as is contended for by counsel for the defendant, and set out in RUSSELL ON ARBITRATION AND AWARD, 13th Edn. As my Lord has said, any such general proposition would appear to be contrary to the provisions of the Arbitration Act, 1889, s. 4, and, in my view, it cannot be sustained.

I agree that the appeal should be dismissed.

SOMERVELL, L.J.: I agree with the reasons which have been given by the Master of the Rolls for dismissing this appeal and I should also like to state expressly my agreement with what has just fallen from MORTON, L.J., with regard to the nature of an arbitration clause. It seems to me that, on any ordinary principle, it certainly is not a personal covenant in the sense in which the adjective " personal " is ordinarily used in these contracts.

Appeal dismissed with costs.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Girling, Wilson & Bailey*, Herne Bay (for the appellant); *Bentley, Taylor & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* TURVEY.

[Court of Criminal Appeal (Lord Goddard, L.C.J., Humphreys and Lynskey, JJ.), May 13, 1946.]

Criminal Law—Larceny—Conspiracy to steal disclosed to owner—Property handed over on instructions from owner for purpose of apprehension—Absence of asportation.

The appellant, who was in charge of a Ministry of Works depot, approached W., who was in charge of another depot, and suggested a plan, whereby W. was to steal some goods from his depot, hand them to the appellant, who, in turn, would hand them to a receiver. W. informed his superiors of the plan, and, with a view to entrapping the appellant, it was arranged that W. should hand over the goods to the appellant, and W. did in fact do so. The appellant was charged with and convicted of stealing :—

Held : the charge was wrong ; there was no evidence of asportation ; the appellant did not carry away the goods against the will of the owner, who was willing that he should have them, and handed them to him ; in the circumstances the conviction must be quashed.

R. v. *Eggington* (1) *distinguished.*

[**EDITORIAL NOTE.** Absence of consent by the owner of goods to the taking of them is an essential element in a charge of larceny. Cases of the type of *R.* v. *Egginton* (1) do not affect this rule, since facilities given to the thief to carry out his offence still leave the element of true asportation. It was held as far back as 1850, in *R.* v. *Lawrence* (14 J.P. 561), that there was no larceny where the goods were put into the hands of the thief by a servant, by direction of the master, and the case now reported is similarly decided.

As to Taking Property by Consent of Owner, see HALSBURY, Hailsham Edn., Vol. 9, p. 506, para. 866 ; and for Cases, see DIGEST, Vol. 15, pp. 833, 834, Nos. 9693-9701.]

Case referred to :

*(1) *R.* v. *Egginton* (1801), 2 Bos. & P. 508 ; 15 Digest 883, *9693.*

Appeal against a conviction for larceny at the Devon County Sessions, on Mar. 1, 1946. The facts are fully set out in the judgment.

W. Scott Henderson, K.C., and *Malcolm Wright* for the appellant.

H. E. Park for the Crown.

Lord Goddard, L.C.J. [delivering the judgment of the court]: In this case the court is of the opinion that the conviction must be quashed. The appellant appeals against his conviction on count 1 of the indictment only.

The circumstances were these : The appellant was charged that on Dec. 12, 1945, being a servant of His Majesty's Minister of Works, he stole from the Minister a considerable number of table knives, spoons, and so forth. He had got into touch with some foreigner living at Newton Abbot, and found that he would be a ready receiver of goods which could be stolen from the Ministry of Works. Then, being in charge at that time of a depot of the Ministry of Works at Torquay, he approached one Ward, who was in charge of a depot at Exeter. Ward was tempted to steal the property of the Ministry of Works and hand it to the appellant, who would in turn hand it to the man at Newton Abbot. Ward at once communicated with his superiors at Bristol, the people who were really in control of the property, and told them of this plan which had been suggested to him. The officials of the Ministry of Works said it would be a good thing to let this plan go on and catch them at a suitable time, which would enable them to prosecute this appellant for stealing. What they did was this : They told Ward to hand over the property to the appellant, and Ward handed over the property to the appellant. He intended to hand it to the appellant and did hand it to the appellant.

That being so, the question arose whether or not the appellant could be charged with stealing. He could have been charged with conspiracy that he was inciting to commit a felony and other charges, there is no doubt, but could he be charged with the felony of stealing ? In this case it is perfectly clear that if he stole the goods, he stole them at Exeter, but he did not take them there against the will of the owner because the owner handed them to him and meant to hand them to him. The chairman in his ruling, when counsel submitted no case, set out his findings, and it appears that he decided principally on the authority of *R.* v. *Eggington* (1), an old case, but perfectly good law, and also because he took a certain view with regard to the control the owner was exercising over the goods.

R. v. *Egginton* (1) was a case in which a servant told his master that someone was going to rob the premises. "Very well," said the master, "let them rob the premises and we will catch them"; in other words, to put a homely illustra-
A tion, a man, knowing that somebody is going to break into his house, leaves the bolts drawn and so makes it easy for the man to come into the house, and when he comes in he catches him and a crime has been committed; he commits the crime none the less that the servant has been told to make things easy. In this case, if Ward had been told by the person who really had control of these matters, "Let the appellant come in and take the goods," that would have been one thing, but he told him to take the goods and hand them to the appellant, and
B that makes all the difference.

One matter to which the chairman seems to have attached considerable importance was this, that Ward said to the appellant at the time when he was handing over the goods: "You must give me a receipt, I must have a receipt for these goods," and the appellant said he quite understood that and he would give a receipt for the goods. Thereupon, a perfectly fictitious document is made out, which both parties knew and intended to be fictitious, under which it is
C made to look as though the goods were handed over to the appellant to take to the Palace Hotel at Torquay, but, of course, that was not an authority by Ward to the appellant to take the goods to Torquay because everybody knew that the appellant was meaning to steal these goods and they were to go to the receiver at Newton Abbot. No one intended that they were to go to Torquay, and this document was simply manufactured as a blind, or whatever word you
D like to use; it is not a genuine document, and therefore it is as if it did not exist.

The other point on which the chairman in his direction to the jury, as we think, went wrong was that he told the jury that these goods always remained under the control of the Ministry, because apparently the police had been warned, and the police were to follow the prisoner once he had stolen them, either to follow him or go immediately to Newton Abbot and find them in the possession
E of the receiver. But that will not do. Once the goods were handed over to the appellant the goods were under his control and nobody else's. What was to happen supposing, while he was driving along being followed by the police, the police car broke down? Of course, he would cheerfully drive away with these goods. Of course the goods were under the appellant's control as soon as he went away with the goods.

The charge that was put against the appellant was the wrong charge, a charge
F of which he could not have been convicted because there was no evidence here of what, to use a technical expression, is termed asportation. He did not carry away the goods against the will of the owner but because the owner was willing that he should have the goods and gave them to him. In those circumstances, the conviction will be quashed, so far as this charge is concerned, and the appeal allowed on count 1.

G *Appeal allowed.*

Solicitors: *Crawley & de Reya*, agents for *J. C. M. Dyke & Toyne*, Exeter (for the appellant); *Treasury Solicitor* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

ALSTON *v.* ALSTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), May 27, 1946.]

Divorce—Petition—Date of presentation—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2—*Matrimonial Causes Rules,* 1944, *r.* 3.

The date of the " presentation " of a petition for dissolution of marriage under the Matrimonial Causes Act, 1937, s. 2, is the date on which the petition is filed.

[**EDITORIAL NOTE.** By the Matrimonial Causes Rules a matrimonial cause is commenced by filing a petition, therefore the date of filing is held to be the date of presentation for the purpose of calculating the period of three years' desertion preceding the presentation of the petition.

AS TO THE MATRIMONIAL CAUSES ACT, 1937, s. 2, see HALSBURY'S STATUTES, Vol. 30, p. 336.]

PETITION by the husband for divorce on the ground of his wife's desertion. The report is confined to the question of the date of the presentation of a petition. The relevant facts are set out in the judgment.

V. G. Hines for the petitioner.

WILLMER, J.: This case, I believe, raises a novel point. The petition was signed by the petitioner on Oct. 10, 1945, who on the same day swore the affidavit verifying it. It was not, however, filed with the court until Oct. 31, 1945. The petitioner's case is that he was deserted by his wife from a date which he fixed as Oct. 17, 1942. According to the Matrimonial Causes Act, 1937, s. 2, the petitioner, if he is to succeed, must establish a period of at least three years immediately preceding the presentation of the petition. It therefore becomes obvious that it is vital to decide at what stage a petition is presented. If the presentation of the petition refers to the date when the petitioner signs it and swears his affidavit, in this case the three years had not elapsed. If, on the other hand, the presentation of a petition refers to the date when it is filed in the court, then the three years have elapsed, and the case having otherwise been completely proved, the petitioner is entitled to his decree. There appears strangely enough to be no authority which counsel has been able to find as to what presentation of the petition means. I have been referred to the Matrimonial Causes Rules, 1944, r. 3, which does specify that every matrimonial cause shall be commenced by filing a petition addressed to the High Court. It has been argued that a petition can only be said to be presented when it actually reaches the court. That must be and can only be on the day when the petition is filed. The point is purely a technical one. If I decided that this petition was presented on Oct. 10, 1945, it would have the effect of causing this petition to be dismissed, and would involve instituting new proceedings on what could only be a technical point. I think both on the merits of the case and also on the technical ground, I must decide that a petition is presented when it is filed in the court, that is to say, in this case on Oct. 31, 1945. That being so, on the date when this petition was presented, in accordance with the meaning I attach to the word, the three years had already run and I, therefore, hold that the petitioner is entitled to succeed. There will, therefore, be a decree nisi.

Decree nisi.

Solicitors: *Church, Rendell* (for the petitioner).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

BLUFF *v.* BLUFF (otherwise KELLY)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 26, 27, 28, 1946.]

Divorce—Onus of proof—Intervention by King's Proctor—Undefended petition for nullity—Wilful refusal to consummate marriage—Decree nisi granted—King's Proctor alleging marriage consummated—Whether affirmative proof necessary.

The petitioner was granted a decree nisi on the ground that the marriage had not been consummated owing to the wilful refusal of the respondent. The suit was not defended. The King's Proctor subsequently intervened and alleged that the marriage had been consummated. It was contended on behalf of the petitioner that the King's Proctor, intervening to show cause, must prove the truth of his plea and that, consequently, if the court at the end of the hearing were left in doubt, the petitioner was left in possession of his decree. On behalf of the King's Proctor it was contended that in these circumstances the petition failed :—

HELD : the intervention of the King's Proctor alleging that the assertion, which was the foundation of the decree obtained by the petitioner, was false, went to the same subject as that which formed the basis of the petitioner's prayer for a decree ; in such a case the King's Proctor was not bound to prove affirmatively that the marriage had been consummated ; the whole matter was re-opened, and, if the petitioner failed to satisfy the court that the marriage had not been consummated because of the wilful refusal of the respondent, the petition should be dismissed.

Semble : aliter when the King's Proctor intervenes to show cause, in an undefended case, by alleging that the petitioner has been guilty of adultery which had not been disclosed to the court. In such a case the onus would be on the King's Proctor to establish affirmatively that such adultery had taken place, and if the King's Proctor failed in that respect the petitioner would be left in possession of a decree which he had already obtained.

[**EDITORIAL NOTE.** There does not appear to be any previous decision upon the onus of proof when the King's Proctor intervenes to show cause against a decree of dissolution on the ground of wilful refusal to consummate the marriage. It is held that it is still for the petitioner to satisfy the court of the truth of the grounds alleged. WILLMER, J., suggests that the position is otherwise when the King's Proctor is alleging adultery by the petitioner, and this view is supported by *Hulse* v. *Hulse and Tavernor* (1871) L.R. 2 P. & D. 357, where it was held that identity need not be so strictly proved by the King's Proctor as upon the trial of such an issue between husband and wife.

AS TO INTERVENTION BY THE KING'S PROCTOR SHOWING CAUSE AGAINST A DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 771-774, paras. 1216-1223 ; and FOR CASES, see DIGEST, Vol. 27, pp. 480-487, Nos. 5085-5193.]

INTERVENTION by the King's Proctor showing cause why a decree *nisi* granted in favour of the petitioner should not be made absolute, on the ground that the marriage, alleged by the petitioner not to have been consummated owing to the wilful refusal of the respondent, had, in fact, been consummated. The extract from the judgment of WILLMER, J., which contains all relevant facts, is confined to the question of onus of proof.

C. A. Marshall-Reynolds for the King's Proctor.

J. G. St. George Syms for the petitioner.

WILLMER, J. : There has been some discussion with regard to the onus of proof in a case such as this. Counsel for the petitioner contended that he was in possession of the decree of the court, and that the King's Proctor, intervening to show cause, must prove the truth of his plea ; and that consequently, if the court at the end of the hearing were left in doubt, he (counsel) was left in possession of his decree.

On the other side, counsel for the King's Proctor, when I posed the same question to him—namely, What is the position if, after hearing all the evidence, the court is left in a complete state of doubt as to what really did happen ?—submitted that in that state of affairs the petition failed.

The odd thing is that there appears to be no direct authority for this comparatively simple point. It is important to bear in mind that the decree so far has been obtained by hearing one side only ; so that it is not a case of a re-trial or a rehearing such as that of a defended case in the Court of Appeal. In such a case it may well be said that the onus is always on the appellant to satisfy the appellate tribunal that the court below has made a mistake and gone wrong. But it seems to me that no such consideration arises in a case like this, where the previous proceedings have been undefended and the court has only heard the one side. A

It may very well be that there is a difference between different types of case. If the King's Proctor intervenes, as he commonly does, to show cause in an undefended case by alleging that the petitioner himself or herself has been guilty of adultery which has not been disclosed to the court, it may very well be that, in such a case, the onus would be upon the King's Proctor to establish affirmatively that such adultery had taken place ; and if the King's Proctor's proof failed in that respect, then it would be fair to say the petitioner was left B in possession of his decree which he had already obtained. I doubt, however, whether the same considerations apply in a case like this, where the intervention of the King's Proctor goes to the same subject as forms the basis of the petitioner's prayer for a decree, *i.e.*, the question whether or not the marriage has been consummated. Initially the petitioner starts out to prove that the marriage has not been consummated, and has not been consummated because of the wilful refusal of the respondent ; and all that the King's Proctor does by C his plea is to allege that that assertion, which is the foundation of the decree obtained by the petitioner, is false. A case such as that reopens the whole matter. It is not a case where the King's Proctor has to prove affirmatively that the marriage has been consummated or one in which, in default of such proof—*i.e.*, if the court is left in doubt—the petitioner remains in possession of his decree. The whole matter is re-opened before me and, as counsel for the D King's Proctor put it, I am put in the same position as the previous judge would have been in had the whole of the evidence been before him ; and if at the end of the whole case I am left in doubt as to which side has told me the truth (if either), then the effect is that the petition fails because it has not been proved.

I propose to act on that principle in this case. I have been through the evidence at length and I do not place very much reliance on either side, although, as I have stated, I have a preference for the case of the respondent. This E petition fails because so much of it is left in doubt. I think the marriage has been consummated. I would not like to say that the respondent has proved it to me. My opinion is that it was consummated ; but, in any case, the petition fails because the petitioner has not satisfied me that it was not consummated.

Petition dismissed.

Solicitors : *Henry Mossop & Syms* (for the petitioner) ; *King's Proctor.*

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*] F

EVANS *v.* ROGERS

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), May 8, 1946.] G

Food and Drugs—Milk—Standard agreement with Milk Marketing Board—Surplus to requirements—Delivery taken at farm collecting point—Sample taken later at diversion point—Whether in accordance with Act—Food and Drugs Act, 1938 (*c.* 56), *ss.* 24 (1), 68 (4).

The respondent entered into a standard agreement with the Milk Marketing Board to sell all his milk to the Board. The milk was, and had been for H many years past, under the direction of the Board, supplied to one G., who was a bulk purchaser of milk from the Board and also a haulage contractor conveying milk on behalf of the Board. Under a diversion order from the Board milk surplus to the requirements of G. was to be re-directed by him to a specified creamery. On the occasion in question some churns of the respondent's milk were collected by G. at the respondent's farm, the contents treated by G. as surplus milk and conveyed by a circuitous route to the specified creamery. The milk was sampled at this creamery and it was found that a quantity of water had been added. The respondent was charged, under the Food and Drugs Act, 1938, s. 24 (1), with unlawfully selling for human consumption to the Board milk to which an addition of water had been made. The justices dismissed the information. The question for the determination of the court was whether the sample was taken in accordance with the Act, sect. 68 (4) of which provides that samples may be taken at any dairy, or at any time while the milk is in transit, or at the place of delivery to the purchaser, consignee or consumer. It was agreed that the sample was not taken at the respondent's dairy :—

HELD : the place of delivery for the purpose of sect. 68 (4), and under the contract, was the place where the delivery to the purchaser took place under the direction of the Board, in this case the farm collecting point where G. took delivery ; G. having taken delivery, it could not be said that the milk was any longer in transit ; and as the sample was not taken at the place of delivery, it was not taken in accordance with sect. 68 (4) ; accordingly, the justices were right in the conclusion to which they came in dismissing the information.

[**EDITORIAL NOTE.** This is another case upon the construction of the very unsatisfactory form of contract prescribed by the Milk Marketing Board. In *Watson* v. *Coupland* (1) the court expressly left open the question as to where the place of delivery might be for the purpose of taking a sample as laid down by the Food & Drugs Act, 1938, s. 68. It is held that the place of delivery is the place where a bulk purchaser takes delivery, and that, therefore, a sample taken on premises to which the bulk purchaser subsequently re-directs surplus milk in accordance with a direction of the Board is not properly taken for the purpose of the Food & Drugs Act, 1938.

AS TO WHERE SAMPLES OF FOOD MAY BE TAKEN, see HALSBURY, Hailsham Edn., Vol. 15, p. 144, para. 230 ; and FOR CASES, see DIGEST, Vol. 25, pp. 71, 72, Nos. 14-22.]

Case referred to :
*(1) *Watson* v. *Coupland*, [1945] 1 All E.R. 217.

SPECIAL CASE stated for the opinion of the King's Bench Division of the High Court by the Justices of the County of Montgomery on an information preferred by an inspector of weights and measures under the Food and Drugs Act, 1938, s. 24 (1). The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

Vernon Gattie for the appellant.

LORD GODDARD, L.C.J. : This is a special case stated by the justices of the county of Montgomery on an information preferred by an inspector of weights and measures, who had prosecuted the respondent for unlawfully selling for human consumption to the Milk Marketing Board milk to which an addition of water had been made, contrary to the Food and Drugs Act, 1938, s. 24 (1).

The case raises a question of some difficulty by reason of the form of contract which every milk producer is now obliged to make with the Milk Marketing Board. As has been pointed out before in this court, it is one which may inflict considerable hardship on the farmer because he is bound to sell to the Milk Marketing Board and to nobody else. He has no voice in the form of contract ; it is one which the Milk Marketing Board prescribe, and they are the only possible purchasers. It is a case in which if something took place which it is shown the farmer could not control in any way, the court should not find him guilty of any offence unless the statute forces us to do so.

The point which is raised in this case differs from the point which was raised in *Watson* v. *Coupland* (1), because the point in that case was as to where the sale took place, and the court expressly left open the question which is raised in this case as to where the place of delivery might be for the purpose of the Food and Drugs Act, 1938, s. 68. The question which is now raised is not where the sale took place, but whether or not the sample was taken at the place of delivery. The prosecution relied upon the sample which was taken and the analysis of the sample which had been taken, and it is, therefore, necessary for the prosecution to show that the sample was taken in accordance with the terms of the Act. Sect. 68 (4) provides :

> A sampling officer, or an inspector of the Minister, may take samples of milk at any dairy, or at any time while it is in transit, or at the place of delivery to the purchaser, consignee or consumer . . .

Sect. 100 defines transit as including all stages of transit from the dairy, the place of manufacture or other source of origin to the consumer.

It is agreed here that there is no question of the sample being taken at the dairy. Therefore, in order that the sample should have been regularly taken in this case, it must have been taken either while the milk was in transit or at the place of delivery. Before I refer to the facts I ought to refer to the contract under which the milk was sold by the respondent to the Milk Marketing Board. He sells all his milk to the Milk Marketing Board, and by cl. 3 of the contract it is provided :

> The producer shall deliver the milk daily to such places and consignees as the Board directs.

It is quite obvious that under that clause the Milk Marketing Board can give such directions as it pleases as to the places and consignees, but if they only direct the farmer to deliver to a particular consignee without stating the place where it is to be delivered, the farmer will fulfil his contract if he delivers to the consignee who chooses to fetch the milk. It is then provided :

> The producer shall permit the Board to arrange and pay for transport of the milk from the farm collecting point to the place of delivery.

Then there are some provisions with regard to the farmer having the milk ready at the farm collecting point, and the farm collecting point is defined.

In cl. 5 it is provided :

> Subject to the provisions of cl. 9 hereof, the property and risk in the milk will pass to the Board at the place of delivery when the milk is unloaded from the vehicle by which it is transported, or in the case of rail-borne milk at the time when it is made available by the railway company for collection by the consignee.

Watson v. *Coupland* (1) really depended upon that clause, and the court held in that case that the sale took place and was complete when the milk arrived at the place of delivery where it was unloaded from the vehicle by which it was transported.

Now in this case the material facts found by the justices are, first of all, that the sample was taken at a place called the Four Crosses Creamery in the county of Montgomery, but it is also found that one Griffiths was a bulk purchaser of milk from the Milk Marketing Board and under a diversion order from the Milk Marketing Board milk surplus to the requirements of Griffiths was re-directed to Four Crosses Creamery. It seems to follow from that that it was to be re-directed by Griffiths. It is also found that the respondent's milk was and had been for many years past, under the direction of the Milk Marketing Board, supplied to Griffiths ; that Griffiths was also a haulage contractor conveying milk on behalf of the Board ; that on the day in question the seven churns of milk were collected by Griffiths' lorry driver at the farm, and on that day the contents were treated as surplus milk by Griffiths and conveyed by a circuitous route to the Four Crosses Creamery.

It seems to me, in the first place, that the place of delivery need not necessarily be the place where the property passes. Where the property passes under this contract was decided in *Watson* v. *Coupland* (1). HUMPHREYS, J., said in that case ([1945] 1 All E.R. 217, at p. 220) :

> I do not say that the question where the delivery took place is immaterial. It may be from certain points of view material, but for the purposes of this case it is absolutely immaterial because what has to be considered is not where the milk was delivered from A to B, but where the sale took place.

CROOM-JOHNSON, J., said much the same thing in his judgment. In that case, therefore, the court left open the question as to where the place of delivery was.

In my opinion, the place of delivery for the purpose of sect. 68 (4), and indeed under this contract, is the place where the delivery to the purchaser takes place under the direction of the Milk Marketing Board. The farmer is to deliver to the person to whom he is told to deliver, and at the place he is told, if he is told the place. There is no suggestion in the case that he was told to deliver at any particular place. It appears that he was told to deliver to Griffiths, and Griffiths took delivery of the milk at the farm collecting point. It may be —I am not deciding it one way or the other—that it could be argued that delivery in fact took place at Griffiths' place of business. Griffiths may be in a dual capacity as a haulage contractor to the Milk Marketing Board and also a person entitled to delivery of milk from the farmer. But it is unnecessary to consider that because the sample of milk was not taken at Griffiths' place of business ; it was taken at the place to which Griffiths delivered the milk under some order which the Milk Marketing Board had apparently served upon him, because the direction of the Milk Marketing Board to him was that he was to re-direct milk which was surplus to his requirements to the creamery where the sample was in fact taken.

It seems to me that in these circumstances the place of delivery of the milk was the farm collecting point where Griffiths took delivery. We are relieved from having to consider the question as to whether this sample was taken in course of transit because once the milk was delivered to Griffiths and Griffiths took delivery of it, the question as to whether the milk was in transit does not arise for the purpose of this case, because it cannot be said that the purchaser having taken delivery, the milk was any longer in transit once Griffiths had got the milk. In these circumstances it seems to me that before the sample can be used in evidence against the respondent, it must be shown that it was taken at the place of delivery, which was the farm collecting point for this purpose. We are not considering the question as to whether the property passed. The place of delivery for this purpose was the place where it was collected by Griffiths. As the sample was not taken there, it follows it was not taken in accordance with the section, and, accordingly, the justices were right in the conclusion to which they came in dismissing the appeal.

HUMPHREYS, J. : I agree with the judgment of my Lord. All I desire to say is that it seems to me that probably the point which has been raised in this case might have been raised upon the facts in *Watson* v. *Coupland* (1), but it was not in fact raised. No question was raised or argued as to where the delivery took place in that case, and, as my Lord has said, that question was expressly left open by the members of the court. On the peculiar facts of this case, I agree with the result proposed.

SINGLETON, J. : I am of the same opinion. I wish to add that it is greatly to be regretted that the Milk Marketing Board cannot adopt a form of contract which will work more satisfactorily. Everyone is anxious that adulteration of milk by farmers or by others should be dealt with, and severely dealt with, when it is detected. But this contract, which has been in operation for some years now, is so difficult that a farmer's life is far from easy.

As to the facts of the case I would add this. Griffiths was a bulk purchaser of milk from the Milk Marketing Board. The respondent's milk was, and had been for many years past, under the direction of the Board, supplied to Griffiths. The farmer under the contract had to deliver the milk daily to such places and consignees as the Board directed. When there was surplus milk, that was dealt with by a diversion order, and on the day in question the contents of the churns were treated as surplus milk and conveyed by a circuitous route to the Four Crosses Creamery. There is nothing to show that the farmer, the respondent, knew anything whatever of that diversion order or that the milk was in fact going to the Four Crosses Creamery. The submission on behalf of the appellant was that having regard to the existence of the diversion order, the point of delivery of the milk was the Four Crosses Creamery. The justices rejected that submission, and there is no ground upon which we can say that they were wrong in law in so doing.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *P. E. White*, Welshpool (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN MONTAGUE WICKHAM AND THE MAYOR, ALDERMEN AND BURGESSES OF THE METROPOLITAN BOROUGH OF PADDINGTON.

[King's Bench Division (Atkinson, J.), March 21, 29, 1946.]

Local Government—Superannuation of officers—Assessment of superannuation allowance—Remuneration of borough treasurer acting as local fuel overseer—Superannuation rights regulated by local Act—Local Government Superannuation Act, 1937, *s.* 40 (3) *not applicable to employees of local Act authorities—Employment not to be treated as two separate employments—"Officer"—"Emoluments"—Paddington Borough Council (Superannuation and Pensions) Act*, 1911 (c. ci), *ss.* 3, 4, 5, 13—*London County Council (General Powers) Act*, 1928 (c. lxxvii), *Pt. VII—Local Government Superannuation Act*, 1937 (c. 68), *ss.* 1, 3, 8, 26, 40 (3)—*Local Government Superannuation (Administration) Regulations*, 1938 (*S.R. & O.*, 1938, *No.* 574), *art.* 4—*Fuel and Lighting Order*, 1939 (*S.R. & O.*, 1939, *No.* 1028), *art* 16 (1)—*Paddington Borough Council Superannuation Scheme*, 1938, *arts.* 4, 13 (2), 15.

In 1903, at the age of 22, W. became an officer of the Paddington borough council. In 1923, he was appointed borough treasurer and had held that office continuously, as an officer in an established capacity and duly placed on the permanent staff, until 1945, when he reached the age of 65, which was the age of compulsory retirement under the Paddington Borough Council (Superannuation and Pensions) Act, 1911. By sect. 5 of that Act, after 10 years' service an officer was entitled to a certain proportion (varying with the length of his service) "of the average amount of his salary or wages and emoluments during the 5 years ending on the quarter day which immediately precedes the day on which he ceases to hold his office." The Act further provided that an officer had to contribute 2½ per cent. of "his salary, wages and emoluments" to the superannuation fund, and by the London County Council (General Powers) Act, 1928, this amount was raised to 3 per cent., and to 5 per cent. for officers appointed after 1928. "Officer" was defined in the Acts as "every officer in the service of the council in an established capacity and duly placed on the permanent staff," and "emoluments" as including "all fees, poundage and other payments made to any officer or servant as such" but not including "casual payments or gratuities or payments in respect of overtime." The "local Act scheme" under which W. was serving differed in material respects from the scheme prescribed by the Local Government Superannuation Act, 1938. Pursuant to this latter Act, the Paddington Council made an amending scheme in 1938, but under this scheme a person who had attained the age of 55 (and could not therefore complete 10 years' service before attaining the age of compulsory retirement) was not entitled to participate in the benefits of the superannuation fund. In Sept., 1939, an emergency committee of the council appointed W. local fuel overseer under the Fuel and Lighting Order, 1939, but nothing was said about remuneration. On Feb. 12, 1940, the committee resolved to grant an honorarium of £50 for the 4 months ending Dec. 31, 1939, "to the borough treasurer for services rendered under the Fuel and Lighting Order, 1939." On Dec. 16, 1940, the committee "considered the question of fixing the remuneration of the borough treasurer in his capacity of local fuel overseer" and resolved that W.'s remuneration as local fuel overseer be fixed at £150 per annum as from Jan. 1, 1940. From this £150 a year, W. had deducted 3 per cent. as contribution to the superannuation fund. The question to be determined was whether the superannuation allowance payable to W. was to be based merely upon what he had earned as borough treasurer or whether what he had received for his duties as local fuel overseer should also be brought into consideration. Under the Local Government Superannuation Act, 1937, s. 40 (3): "Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority." It was contended by the council that this section applied to W. in relation to his employment as borough treasurer and local fuel overseer: his employment in these two capacities must be treated as separate employments and, therefore, the remuneration received by W. as local fuel overseer could not be included in his superannuation allowance because he was over 55 when appointed to that post. The council further contended that the rate of contribution payable by W. to the superannuation fund in respect of the remuneration received by him as local fuel overseer was 5 per cent., and not 3 per cent. On behalf of W., it was contended that, for the purposes of the Superannuation Acts, his employment should be treated as that of an officer and not as two separate employments, and that his superannuation allowance should be calculated on the average of all that he had received in the 5 years previous to his compulsory retirement (as provided by sect. 5 of the 1911 Act) :—

Held: (i) upon the true construction of the Local Government Superannuation Act, 1937, sect. 40 (3) thereof did not apply to W. in relation to his employment as borough treasurer and local fuel overseer, because W.'s superannuation rights were regulated by the provisions of Paddington Borough Council (Superannuation and Pensions) Acts, 1911-1938 (local Acts), and not by the Local Government Superannuation Act, 1937. Sect. 40 (3) of the 1937 Act merely provided that, where the provisions of that Act applied, they should apply in a particular way.

(ii) for the purposes of the Superannuation Acts, W. was to be regarded as an officer, and his employment should not be treated as two separate employments. Superannuation rights were paid not in respect of an office, but were earned by an officer for services rendered. On the facts of the case, the £150 per annum paid to W. for his services as local fuel overseer was an emolument paid to him as borough treasurer for extra services rendered by him as borough treasurer. He was, therefore, entitled to have it brought into account in the calculation of his superannuation allowance, which was to be assessed on all his receipts for the 5 years previous to his retirement.

R. v. *Lyon* (1) *applied.*

(iii) the rate of contribution payable by W. to the superannuation fund in respect of the remuneration received by him as local fuel overseer was 3 per cent.

[**EDITORIAL NOTE.** The question in this case is the proper treatment of a local government officer entitled to superannuation in respect of his services in one office, that of borough treasurer, who has been called upon to render services in another capacity, that of fuel overseer, which services did not entitle him to any separate superannuation rights. It is held that the payments in respect of his services as fuel overseer are "emoluments" which are to be taken into consideration in calculating his superannuation allowance.

As to Superannuation of Officers, see HALSBURY, Hailsham Edn., Vol. 21, pp. 71-88, paras. 123-154; and for Cases, see DIGEST, Vol. 33, Nos. 1687, 1688, Vol. 37, Nos. 100-105, and Supplement, Metropolis, 29a-c.

For the Local Government Superannuation Act, 1937, see HALSBURY'S STATUTES, Vol. 30, p. 385.]

Cases referred to:

*(1) *R.* v. *Lyon, Ex p. Harrison,* [1921] 1 K.B. 203; 33 Digest 248, *1688*; 90 L.J.K.B. 278; 124 L.T. 243.

*(2) *Stoke Newington Borough Council* v. *Richards,* [1930] 1 K.B. 222; Digest Supp.; 99 L.J.K.B. 1; 142 L.T. 257.

Special Case stated for the opinion of the King's Bench Division of the High Court of Justice by an arbitrator. The facts are fully set out in the judgment.

H. B. Williams for the applicant.

Harold I. Willis for the respondent council.

Cur. adv. vult.

Atkinson, J.: This is a special case asking several questions bearing upon the superannuation right of one Wickham, the late borough treasurer of the respondent council, the Metropolitan Borough Council of Paddington. Since Sept., 1939, he was called upon to perform and has performed, the duties of local fuel overseer, and he received certain remuneration for that work. The real issue between the parties is as to whether his superannuation allowance is to be based merely upon what he had earned as borough treasurer or whether what he received for those extra duties must be also brought into consideration.

To understand the question and how it arises it is necessary to go in some detail into the relevant legislative provisions. I begin with a private Act, the Paddington Borough Council (Superannuation and Pensions) Act, 1911. Sect. 4 provides:

> (1) Subject to the provisions of this Act every officer who (*a*) shall have completed 10 years' service . . . shall be entitled on [retiring] to receive . . . a superannuation allowance according to the scale . . . provided.

The original definition of an officer [in sect. 3] has been slightly varied by the London County Council (General Powers) Act, 1928, s. 42, so that the present definition is (and has been since 1928):

> "Officer" means every officer in the service of the council in an established capacity and duly placed on the permanent staff.

Sect. 13 of the 1911 Act provides:

> Subject to the provisions of this Act every officer in the service or employment of the council shall contribute to the superannuation fund a percentage amount of his salary or wages and emoluments according to the scale provided by this Act such amount to be deducted by the council from the salary or wages and emoluments payable to him and to be carried to the credit of and form part of the superannuation fund.

Emoluments are defined in this way [in sect. 3]:

> "Emoluments" includes all fees poundage and other payments made to any officer or servant as such . . . but does not include casual payments or gratuities or payments in respect of overtime.

Sect. 5 says:

> The scale of superannuation allowances to be made to an officer under this Act shall be as follows (that is to say): After 10 years' service or aggregated service ten-sixtieths of the average amount of his salary or wages and emoluments during the 5 years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment; after 11 years . . . eleven-sixtieths . . . And so on up to a maximum after 40 or more years' service or aggregated service of forty-sixtieths of such average amount.

Going back to sect. 4, subsect. (3) thereof says:

> Where an officer has attained the age of 65 years he shall cease to hold his office or employment and shall thereafter receive the superannuation allowance to which he may be entitled under this Act.

That is the scheme under which Wickham was employed.

The next Act to which I must refer is the Local Government Superannuation Act, 1937, because the first question which is asked by the arbitrator has reference to whether a particular provision of this Act applies to Wickham's position. This Act was a general Act, which imposed upon all councils the obligation of providing and maintaining superannuation schemes; but that obligation did not apply to councils which already had a superannuation scheme in existence. The heading to Pt. I is this:

> Superannuation of employees of local authorities not being local Act authorities.

It is made quite clear in Pt. I that a local Act authority is an authority which has already got a superannuation scheme by virtue of a special Act. Sect. 1 provides:

> (1) As from the appointed day, a superannuation fund shall, subject to the provisions of this section, be maintained for the purposes of this Part of this Act by each of the following bodies, that is to say: (*a*) the council of every county, county borough and metropolitan borough . . . (2) The preceding subsection shall not apply to any local authority specified therein who (*a*) not having adopted the Act of 1922, maintain a superannuation fund under a local Act [which takes Paddington out of this Part of the Act] . . . (3) (*a*): a local authority who are for the time being required to maintain a superannuation fund under this Part of this Act are referred to as an "administering authority."

Then sect. 3 provides for contributions:

> . . . all such persons as are mentioned in the next succeeding subsection shall, subject

> to the provisions of this section and to the provisions of Pt. III of this Act relating to officers appointed in a temporary capacity, be entitled to participate in the benefits of the appropriate superannuation fund maintained under this Part of this Act, and persons [and this is rather important] so entitled shall, unless they are such persons as are mentioned in the proviso to sect. 6 (1) of this Act, contribute to that fund in accordance with the provisions of that section, [*i.e.*, only people who are going to benefit are to contribute]. In this Act, the expression "contributory employee" means a person who is for the time being entitled to participate in the benefits of such a superannuation fund, notwithstanding that he may be such a person as is mentioned in the said proviso. (2) The persons referred to . . . are (*a*) every whole-time officer of a local authority specified in Sched. I, Pt. I, to this Act who are not a local Act authority . . . (*c*) every officer or servant of a local authority, not being either a local authority specified in Sched. I, Pt. I, or a local Act authority . . .

Therefore, any one who is within a scheme run by a local Act authority, is excepted out of these provisions of this Act. Sect. 3 (4) provides :

> The following persons shall not become contributory employees by virtue of the foregoing provisions of this section, that is to say, a person who . . . (*c*) has attained the age of 55 years and has not completed, and cannot before attaining the age of compulsory retirement applicable in his case complete, 10 years of service.

So that a person who did not become a whole-time officer or a contributory officer within the provisions of this Act before he was 55 was outside it altogether —no contributions, no benefits. Then sect. 8 (5) deals with the superannuation allowance :

> For the purposes of this section, the average remuneration of a contributory employee means the annual average of the remuneration received by him in respect of service rendered during the 5 years immediately preceding the day on which he ceases to hold his employment or the day on which he attains the age of 65 years, whichever is the earlier.

There is a distinction there between the measure of the 5 years and the 5 years under a local Act. Under a local Act the 5 years ends for the purpose of ascertaining the average with the quarter day previous to retirement. The 5 years under this provision ends on the day immediately preceding the day on which the officer ceases to hold his employment. The definition of "remuneration" [in sect. 40 of the 1937 Act] is again different from the definition of "emoluments" in a local Act :

> "Remuneration" means all salary, wages, fees, poundage and other payments paid or made to an employee as such for his own use . . .

It does not include payments for overtime or allowances paid to cover cost of office accommodation or clerks' assistance, and so on, but there are no words excluding, as there are in the other case, casual payments or gratuities. So that it is quite plain that, in material respects, the scheme which this Act ordained differs from the local Act scheme under which Wickham was serving.

Pt. II of the 1937 Act does, however, apply to local Act authorities. Sect. 26 provides :

> (1) A local Act authority shall, not later than 12 months before the appointed day, make a scheme for modyifing their local Act scheme so as to secure that on and after the appointed day (*a*) the following persons shall [subject to certain exceptions] be entitled to participate in the benefits of their superannuation fund, that is to say (i) every whole-time officer of the authority . . . (*b*) . . . the benefits of their superannuation fund shall be so adapted . . . to such persons as are mentioned . . . that they shall enjoy rights not substantially less favourable . . . (2) The following persons shall not be entitled to the benefit of the preceding subsection, that is to say, a person who . . . (*c*) has attained such an age that he cannot under the provisions (if any) of the local Act scheme or the practice of the authority, relating to qualifying periods of service and the age of compulsory retirement, become entitled to a superannuation allowance.

As a result of that section, the Paddington Council made a scheme, as they were ordered to do, for modifying their local Act [Paddington Borough Council Superannuation Scheme, 1938] : Art. 4 was this :

> Subject to the provisions of this scheme and to the provisions of Pt. III of the Act of 1937 relating to officers appointed in a temporary capacity, the following persons shall be entitled to participate in the benefits of the superannuation fund, that is to say (*a*) every whole-time officer of the council.

Then the scheme proceeds to do exactly what Pt. II of the Act said it ought to do. I then come to art. 13 (2):

> Any person who, having been in the employment of the council immediately before the appointed day, becomes subject to the local Act scheme on the appointed day by virtue of art. 4 (*a*), not being a person to whom para. (1) of this article applies or such a person as is mentioned in art. 4 (*b*) or (*c*) [*i.e.*, a whole-time employee] shall be deemed for the purposes of the local Act scheme to be in the service of the council in an established capacity and duly placed on the permanent staff of the council on the appointed day and the provisions of that scheme relating to the reckoning of further service and to service under other authorities shall apply accordingly.

That makes this clear: every whole-time officer who was brought into the superannuation scheme by this amending scheme became an officer within the definition contained in the 1911 private Act. But it is equally clear that every whole-time officer who came into the scheme at a later date (*i.e.*, at a date later than the appointed day), did not automatically become an officer within the meaning of the Act of 1911. Then art. 15:

> Notwithstanding anything contained in the foregoing provisions of this scheme a person who has attained the age of 55 years and has not completed, and cannot before attaining the age of compulsory retirement applicable in his case complete, 10 years of service, shall not be entitled to participate in the benefits of the superannuation fund.

That completes the legislative provisions with which I need deal at the moment.

Wickham was born on Sept. 16, 1880, so that he attained the age of 65 on Sept. 16, 1945. In fact, he was compulsorily retired. He entered the service of the council so long ago as Mar., 1903. On Feb. 26, 1924, he was appointed borough treasurer to the council and since that date he has continuously held that office as an officer in the service of the council in an established capacity and duly placed on the permanent staff. On Sept. 7, 1939, he was appointed by the emergency committee acting on behalf of the council to be local fuel overseer under and by virtue of the Fuel and Lighting Order, 1939, but no remuneration was fixed at the time of appointment. What in fact happened was this. On Sept. 7, a resolution was passed by an emergency committee stating that the borough treasurer consulted the committee generally upon the matter of fuel controlling. He undertook to submit certain names for the advisory committee which the Order required and undertook to report at a subsequent meeting. Then came this resolution:

> Resolved that Mr. Montague Wickham be appointed local fuel overseer for the Metropolitan Borough of Paddington.

The Fuel and Lighting Order, 1939, art. 16 (1) provided:

> Each local authority shall within 7 days after the date on which this order comes into force appoint for their district an officer to be called "the local fuel overseer," who shall hold office, subject to any directions of the divisional coal officer, at the pleasure of the local authority.

The council had to have a local fuel overseer. Apparently Wickham was asked if he would take on this work and agreed to do it, and so he was appointed; but nothing was said about remuneration. On Feb. 12, 1940, there was another meeting of this emergency committee and the town clerk submitted a memorandum from the Mines Department regarding the repayment of the reasonable expenses incurred by local authorities in the administration of the above-mentioned order and stated that it was not the intention of the Department to lay down a scale of remuneration for local fuel overseers. The committee then passed the following resolution:

> Resolved that for the 4 months ended Dec. 31, 1939, honoraria of £50 and £25 be granted to the borough treasurer [that is, I think, very significant], and Mr. J. M. Shoubridge respectively, for services rendered under the Fuel and Lighting Order, 1939.

It is significant that the honorarium was not granted to the local fuel overseer but to "the borough treasurer" "for services rendered under the Fuel and Lighting Order, 1939." So it went on for that year, but on Dec. 16, 1940:

> The chairman submitted to the committee details of remuneration paid to local fuel overseers in certain boroughs in the metropolis, and the committee having considered the question of fixing the remuneration of the borough treasurer in his capacity of local fuel overseer, it was—Resolved that the remuneration of Mr. Montague Wickham as local fuel overseer, be fixed at £150 per annum, with effect from Jan. 1, 1940.

There was no further change in the following years.

Now this problem presented itself to Wickham as borough treasurer: what contribution ought to be deducted from his salary? Under the original scheme an officer had to contribute 2½ per cent. of his salary every year. This was increased by the London County Council (General Powers) Act, 1928, Pt. VII, of which applied to the Paddington Borough Council. That, in effect, raised the contribution to 3 per cent., and for officers appointed after 1928 to 5 per cent. There is one other matter which must be pointed out here. The Local Government Superannuation (Administration) Regulations, 1938 [made under the Local Government Superannuation Act, 1937] imposed the following duty on local authorities by art. 4:

> Every local authority specified in Sched. I, Pt. I, to the Act shall (*a*) upon a person entering their employment on or after the appointed day; (*b*) if during the continuance of the employment by them of an employee on or after the appointed day, any change occurs in the circumstances of his employment, being a change which is (either in their opinion or in the opinion of the employee notified by him to them in writing within 6 months after the change) material for the purposes of the Act, as soon as may be after the change or after receipt by them of such notification as aforesaid, as the case may be; and (*c*) if during the continuance of the employment by them of an employee on or after the appointed day, the authority pass a statutory resolution for the purpose of sect. 3 (2) (*b*) of the Act, being a resolution which is (either in their opinion or in the opinion of the employee notified by him to them in writing within 6 months after the resolution is passed) material in relation to that employee, as soon as may be after the resolution is passed or after receipt by the authority of such notification as aforesaid, as the case may be; take into consideration the question whether that employee was or was not a contributory employee or local Act contributor immediately after he entered their employment, immediately after the change in the circumstances of his employment, or immediately after the passing of the resolution, as the case may be.

In other words, if there is a change made, it is the duty of the council at once to determine what effect it has, if any, upon the superannuation rights of the employee with whom they are dealing so that he may know where he is. It never occurred to the Council that there was any change in the position of the borough treasurer, and in fact nothing was done under that provision.

Wickham took the view that this salary of £150 and the £50 were both emoluments within the scheme and, therefore, that he had to deduct 3 per cent., and he did deduct 3 per cent. every time from the payment to himself, which I suppose he authorised. That 3 per cent., of course, could only be the right contribution if this was an emolument due to him in his capacity of borough treasurer. As everybody knows, the accounts of these local authorities are audited, and if an auditor took the view that insufficient contribution was being paid it would be his duty to raise it. In a case to which I shall refer later, where insufficient had been deducted, the auditor charged the council with having paid too big a salary without the proper deduction, and they were surcharged. So that if, during these years, 5 per cent. ought to have been deducted, as is contended now by the council, and not 3 per cent., as Wickham says, at any time during those years the council could have been surcharged with this extra payment. Up to this point in the history, the auditor, Wickham and the council apparently all took the view that that which was being done was being properly done.

On June 14, 1944, the assistant district auditor wrote to the council calling their attention to the fact that they had not complied with the provision of the 1938 Act, that, if during the continuance of an employee any change occurred they should consider the matter and determine as to whether or not he was liable to contribute to the superannuation fund. Thereupon the council did give their mind to it and sent Wickham notice, dated Aug. 11, 1944:

> You were appointed by the council . . . during the continuance of such employment . . . a change occurred in the circumstances of your employment by virtue of your appointment by the council as local fuel overseer and such change is in the opinion of the council material for the purposes of the said Act. And whereas the council in pursuance of art. 4 of the above mentioned Regulations have taken into consideration the question whether you were or were not a local Act contributor immediately after the change in the circumstances of your employment as aforesaid. Now in pursuance of art. 5 of the said Regulations and of all other powers in that behalf them thereunto enabling the council hereby notify you of their decision which is as follows: (i) The council have decided that as local fuel overseer you are a local Act contributor [that

> is worth remembering when we come to their contentions on another question], and that you became such a contributor at the date of your appointment to such office. (ii) The council have further determined that the statement required to be furnished to you in accordance with the provisions of art. 5 (2) of the said Regulations shall be as follows : (*a*) as local fuel overseer you are an officer of the council within the meaning of the said Act. [There, again, it seems clear that on that date Wickham became an officer within the meaning of the Act.] (*b*) your description as such officer is that of local fuel overseer ; (*c*) the rate of contribution you are liable to pay to the superannuation fund maintained by the council under their local Act scheme is 5 per cent ; (*d*) the remuneration upon which contributions are payable by you is £150 per annum as from the date of commencement of such remuneration namely Jan. 1, 1940 ; (*e*) the previous service which you are entitled to reckon in connection with the said office is nil.

Wickham gave notice of objection and that led to this arbitration. Before we leave that notice, let me emphasise again that they decided that he was a local Act contributor, that he was an officer within the meaning of their local Act and that as such officer the rate of contribution was 5 per cent.

Then came the arbitration, and the first question asked in the award has reference to the applicability of the Local Government Superannuation Act, 1937, s. 40 (3). Before I come to that section, let me clarify the issue between the two parties. Wickham says : " I am an officer and I have been since 1924. As such officer I am entitled to a superannuation allowance which shall be twenty-one-sixtieths of my average salary and emoluments of the last 5 years. Part of those emoluments is the £150 which I received per year, payment to me for extra services which I rendered." The council, on the other hand, say : " No, these are two separate offices. As borough treasurer you are entitled to your superannuation allowance based upon your average salary for the last 5 years." I do not know what they would say that his rights as local fuel overseer would be ; but they say that is a separate office and that the £150 a year is not to come into the emoluments which are to be brought into the calculation. If that is right, it is perfectly plain that, as local fuel overseer, Wickham never was in any of these schemes because he did not become local fuel overseer until he was 59 years of age, when he could not be entitled to any superannuation benefit and, therefore, could not be liable to contribute. I quite agree that in the Act of 1911 there are no express words saying that he shall not be liable to contribute, but it is clearly implicit when it says : " You are not entitled to any superannuation allowance unless you have put in 10 years' service, and you have got to retire at 65." Therefore, it is perfectly plain that he never could come within the benefits of the scheme, and I cannot imagine that anyone would contend that he was, therefore, liable to contribute to the scheme. Then there was the further scheme bringing in whole-time employment. When he was appointed local fuel overseer he came within it, if at all, by virtue of that scheme as a whole-time officer, because he was not an officer within the original scheme, and that scheme expressly excepts servants or employees who cannot put in 10 years before their compulsory retirement. The Act, in so far as schemes are concerned which are made under the Act, again says in plain terms that he is not a contributor and not within the scheme. Therefore, as local fuel overseer, he could not be liable to contribute and he could not be entitled to any benefit. That would be the position if the two offices are kept separate and if he is deemed to be two separate individuals. That is the issue.

Pt. III of the Act of 1937 is headed " Miscellaneous and General Provisions." Sect. 40 (3) says this :

> Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority.

The first question that I am asked is this :

> Whether the Local Government Superannuation Act, 1937, s. 40 (3) applies as respects Mr. Wickham in relation to his employment as borough treasurer and local fuel overseer.

It seems to that the subsection assumes that the provisions of the Act apply to the offices with which it is dealing and that it is simply ordering how those provisions shall apply. In my view, it means that, where the provisions of this

Act apply, they shall apply in a particular way, *i.e.*, where an employee is an employee to whom these provisions apply, these provisions shall apply in a certain way. It is interesting to see what the section does not say. It does not say: "The provisions of this Act and also the provisions of any local Act shall apply," as if the employee had different employers—in other words, separating the two offices completely. It does not say: "Neither the provisions of this Act nor the provisions of the local Act." It is interesting to observe that the framers
A of this section thought that, with reference to a scheme even under the Act, it was necessary, if you wanted to achieve that result, to have a special section providing for it.

Let me go further. I ask myself the question what provisions of this Act can apply to an employee of a local Act authority; because it is not only some provisions, it is "the provisions of this Act" which are to apply. Can it really mean that an officer, being plainly and admittedly within the local scheme, if
B he accepts a second post passes out of the scheme he has contributed to for years, under which he is entitled to a superannuation allowance—that he passes into some other scheme, some hypothetical scheme which does not even exist (because this Act does not make a scheme for any authority, it only orders authorities which have not got a scheme to provide one)? Paddington had no other scheme but the one contained in their local Act. Can it really mean that this officer holding two offices has to pass out of his own scheme into some
C nebulous hypothetical scheme which does not even exist and which has got no funds? It cannot possibly mean that. I have tried very hard to find any argument in favour of the contention that this section governs employees whose rights are regulated solely by the local Act, even apart from the words "unless the context otherwise requires," and there are very many such contexts in Pt. I. It is only Pt. I which lays down the superannuation clauses and it is
D only superannuation clauses which are relevant for this purpose. Pt. I, in terms, is not to apply to a local Act. I am quite satisfied that sect. 40 (3) of the 1937 Act means simply that where an officer is subject to a scheme made under the provisions of this Act (*i.e.*, a scheme which is not a local Act scheme) those provisions shall apply in a certain way. That cannot apply to an officer whose rights are regulated by a local Act scheme. It would be fantastic in one way. Let me take sect. 3 (4) of the 1937 Act. Here is a plain provision that a person
E shall not become a contributory employee if he has attained the age of 55, and cannot before attaining the age of compulsory retirement complete 10 years' service. By that provision as local fuel overseer he is outside the whole thing; he is not a contributor. Yet the council say, wholly inconsistently with their argument here, "As such overseer you are liable to contribute 5 per cent." I cannot reconcile the two contentions. Rightly or wrongly, I cannot see how sect. 40 (3) has any bearing at all, but I do think Wickham can get two points out
F of the existence of that section. I have referred to them and I repeat them again. First, the person who drew the section obviously thought, and, therefore, I am entitled to say that Parliament obviously thought, that without that provision there would be no separation of the two offices. Also, they merely say: "The provisions of this Act" when they might also have said, if they had meant it, "and also the provisions of any local Act." Therefore, I answer the first
G question in the negative.

Question (ii) is:

> Whether Mr. Wickham's employment as borough treasurer and local fuel overseer should be treated as two separate employments for the purposes of the Paddington Borough Council (Superannuation and Pensions) Acts, 1911-1938, the Local Government Superannuation Act, 1937 (so far as that Act applies) and the Paddington Borough Council (Superannuation) Scheme, 1938, or as the employment of an officer.

H If the first question had been answered "Yes," I suppose one would say that that would answer the second question, but the mere fact that question (i) is answered in the negative does not necessarily settle question (ii). Question (ii) has to be determined by the proper interpretation and construction of the Paddington local Act, and it raises two contentions. The contention for Wickham, urged very strongly here, was simply this: "This is a case of the employment of an officer, Wickham. All you have got to get at when he is compulsorily retired is what has he made in the last 5 years, what benefits he received, and average those." The contention still remains the same by the council: "No, you are to separate the two, they are to be treated as two separate employments." If they are right about that, as I have pointed out, as fuel overseer he is out of everything. He has paid contributions when he ought not to have paid them and cannot possibly be entitled to anything because he has not put in 10 years' service. So their contention comes to this: in finding out what the borough treasurer is entitled to, you are to ignore entirely the £150 a year; he gets nothing in respect of that.

I think it important to appreciate that this is not a question as to the proper treatment of an officer holding two offices each of which carries superannuation rights, for no office carries such right. It is not the office which entitles him to a superannuation allowance; it is the length of service by somebody who is an officer which earns a pension or superannuation rights. It is not a question as to the proper treatment of an officer entitled to superannuation rights in respect of service in each of two offices, because one office is out of it. The question is the proper treatment of an officer entitled to superannuation in respect of his services in one office who has been called upon to render services in another capacity (or in another office), which services could not entitle him to any separate superannuation rights. That is the matter to be considered. Wickham has all along taken the view that the extra salary was an emolument paid to him for extra services rendered and, therefore, subject to a 3 per cent. deduction; and that 3 per cent., as I have said, has been deducted. The council, strangely enough, take the view that Wickham, *qua* local fuel overseer, is not within the scheme as contained in the 1911 Act, not being an officer as there defined and not becoming such until he was 59, and that he is not within the scheme of 1938 in that he was over 55 when appointed. Yet they claim that his salary was subject to a 5 per cent. deduction as an officer appointed under the original Act, which, of course, he is not. I have already referred to that inconsistency. As local fuel overseer, he was not (at any rate, until 1944), an officer within the original scheme; he did not come within the definition of it. In that capacity he had never been put on the permanent staff. I asked what made a man an "officer on the permanent staff" and I was told it needed a resolution to put him on the permanent staff and bring him within that definition. There never was such a resolution and the nearest you get to it is Aug., 1944, when Wickham was told that the council had determined that he was such an officer. In my view, it is plain that the salary paid for services rendered under the Fuel and Lighting Order, 1939, was not subject, and could not be subject, to any deduction except on the basis that it was an emolument to Wickham for extra services rendered. I think that must be clear. If you are going to consider it as a separate office, I cannot see on what possible ground it can be said that the salary was subject to any deduction. It did not begin until he was 59. Whether you regard him as a whole-time employee or as an officer does not seem to me to matter. He never could come as such within this superannuation scheme and, therefore, could not be called upon to contribute to it. Therefore, if there was a deduction to be made, it could be only a deduction of 3 per cent., regarding it as an emolument to Wickham in his capacity as borough treasurer; and such, in fact, it was.

I am entitled, in dealing with a special case, to draw all necessary inferences of fact. I doubt whether the facts do not speak for themselves without the drawing of inferences. Let me repeat them again. On Sept. 7, 1939, Wickham was appointed local fuel overseer, nothing being said about remuneration. On Feb. 12, 1939, there is this resolution (which seems to me to crystallise the position) that for the 4 months ended Dec. 31, 1939, the honorarium of £50 be granted to "the borough treasurer"—not to "the local fuel overseer," not to Wickham as local fuel overseer, but simply to the borough treasurer. For what ?—for services rendered under the Fuel and Lighting Order, 1939. They are saying: "We are giving you, the borough treasurer, £50 more than your salary because of the services you, the borough treasurer, have rendered under this order." Eighteen months go by without any change. To get at the real relationship and the real contention between the parties, you have to go back to the commencement of it and see how it started and find out how the thing began—services rendered by Wickham as borough treasurer—outside the particular scope of his office, but still services rendered to the council. Then on Dec. 16, 1940, there comes this:

> Resolved that the remuneration of Mr. Montague Wickham as local fuel overseer be fixed at £150 per annum.

Surely it cannot be suggested that you can read into that resolution: "Understand that from now onwards there is a complete change in your position and that so far from this service being rendered by you as borough treasurer or being added to your services as borough treasurer, this resolution means that you pass out of the scheme *qua* local fuel overseer and cease to be entitled to any superannuation rights in respect of what you will be paid." I cannot read that into that resolution. It seems to me you could look at it in this way: the job was either to carry extra remuneration or it was not. If it was, the £50 for services rendered was for services which were to be paid for, and the £50 would not be properly a gratuity but would be the payment of a reasonable sum for services rendered which had to be paid for—and the payment of a sum paid for services rendered (as the resolution says) by the borough treasurer. If the services were not to be paid for, it is a little difficult to regard that appointment as an appointment to a separate office, a voluntary office which was not to be paid for. It seems to me that the only inference which can be properly drawn from the facts here is that this case is precisely like *R* v. *Lyon* (1).

Therefore, I think that there is no answer to the argument for Wickham on the second question that he is to be regarded as an officer, and that the average is to be calculated on all that he received during the past 5 years. There is no suggestion that the £150 was not, at least, an emolument. The £50, it is said, was a gratuity. It does not matter for the purpose of this case what it was because it was outside the 5 years. The 5 years begins in June, 1940, and ends in June, 1945, and, therefore, I am not going to determine the rather difficult question as to whether the £50 was a mere gratuity or was a payment for services rendered which it had been always contemplated should be paid for. That is wholly immaterial and too trifling a matter to worry about. My answer to question (ii) is that his employment is to be treated as the employment of an officer, that is, superannuation rights are not paid in respect of an office, they are earned by an officer for services rendered.

Question (iii) is:

> Whether contributions should be paid to the superannuation fund by Wickham in respect of the remuneration paid to him in his capacity of local fuel overseer at the rate of 3 per cent., being the percentage applicable to his remuneration as borough treasurer as in the case of an officer appointed by the council on or before Sept. 29, 1928, or at the rate of 5 per cent. being the percentage applicable in the case of officers appointed after that date.

The answer to that depends on the answer to question (ii), that, if it is deemed to be merely an emolument payable to Wickham as borough treasurer, he only pays 3 per cent. If that is wrong, then it is not liable to anything. It is not liable to 5 per cent., because, as local fuel overseer, he never came into the scheme at all and no contribution could be called for from him. All that happened to him was that he was appointed. If he had been younger, he would have come into the scheme as a whole-time officer under the 1938 alteration of the original Act, but even that scheme, in plain terms, says he shall not be liable to contribute if he is of such an age that he cannot put in 10 years' service before compulsory retirement. Therefore, it is plain that it is either 3 per cent., or nothing, and, as 3 per cent. has been deducted, my answer to that is: The rate of 3 per cent. is the true rate and not 5 per cent.

Question (iv) is:

> Whether the payment of £50 under the resolution of the emergency committee of Feb. 12, 1940, was rightly or wrongly taken into account by Wickham as being salary or emoluments from which deductions ought to be made on behalf of the council for the purposes of the Acts and Scheme referred to in question (ii).

Really, that is trifling. I think myself a good deal could have been said by Wickham in support of a right not to make any contribution in respect of that sum, but he is content to have made the contribution and he is not asking for it back. Therefore, I answer that by saying it was rightly deducted. The fact that 30*s.* was deducted makes no difference at all because it does not enter into the matter.

There are two cases which I want to refer to, because I think they support the view I take. In *Stoke Newington Borough Council* v. *Richards* (2) the point was this:

> Where the town clerk of a metropolitan borough is by virtue of the Representation of the People Act, 1918, the registration officer of a registration area which is coterminous with the borough, the fees which he receives as registration officer are "emoluments" of his office as town clerk within the meaning of the Superannuation (Metropolis) Act, 1866, s. 4, and ought, therefore, to be taken into account along with his salary and other emoluments in calculating the superannuation allowance to be granted to him under the last-mentioned Act on his retirement from the office of town clerk. A

The Superannuation (Metropolis) Act, 1866, s. 4, under which the question arose, was:

> Subject to the provisions herein contained, the allowance to be granted [after the commencement of this Act] to persons who shall have served in an established capacity as officers as aforesaid, whether their remuneration be computed by weekly wages, B poundage or percentage on collection of rates, or annual salary, shall be as follows; (that is to say) To any person who shall have served 10 years and upwards, and under 11 years, an annual allowance of ten-sixtieths of the salary and emoluments of his office . . .

Those words "of his office" are not in the Act with which we have to deal. I have to deal with emoluments to an officer "as such." There is no reference C to a particular office but simply emoluments of an officer "as such," whereas *Stoke Newington Borough Council* v. *Richards* (2) had to deal with the words "emoluments of his office." The decision was that even there the fees paid to the registration officer were emoluments of his office of town clerk because the law required the town clerk to be appointed registration officer. The main interest to me of the case is the argument of counsel for the officer, and the cases which he collected and referred to, where additional work had been put D upon an officer in respect of which he had received remuneration. They were mostly cases for compensation for loss of office but where the compensation had to be with reference to emoluments and earnings from office. In all those cases the officer had always had the benefit of the view that these extra payments to him in respect of extra work put upon him were rightly taken into consideration in assessing the compensation payable.

I wish to refer to *R.* v. *Lyon* (1), because it seems to me so like this case. This E is the headnote:

> The London County Council, as the authority under the Lunacy Acts for the county of London, maintains a number of asylums. During the war many of the officers employed in those asylums undertook military service, and the asylums had to be carried on with depleted staffs. The council called upon the remaining officers to undertake special duties or extra work outside the terms of their contracts, and, in F consideration of the special services rendered, approved of special duty grants to those officers. Upon payment of the grants no deductions were made in respect of the superannuation fund under the Asylums Officers' Superannuation Act, 1909, s. 8, as the council considered that the payments did not come within the words "salary or wages and emoluments" in that section, but were mere gratuities. Out of the sum paid for special duty grants, the district auditor disallowed a sum of £36 1*s*., and surcharged it upon the council.

His contention was: "These sums will come into the calculation of superannuation rights and, therefore, there ought to have been a contribution in respect G of those payments. You have overpaid this man, you have not made the deductions." Therefore, he surcharged them. The court held:

> . . . that the special duty grants were "emoluments" within the meaning of sect. 8 of the Act and were subject to deductions in respect of the superannuation fund, and that the disallowance and surcharge by the auditor were, therefore, properly made. H

The EARL OF READING, L.C.J., giving the first judgment, quoted sect. 16 of the Act ([1921] K.B. 203, at pp. 207, 208):

> "The salary or wages and emoluments of an established officer or servant shall, for the purpose of computing the amount of a superannuation allowance or gratuity, be calculated according to the average amount of his salary or wages and emoluments during the 10 years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment." Then it goes on: "and the expression 'emolument' includes all fees, poundage and other payments made to any established

> officer or servant as such [so that there is the same language as I have got here] for his own use." If I stop at those words, I can see no reason why the words "other payments made to any established officer or servant as such for his own use" would not include extra payments for extra services and extra responsibilities undertaken . . . [they] can be brought within the words "extra work and responsibility"; and it is to be observed that this is extra work and responsibility in the employment which the established officer or servant is actually engaged for.

It was work outside what he was actually engaged for. Then the EARL OF READING, L.C.J., said (*ibid.*, p. 209):

> . . . but in any event it all comes back to this, that the work which the officer or servant was doing was work for the same employer in the same institution, in respect of the same class of work . . .

DARLING, J., put it somewhat differently. He said (*ibid.*, pp. 209, 210):

> I am of the same opinion. It is said that there is a difficulty about this case in many respects, but particularly because what was paid here to one officer who was an established officer for doing more work than that which he at first contracted to do was not paid to him as "an established officer or servant as such for his own use." Now it was paid to him for his own use. If he had not been an established officer this case could not have arisen; it was paid to him for doing the work which another established officer did before the war, and, therefore, it appears to me that what he received in each of these instances was a payment made to an established officer as such for his own use. Now another difficulty is raised upon sect. 8 of the Act. It is pointed out that the words are "subject to the provisions of this Act, every established officer and servant employed in an asylum shall contribute annually"—it is said how can he "contribute annually"? The war is over. He cannot contribute next year, because there will be no difficulty in employing the ordinary number of servants, and, therefore, next year he will not get the money. I do not see any difficulty about that. He will contribute annually in the years in which he does get the money, and the result will be that when it comes to calculating his pension, for some years it will be put down to his benefit that he received more than the ordinary salary attaching to his particular office, and that will give him an increase of pension.

AVORY, J., took the same view.

To my mind *R.* v. *Lyon* (1) is very helpful in this case and seems to me to support the view I have formed quite independently of it that Wickham's rights are to a pension which is to be assessed on all his receipts for the past 5 years and that this £150 was paid to him for extra work which was imposed upon him, with his consent, which began on a voluntary basis and which after 18 months was put on a basis of remuneration. It is perfectly plain that the council would never have got a whole-time officer to do the local fuel overseer's work for £150 a year. If they had tried to get somebody outside to hold such an office it would have cost them far more. Because the borough treasurer was getting a salary and was ready to do these extra duties, he did them. To my mind, it is quite plain that the £150 was an emolument which he was entitled to have brought into account. Therefore, I answer all four questions in that way.

Order accordingly.

Solicitors: *W. H. Thompson* (for the applicant); *W. H. Bentley*, Town Clerk Paddington (for the respondent council).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

BOMFORD *v.* SOUTH WORCESTERSHIRE AREA ASSESSMENT COMMITTEE AND PERSHORE RURAL DISTRICT RATING AUTHORITY.

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), May 2, 1946.]

Rates and Rating—Valuation of agricultural dwelling-houses—Deduction from minimum wage in respect of dwelling-houses -Whether gross value limited by value for payment of wages in lieu of cash -Agricultural Wages (Regulation) Acts, 1924-1940—*Local Government Act,* 1929 (*c.* 17), *s.* 72.

Two cottages on the appellant's farm were occupied respectively by a foreman, who received his wages free from any deduction in respect of the cottage, and a tractor driver, from whose wages a sum was deducted in respect of the cottage. The deduction was made pursuant to an order made by the local agricultural committee under the Agricultural Wages (Regulation) Acts, 1924-1940, which fixed a minimum wage and enabled part of that wage to be paid otherwise than in cash:—

Held: (i) the Local Government Act, 1929, s. 72, required that where agricultural cottages were used as dwelling-houses for agricultural labourers, the cottages, for the purposes of rating, were to be dealt with as though they were let to the farmer, subject to a restrictive covenant that he could use them only for the purpose of housing his labourers.

(ii) the gross value of the cottages, ascertained in accordance with that section, was not limited by the value at which they were to be reckoned as payment of wages in lieu of payment in cash under the Agricultural Wages (Regulation) Acts, 1924-1940, and the order then in force.

(iii) the true effect of the section was that the gross value of the cottages was to be fixed by reference to the rent at which the cottages would be expected to let with a restrictive covenant upon them; and account must be taken both of the greater benefit which the farmer might be receiving through having cottages into which he could put his labourers, and of the diminution, by the restriction as to their user, of the gross value they would otherwise bear.

[**EDITORIAL NOTE.** This appears to be the first reported decision upon the valuation of agricultural dwelling-houses under the Local Government Act, 1929, s. 72. In such cases the true position would seem to be that the agricultural workers are mere licensees, while the farmer is the tenant subject to a restrictive covenant by virtue of which he is bound to use the dwellings for farm workers. It was pointed out in *Baker* v. *Wood* (1919) 89 L.J.K.B. 344, that the deduction from the minimum wage in respect of a dwelling-house occupied by an agricultural worker was not rent and did not indicate a contract of tenancy. The value for rating purposes is not, therefore, limited to the sum which the Agricultural Committee can fix as the proportion of the worker's wage applicable to his occupation of the dwelling. This sum is merely one of the factors to be borne in mind when fixing the gross value. Another factor is the restrictive covenant.

For Agricultural Workers' Wages, see HALSBURY, Hailsham Edn., Vol. 1, pp. 389-395, paras. 652-660.

For the Valuation of Agricultural Dwelling-Houses, see HALSBURY, Hailsham Edn., Vol. 27, p. 434, para. 870.]

Case referred to:

(1) *Williams* v. *Smith,* [1934] 2 K.B. 158; Digest Supp.; 103 L.J.K.B. 421; 151 L.T. 112.

Special Case stated for the opinion of the King's Bench Division of the High Court, under the Quarter Sessions Act, 1849, s. 11. The facts are fully set out in the judgment of Lord Goddard, L.C.J.

H. B. Williams for the appellant.

G. D. Squibb for the respondents.

Lord Goddard, L.C.J.: This is a case stated for the opinion of the court under the provisions of the Quarter Sessions Act, 1849, s. 11, and it raises a question of considerable importance to farmers and assessment committees in agricultural areas. It involves the construction of the Local Government Act, 1929, s. 72, which deals with the rating of cottages used in connection with a farm for the housing of agricultural labourers. The section is in these words :

> As from the first day of April, nineteen hundred and thirty, the gross value for rating purposes of a house occupied in connection with agricultural land and used as the dwelling-house of a person who—(*a*) is primarily engaged in carrying on or directing agricultural operations on that land ; or (*b*) is employed in agricultural operations on that land in the service of the occupier thereof and is entitled, whether as tenant or otherwise, A so to use the house only while so employed, shall, so long as the house is so occupied and used, be estimated by reference to the rent at which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid.

The two cottages in this case are cottages one of which is actually occupied by a foreman on the appellant's farm (the appellant being the farmer) who receives £4 a week without any deduction in respect of the cottage ; the other cottage is B the dwelling of a tractor driver on the farm, who receives an average of £3 15*s.* 0*d.* a week from which 3*s.* 0*d.* a week is deducted in respect of the cottage. The 3*s.* 0*d.* is deducted pursuant to the provisions of an order made by the Worcestershire Agricultural Committee under the provisions of the Agricultural Wages (Regulation) Acts, 1924-1940, which fixes a minimum wage and enables part of that wage to be paid otherwise than in cash ; that is to say, if the farmer provides a cottage for his worker the cottage is to be taken as representing C 3*s.* 0*d.* part of the minimum wage. If he pays the man £3 15*s.* 0*d.* a week and provides him with a cottage he is entitled to deduct 3*s.* 0*d.* a week and to pay him only £3 12*s.* 0*d.* a week. The contention of the appellant in this case (which is supported by counsel's argument) was that in those circumstances the gross value of the cottage could not be fixed at a higher sum than £6, because the effect of the section, so he said, was to make the 3*s.* 0*d.* a week the criterion D of the value. I think that is a fair way of putting his argument, and I am bound to say that at first his argument very much impressed me and I thought he was right ; but when I turn to the case, as counsel for the respondents invited us to do, the first fact that is stated in the case is this :

> The appellant is a farmer and occupies the two cottages for the accommodation of agricultural workers employed by him on his land. The cottages are not let to the agricultural workers, who reside therein by virtue of their employment . . .

E They are, therefore, what are commonly called service tenants, but, in fact, must be regarded as in the position of licencees, because if they leave the farmer's employment they have to leave the cottages and can be ejected from the cottages ; therefore, the person to whom these cottages are let, or who must be regarded as the person to whom the cottages are let, is the farmer.

Therefore, counsel for the respondents has argued, and his argument has con-F vinced me he is right, that what this section requires is that where you have these agricultural cottages which are used as dwelling-houses for agricultural labourers you are, for the purposes of rating, to deal with the cottages as though they were let to the farmer subject to a restrictive covenant, the restrictive covenant being that he can only use the cottages for the housing of his workers on the farm. When one gets that firmly into one's mind one sees that the value for rating purposes is not necessarily to be limited to this 3*s.* 0*d.*, which is the sum G that the agricultural committee can by statute fix, and have in this case fixed, as representing the part of the wage which can be deducted in respect of the occupation of the cottage. Whether it is deducted or not does not matter. The benefit which may be given to the agricultural worker, in lieu of cash, is the benefit of giving him the cottage which is assessed at 3*s.* 0*d.* a week.

It is quite obvious that the person to whom the cottages are let, or who must be regarded as the person to whom the cottages are let, is the farmer for rating H purposes ; and a farmer might be ready and willing to pay a higher rent than 3*s.* 0*d.* a week for the cottage, although that would mean the utmost benefit he could receive from his servant once he put the servant into the cottage to live there. The reason (as SINGLETON, J., pointed out during the argument) is this : It may pay a farmer very well to get a foreman, who will only come to him at a particular wage, if he can have a cottage ; and to enable a farmer to get a labourer on his farm he would be very anxious to have cottages so that he may induce workers to come ; what he would pay to get a cottage into which he may put a labourer might be more than he would be able to deduct from the labourer's wage, because he would have the advantage of having the labourer on the farm, or whatever class of servant it might be; and, therefore, I think the construction which counsel for the respondents placed on the section is right, and that the true effect of the section is that the gross value of the cottage is to be fixed by reference to the rent at which the cottage would be expected to let with a restrictive covenant upon it; and although the restrictive covenant upon it is that it must only be let to a worker on the farm, and although if it is let to a worker on the farm, 3*s*. 0*d*. is the gross value in cash which the farmer can get from it, it is quite obvious that the letting to the farmer may be of a greater value than the 3*s*. 0*d*. That is a matter which the assessment committee have to take into account, and, therefore, when we are asked the question, as the court is in this case, whether on the facts stated the gross value of the two cottages ascertained in accordance with the Local Government Act, 1929, s. 72, is limited by the value at which they are to be reckoned as payment of wages in lieu of payment in cash under the Agricultural Wages (Regulation) Acts, and the order in force, the answer is in the negative; they are not limited by that 3*s*. 0*d*. a week; they can take into account the greater benefit which the farmer may be receiving through having cottages into which he can put his labourers or his workers. The gross values are agreed in this case to be £12 and £10.

The real object, as it seems to me, of the section is this, that the farmer, having got a cottage of this sort, in which he actually houses his workers, is not to have the cottages assessed as though they were in the open market, in which case they might be taken as week-end cottages by someone who might be willing to pay a very large rent, comparatively speaking, of £50 or £60 a year. So long as the cottage is kept for an agricultural worker that point is to be taken into account, and the restriction is to be taken into account as diminishing the gross value which the cottage would otherwise bear.

The actual sum here is not for us to determine; it has been agreed between the parties. As I have said, the question is answered in the negative, and the gross values of £12 and £10 and the rateable values of £7 and £6 will accordingly stand.

HUMPHREYS, J.: I am of the same opinion. My Lord has covered the whole ground, and if I were to say anything it would be merely vain repetition. I, therefore, say nothing except that I agree.

SINGLETON, J.: I regard this as a difficult case. It comes from South Worcestershire, and the Worcestershire Agricultural Wages Committee in performing their duty under the Agricultural Wages (Regulation) Acts, 1924 to 1940, decided that the benefits or advantages which may be reckoned as payment of wages in lieu of payment in cash for the purpose of the application of any minimum wages should be, in the case of a cottage, including any garden provided with the cottage, 3*s*. 0*d*. per week, less any rent or rates which may be paid by the occupier. The case deals with two cottages, both of which fall under the Local Government Act, 1929, s. 72. One of those cottages is occupied by a foreman employed by the appellant, and no deduction is made in respect of it. The other cottage is occupied by another man who is employed as a tractor driver on the appellant's farm, and a deduction of 3*s*. 0*d*. a week is made in respect of that cottage.

My Lord has pointed out that, for the purposes of this case, we have to regard the farmer himself, the appellant, as the occupier of the cottages. Para. 1, *i.e.*, of the case, so states. It says the appellant is a farmer and occupies the two cottages for the accommodation of agricultural workers employed by him on his land. The cottages are not let to the agricultural workers. The appellant is the occupier for the purposes of rating.

The Local Government Act, 1929, s. 72, provides:

> As from the first day of April, nineteen hundred and thirty, the gross value for rating purposes of a house occupied in connection with agricultural land and used as the dwelling-house of a person who—(*a*) is primarily engaged in carrying on or directing agricultural operations on that land; or (*b*) is employed in agricultural operations on that land in the service of the occupier thereof, and is entitled, whether as tenant or otherwise, so to use the house only while so employed, shall, so long as the house is so occupied and used, be estimated by reference to the rent at which the house might

reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid.

I am not sure when orders of the nature of those made by the Worcestershire Agricultural Wages Committee first came into operation, but I gather at least from the heading of this order that they existed so far back as 1924.

It is important to notice that the Local Government Act, 1929, s. 72, does not say that the rateable value or the gross value of any hereditament so used and occupied shall be assessed according to the figure of deduction allowable by the County Agricultural Wages Committee. Nothing of that sort is said, but the gross value for rating purposes shall, so long as the house is so occupied and used, be estimated by reference to the rent at which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid.

The appellant, the occupier for this purpose, can only make a deduction such as that allowed under the order of the agricultural wages committee. In the one case he does not make any deduction; in the other he makes a deduction of 3*s.* 0*d.* a week. Those are matters to be borne in mind; and, indeed, both counsel told us that under the decision in *Williams* v. *Smith* (1), the appellant could not charge more rent than the 3*s.* 0*d.* a week; so that it seems to me the appellant, being the occupier, the gross value for rating purposes has to be assessed on the basis that he is occupier and that the cottages are occupied and used within the meaning of the Local Government Act, 1929, s. 72 (*b*), and that those who have to fix the gross value for rating purposes must bear in mind that the appellant, the farmer, is the occupier, and that the value to him is limited by the fact that so long as the cottage is used in that particular way he, the owner, can only deduct 3*s.* 0*d.* a week. Consequently the cottage is of much less value than it otherwise would be. Those who fix the gross value for rating purposes are not bound to fix it upon the actual sum of 3*s.* 0*d.* a week, but that fact is one of the essential features they should bear in mind.

I agree that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn* (for the appellant); *Vizard, Oldham, Crowder & Cash,* agents for *Smith & Roberts,* Evesham (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

KILLNER *v.* FRANCE

[KING'S BENCH DIVISION (Stable, J.), April 8, 1946.]

Sale of Land—Completion date, Nov. 27, 1944—Purchaser entitled to rescind contract if property destroyed by enemy action "prior to the date fixed for completion"—Purchase money paid to vendor and purchaser let into possession of part of property on Nov. 23, 1944—Property destroyed by enemy action on Nov. 25, 1944—"Completion"—Purchaser entitled to rescind contract.

By a contract dated Nov. 22, 1944, the owner of a lease of certain property agreed to sell the residue of the term to a purchaser for the sum of £1,500. Completion was to take place on or before Nov. 27, 1944, and the purchaser was to have vacant possession on completion. By cl. 11, the contract provided: "If the property is destroyed or rendered uninhabitable by enemy action prior to the date fixed for completion the purchaser shall have the right to rescind this contract and have the deposit returned to him." Owing to some difficulty in obtaining the original lease, it was found that it might not be possible to complete the legal formalities until after Nov. 27; but, since the purchaser was anxious to take possession on that date, it was agreed that the purchase money should be paid and vacant possession should be given on that date, that apportionment should be as from that date and that a transfer of the leasehold should be executed in due course. On Nov. 23, the balance of the purchase money and authority for releasing the deposit were sent to the vendor's solicitors. On the same day, the purchaser was allowed by the vendor to move some of his furniture into the premises. On Nov. 25, the property was rendered uninhabitable by enemy action. The question to be determined was whether the purchaser was entitled to rescind the contract or whether the vendor was entitled to retain the purchase money and transfer the residue of the term to the purchaser. It was contended by the vendor that the date of completion was the date of the payment of the purchase money :—

Held : (i) the word " completion " in the contract had its usual meaning, *i.e.*, " the complete conveyance of the estate and final settlement of the business."

(ii) upon the true construction of the contract, Nov. 27, 1944, was the date fixed for completion, and was, therefore, the date referred to in cl. 11 of the contract. Since the property had been destroyed before the matter was completed and before the date fixed for completion, the purchaser was entitled to rescind the contract under cl. 11, although he had paid the whole of the purchase money and had been let into possession of part of the property.

[**EDITORIAL NOTE.** The word " completion " is generally construed to mean the complete conveyance of an estate and the final settlement of the business. In this case the purchaser had paid the purchase money and had been let into possession of part of the property, but the date of completion in the contract was subsequent to the destruction of the property by enemy action. Certain legal formalities, however, could not be completed before the date fixed, and adopting the construction of " completion " above referred to, it is held that the purchaser is still entitled to exercise his right of rescission, which by the contract depended upon enemy action prior to the " date of completion."

As to Date for Completion, see HALSBURY, Hailsham Edn., Vol. 29, pp. 340, 341, para. 458 ; and for Cases, see DIGEST, Vol. 40, pp. 110-116, Nos. 877-927.]

Cases referred to :

*(1) *Lewis* v. *South Wales Ry. Co.* (1852), 10 Hare, 113 ; 11 Digest 232, *1212* ; 7 Ry. & Can. Cas. 923 ; 22 L.J.Ch. 209 ; 21 L.T.O.S. 3.

(2) *Lord Advocate* v. *Caledonian Ry. Co.*, [1908] S.C. 566.

Action by a purchaser of the residue of a lease of certain property for the rescission of the contract and the return of the purchase money. The facts are fully set out in the judgment.

Harold Brown for the plaintiff.

G. H. Crispin and *J. W. Wellwood* for the defendant.

Stable, J. : This case raises a short point and one which (as far as I know) is not directly covered by authority. The plaintiff, John Killner, is suing to recover £1,150 from the defendant, in these circumstances. The defendant, Mrs. France, was the owner of the residue of a term of 99 years in a leasehold property at 65, King Henry's Road, Hampstead. She was anxious to sell the residue of the lease, and she put the matter into the hands of some estate agents, Match & Co. Killner was, apparently, anxious to buy the property, and after some correspondence the matter passed into the hands of their respective solicitors.

On Nov. 7, Messrs. Anning, the solicitors who were acting for the vendor, after referring to some little difficulty in getting hold of the original lease, said this :

> We understand your client is very anxious to obtain possession within a fortnight and provided the original lease is recovered or we can get the copy of the counterpart without delay there seems no reason why completion should not take place very quickly, otherwise we understand your client is willing to pay the purchase money to us, and take possession. We will send you a draft contract on these lines and if it is approved you can have the abstract immediately.

I understand this to mean that it is anticipated that there may be early completion, but, if it turns out to be otherwise (*i.e.*, if there is any hitch or delay), the vendor's solicitors are saying : We understand Mr. Killner is ready to pay the purchase money to us and go into possession, notwithstanding that the property has not been legally conveyed to him.

On Nov. 8, a draft contract was sent for approval, and on Nov. 17, Mr. Piper, the purchaser's solicitor, wrote a letter in these terms :

> Will you please state if your client is proposing to vacate the part of the premises occupied by her on Nov. 27, the date arranged for completion. If not, I take it she will be willing to pay rent as a tenant for such period as she remains there. It seems unlikely that we shall be able to complete the purchase by Nov. 27, but I understand

> you will be willing to permit my client to take possession upon payment to you of the balance of the purchase money, and doubtless you will be good enough to let me have a completion statement made up to Nov. 27, and also give an undertaking on your client's behalf to execute the necessary transfer if the matter is not completed by that date.

It appears that Killner, who owned some property (an inn) in some other part of the world, had disposed of that property and his purchaser, or tenant, was coming in on Nov. 27, bringing his own furniture with him, and Killner wanted to get his furniture out of the inn before the new man brought his. Killner saw Mrs. France, the vendor, and asked if she would be kind enough to let his furniture go in a few days before the date of completion. She was a little dubious at first, but he assured her the money was forthcoming, and she said that he could put his furniture in before the matter was completed. Acting on that, Killner brought some furniture into the premises on Nov. 23. The position at that time was this: the basement and the ground floor were still in the possession of Mrs. France; there was a tenant on the top floor, and Killner's furniture went into the first floor.

On Nov. 20 the vendor's solicitors wrote saying:

> Our client informs us she will have vacated the premises in her occupation by Dec. 1.

On Nov. 22 Mr. Piper, who was acting for Killner, sent a formal contract, approved and signed by his client, and he said:

> I shall be sending you a banker's draft tomorrow for the balance of the purchase money and a release of the deposit, so that my client may take possession on Monday next, as I do not think we shall be able to complete by that time.

In other words, he was saying that, as it was probable the legal formalities would not be carried out by Nov. 27, and as his client was anxious to take possession on that date, he was sending a banker's draft and the deposit. Mr. Piper does not appear to have known of the arrangement by which Killner was bringing some of his furniture on to the place on Nov. 23.

On Nov. 22 Messrs. Anning wrote to say:

> We are in position to exchange contracts.

On Nov. 23, Mr. Piper wrote, saying:

> As stated in my letter to you yesterday I now enclose a banker's draft for £1,035 being the balance of the purchase money, together with an authority to the agents to account for the deposit. This is sent so that my client will be able to move into possession of the empty flat. I take it that I have your undertaking to send me your client's part of the contract and to execute a transfer of the leasehold in due course. Will you please take this letter as my undertaking to pay you any apportionments which may be due from my client up to Monday next.

It is important to remember that "Monday next" was Nov. 27., and that Killner's solicitor was releasing the whole of the purchase money, notwithstanding the fact that he had not actually got a contract with the vendor, much less a transfer; but he was relying on the common-sense and professional integrity of the person with whom he was dealing. Simultaneously he inclosed with this letter to Messrs. Anning, a letter addressed to Match & Co., saying:

> This matter is now completed. I hereby authorise you to account to the vendor's solicitors, Messrs. Anning & Co., of 8, Queen's Street, Cheapside, for the deposit in your hands.

On Nov. 24 Messrs. Anning wrote to Mr. Piper acknowledging his letter and the banker's draft and authority for releasing the deposit, and said:

> We sent you the contract signed by the vendor yesterday and will let you have completion statement in due course, and in the meantime shall be glad to receive the draft transfer.

The relevant words of the contract, which is dated Nov. 22, 1944, are in cll. 2 and 11:

> 2. The purchase shall be completed in London on or before Nov. 27, 1944. All current ground rent, taxes, water rates and local rates payable in respect of the property sold shall be paid, or allowed by the respective parties, up to the said date, or earlier day of completion and apportioned if necessary . . . On actual completion (but not before) the purchaser shall be let into vacant possession of the property sold, except of the top flat [which was let to somebody else] . . . 11. If the property is destroyed or

rendered uninhabitable by enemy action prior to the date fixed for completion the purchaser shall have the right to rescind this contract and have the deposit returned to him.

Unhappily, on Nov. 25, the property was destroyed or rendered quite uninhabitable, by enemy action. Mrs. France, who was living on the ground floor, was seriously injured. The question is whether or not the provisions of cl. 11 entitles Killner, the purchaser, to rescind the contract, or whether Mrs. France is entitled to retain the purchase money and to transfer in due legal form the outstanding term of the lease to Killner, for what it is worth.

I have been referred to two authorities : *Lewis* v. *South Wales Ry. Co.*, (1), which was a decision of TURNER, V.-C., and *Lord Advocate* v. *Caledonian Ry. Co.*, (2), a Scottish case turning on the construction of the Finance Act. It seems to me neither of these cases throw any real light on the matter which I have to decide. TURNER, V.-C., in *Lewis* v. *South Wales Ry. Co.*, (1), said (10 Hare, 113, at p. 119) :

> The question is, what is the meaning of the words " until the completion of the purchase." Those words may, no doubt, import and generally perhaps would be construed to refer to, the complete conveyance of the estate and final settlement of the business ; but I do not think this is the only or necessary meaning of the words.

Although he has decided that, in that case, the words bore a different meaning he is saying that the usual construction to place upon those words is a complete conveyance of the estate and the final settlement of the business.

In my opinion, cl. 11 deals with a date—the date fixed for completion. Now, what is meant by " completion " in this clause ? I adopt the words of TURNER, V.C., and, in my judgment, in this contract the words " completion of the contract " mean " the complete conveyance of the estate and final settlement of the business." Having regard to the terms of the contract, it seems to me that what the parties intended, and what they have expressly agreed to, is that the date referred to in cl. 11 is Nov. 27. Up to that date, had the contract been completed ? In my judgment, it had not. It is true the purchaser had paid the whole of the purchase money and had been let into possession of a part of the property that he was buying, but by no means all of it. It is apparent from the correspondence that the apportionment and the like were to be as from Nov. 27.

The result is that, inasmuch as the subject-matter of the contract was destroyed before the matter was completed and before the date fixed by the contract as the date of the completion of the matter, cl. 11 comes into operation and the plaintiff is entitled to succeed in the action. What the position would be if there had been a completion in the strict sense of the word for example on Nov. 23, that is to say four days before Nov. 27 and two days before Nov. 25, when the bomb fell, is an interesting problem, but one which does not fall to be determined in this case.

As a result, I have come to the conclusion that this contract can properly be rescinded and under the terms of the contract Killner can recover his money, and, therefore, I give him judgment for £1,150 with costs.

Judgment for the plaintiff with costs.

Solicitors : *J. Tickle & Co.*, agents for *A. R. Piper*, Hurstpierpoint, Sussex (for the plaintiff) ; *B. R. Everett* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

WALLACE *v.* MAJOR.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), May 1, 1946.]

Street and Aerial Traffic—Motor vehicle—" *Driver* "*—Steersman of towed broken-down vehicle—Road Traffic Act,* 1930 (c. 43), *ss.* 1, 4 (1), 11 (1), 121*—Road Traffic* (*Driving Licences*) *Act,* 1936 (c. 23), *s.* 1 (1)*—Motor Vehicles* (*Construction and Use*) *Regulations,* 1941 (*S.R. & O.,* 1941, *No.* 398), *reg.* 82 (2).

The steersman of a towed vehicle is not the driver of the vehicle within the meaning of the Road Traffic Act, 1930.

The respondent, who was steering a broken-down motor vehicle which was being towed by another motor vehicle, was charged, under the Road Traffic Act, 1930, s. 11, with driving a motor vehicle in a manner which was dangerous to the public. The magistrates came to the conclusion that the respondent was not the driver of a mechanically-propelled vehicle within the meaning of the Act, and dismissed the information. It was contended on behalf of the appellant that the respondent was a driver within the meaning of the Act by virtue of sect. 121 of the Act, which provides that " driver," where a separate person acts as steersman on a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and that the expression " drive " shall be construed accordingly :—

HELD : sect. 121 of the Act did not apply because the provision in that section contemplated two persons being in charge of the same vehicle, *e.g.*, a steam wagon, and the magistrates were right in finding that the respondent was not acting as a driver within the meaning of the Act and in dismissing the information.

[**EDITORIAL NOTE.** It is held in this case that the steersman of a vehicle on tow is not a " driver " for the purpose of a prosecution for dangerous driving. Such a person is not a driver in the popular sense of the term, for he has nothing to do with making the car go, nor can he ever have the proper control contemplated by reg. 82 (2) of the Motor Vehicles (Construction & Use) Regulations, 1941.

FOR THE ROAD TRAFFIC ACT, 1930, ss. 11 (1), 121, see HALSBURY'S STATUTES, Vol. 23, pp. 620, 686.]

SPECIAL CASE stated for the opinion of the King's Bench Division of the High Court by the magistrates for the West Riding of Yorkshire, sitting at Snaith, who dismissed an information, under the Road Traffic Act, 1930, s. 11 (1), for driving a motor vehicle in a manner which was dangerous to the public. The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

Hon. J. R. Cumming-Bruce for the appellant.

J. G. Foster for the respondent.

LORD GODDARD, L.C.J. : I have clearly come to the conclusion in this case that the justices were right.

The matter arises in this way : The charge against the appellant was that " he unlawfully did drive a motor vehicle, to wit, a motor lorry on a road called Pontefract Road in a manner which was dangerous to the public, having regard to all the circumstances of the case . . . contrary to sect. 11 of the Road Traffic Act, 1930." The charge is the offence of what is commonly called dangerous driving.

The Road Traffic Act, 1930, s. 11 (1), is in these terms :

> If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case . . .

he shall be guilty of an offence.

Certain facts were admitted before the justices, and the point was taken on the admissions that were made that the respondent could not be in any case convicted because he was not the driver of the motor car, and the justices, without going into the merits so far as concern the dangerous driving or otherwise, upheld that contention and dismissed the information ; and the question we have to decide is whether or not they were right in holding that the man was not the driver on the admitted facts of the case.

The facts in the case are that a motor vehicle was proceeding along the road towing another vehicle, which had broken down, or was incapable of being driven, by reason of some mechanical defect, and the respondent was the man who was steering the towed vehicle.

The magistrates came to the conclusion that the respondent was not the driver of a mechanically-propelled vehicle within the Road Traffic Act, and, therefore, they dismissed the information. It is, therefore, necessary to consider some of the relevant sections of the Act. Sect. 1 provides :

> This Part of this Act [which includes sect. 11] shall apply to all mechanically propelled vehicles intended or adapted for use on roads (in this Act referred to as "motor vehicles") and to vehicles (in this Act referred to as "trailers") drawn by motor vehicles . . . A

It seems quite clear that what I have compendiously called a motor vehicle can be not only a motor vehicle but can be also a trailer ; but that really is not the main point in this case, because whether it is a trailer or whether it is to B be regarded as a mechanically-propelled vehicle, the point which is taken by counsel for the respondent in support of the justices' decision is that this man in any case was not driving a motor vehicle ; he was simply steering a broken-down motor vehicle which was in tow ; and, ordinarily speaking, giving the ordinary meaning to words in the English language, it is difficult to see how a person who is merely at the steering wheel of a car and having nothing to do with the propulsion of the car, having nothing to do with making the car go, C is driving the vehicle. The vehicle, in fact, was not being driven ; it was being drawn. That is one way of putting it ; but the main answer that was made to that point was that by sect. 121 :

> "Driver," where a separate person acts as steersman of a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression "drive" shall be construed accordingly.

D

So it is said when sect. 11 says if any person drives a motor car that is to include the person who steers a motor car.

The reason why I think that argument must be rejected is that the passage in sect. 121 which I have just read obviously contemplates two persons being in charge (I think I may use that expression) of the same vehicle, and it is, I think, probably designed especially to meet the case of a steam wagon in which one man is making the wagon go, by working the regulator and seeing that the E pressure of steam is kept up in exactly the same way as an engine driver on a railway does, and another person is directing the braking of the vehicle and steering it, and it is desired that he should be liable for negligent driving or dangerous driving just as much as the person who otherwise might be called the driver. Of course, it might be, in such a case, that both would be liable. If the driver who is responsible for the safety of the vehicle was driving it at an F excessive speed he might be properly prosecuted for proceeding at an excessive speed ; if, on the other hand, the negligent driving was caused by the negligent steering of the vehicle, then it is thought right that the steersman should be a person to be regarded equally as a driver ; but that paragraph of sect. 121 cannot, in my opinion, have any bearing on the present case, because the present case is not a case where there were two people in charge of the same vehicle but only one, and the man who was acting as steersman of the vehicle was not, in my G opinion, acting as the driver. After all, we have to remember that this is a penal Act and we are bound to construe the Act strictly and ought not to stretch the language in any way ; and, in my judgment, it is impossible to say that a person who is merely steering a vehicle which is being drawn by another vehicle is driving that vehicle. No doubt he is controlling it to some extent ; no doubt he is doing many things which a driver would have to do ; but before he can be convicted, it seems to me, of being a person driving a motor car in a dangerous H manner, it must be shown he is at least driving it ; that is to say, making the vehicle go.

My attention has been drawn by counsel for the respondent to the Motor Vehicles (Construction and Use) Regulations, 1941, reg. 82 (2), which provide that :

> . . . no person while actually driving a motor vehicle shall be in such a position that he cannot have proper control over the vehicle or that he cannot retain a full view of the road and traffic ahead.

It is quite obvious that a person who is merely steering a towed vehicle cannot have proper control; he certainly cannot have full control; and though he might have as much control as could fairly be attributed to a person on a towed vehicle, it is obvious he cannot retain a full view of the road and traffic ahead. Therefore it would follow that every person who is steering a broken-down car which is being towed by another car would be committing an offence every time he did it.

There seems to be no previous authority on this point except this, that it has got into the text-books (see *e.g.*, MAHAFFY AND DODSON'S ROAD TRAFFIC ACTS AND ORDERS, 2nd. Edn., p. 12, *n*), and has been noted in the JUSTICE OF THE PEACE (Vol. 106, p. 227, Vol. 109, p. 263), that CHARLES, J., at Warwick Assizes held that a steersman of a towed vehicle was not obliged to have a licence; and if he had been a driver of a motor car he obviously would have had to possess a licence under sect. 4 (1) of the Act which provides that:

> A person shall not drive a motor vehicle on a road unless he is the holder of a licence . . .

In my opinion, CHARLES, J., was right, and his decision is in accordance with the decision of this court that the person who is steering the towed vehicle is not the driver of the vehicle.

Our attention has also been called to the Road Traffic (Driving Licences) Act, 1936, s. 1 (1), which provides that:

> Notwithstanding the provisions of subsection (1) of section four of the Road Traffic Act, 1930, a person who is not the holder of a licence to drive a motor vehicle issued under Part I of that Act may act as steersman of a motor vehicle (being a vehicle on which a speed limit of five miles per hour or less is imposed by or under section 10 of that Act) . . .

Such a vehicle is a locomotive under the other provisions of the Road Traffic Act, 1930; but that section is obviously designed to cover the very point that is in the Act of 1930 in making a steersman of a motor vehicle which has also someone else upon it, a driver. In those particular circumstances where there are two people engaged, as I have already said, in the control or management of some of these vehicles the steersman is to be deemed to be the driver. I think the word "steersman" only occurs in the Act of 1930 in that particular (I call it a definition) clause, but it is not strictly; it is a clause which makes the word "driver" include someone who would not ordinarily be regarded as a driver; and, obviously, therefore, when you find the word "steersman" again used in the Act of 1936 it is dealing with the provision in the Act of 1930 which, as I have already said, does not apply to this case.

For these reasons I am of the opinion that the magistrates came to a right decision in this case, and the appeal must be dismissed with costs.

HUMPHREYS, J.: I am of the same opinion. My Lord has covered all the ground in this case, and I only want to say just a word or two as to the way in which the matter strikes me. I was very much impressed, in the first instance by the argument of counsel for the appellant, that, while sect. 11 of the Road Traffic Act, 1930, read, as it has to be, with sect. 1 would probably not cover the case of a person who was steersman of a trailer and would not include him in the word "driver," there was apparently a special provision in that Act stating that for the purpose of the Act, and for all purposes of the Act, the steersman of such a vehicle was to be deemed a driver, and that was a reference by counsel to sect. 121; and until one gives the matter further consideration and gets the assistance which we had from counsel for the respondent, it is a very reasonable construction. What it says is:

> "Driver", where a separate person acts as steersman of a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression "drive" shall be construed accordingly.

Why, then, should it not be said that the person who is steering the towed vehicle is a driver for the purposes of the Act? I think the answer comes when one looks a little more carefully at the exact words in that definition, if that be the right word to use. The words are:

> . . . where a separate person acts as steersman of a motor vehicle [that is one motor vehicle and one man] includes that person as well as any other person engaged in the driving of the vehicle . . .

It seems to me there is one vehicle and two persons who may be deemed, and we now declare are to be deemed, both of them as the driver. Those words do not fit the facts in this case, because here there were two separate vehicles and there is no one person who can be said to be the driver of one of those vehicles, because he was the steersman, while there is another person who can be said to be the driver, because he was engaged in the driving of that vehicle. The facts do not come within the definition at all.

I think my Lord's view must be the right one, that the statement or inclusion A of the word "steersman" and the word "driver" must relate to some such matter as my Lord has referred to; that is to say, probably a steam wagon where you have two men, and are required to have two men, by the Act, one of whom is the steersman and the other is for all practical purposes the driver. That man does the stoking and the manipulating and so forth, that is, everything except the steering.

When once that goes, it seems to me that the whole of the argument of counsel B for the appellant goes, because you are left in this position: Charge, sect. 11: this man drove a motor vehicle on a road contrary to the terms of sect. 11, assuming that the thing he was driving was a motor vehicle. The thing that he was concerned with was a motor vehicle. I think it comes precisely within the language of sect. 1 which says that:

> This Part of this Act shall apply to all mechanically propelled vehicles intended C or adapted for use on roads . . .

In my opinion, it applies equally to one which has temporarily broken down as it does to one which is, in fact, in working order and going along the road.

Then one says that this Act shall also apply to vehicles in this Act referred to as trailers, which are not driven by anyone at all but drawn by motor vehicles. I have no doubt that this trailer was being drawn by a motor vehicle, and that it was a trailer, but what about the driver? It seems to me to be a contra- D diction in terms really to say that this person was driving at all, that he was a driver in the ordinary sense of the word, and, according to the admission of the counsel for the appellant, unless you can bring in sect. 121, in the ordinary acceptation of the term the person who was driving that contraption is the man in charge of the towing vehicle, and I think that is the common sense of the matter.

Sect. 1 of the 1936 Act shows that if you take a man in the position of the person E who was charged here, if he was the driver, then he required a licence. That is quite clear, because the case taken in sect. 1 (1) of that Act is that a person who is not the holder of a licence to drive a motor vehicle may act as steersman on a motor vehicle in one instance, and one instance only, and that is if it is one of those which is not allowed to go more than 5 miles an hour, involving the proposition that if it is an ordinary motor car he must have a licence if he is the driver, the only answer to which must be, it seems to me, he is not the driver. F

Again, the Motor Vehicles (Construction and Use) Regulations, 1941, reg. 82, provides that:

> . . . no person while actually driving a motor vehicle shall be in such a position that he cannot have a proper control over the vehicle . . .

No one could ever act with safety as the driver of a towed vehicle, because he never can have a proper vision and proper control over the vehicle. Then it G goes on:

> . . . or that he cannot retain a full view of the road and traffic ahead.

It states the reason; no person in such a position could ever do it.

Those are the sort of reasons which satisfy me that my Lord must be right in holding as he has (and I agree with him) that sect. 121 has no relation to the facts in this case at all; that this man was rightly dealt with by the justices as a person who was not the driver of the motor vehicle in question. H

SINGLETON, J.: I agree, and I would add only this. A new Road Traffic Act appears every few years; no doubt there will be another before very long, and I hope when that comes about that consideration will be given to the question as to whether or not the position of those who may be in the position of the respondent in this case will be regarded. It may be that in such event an alteration will be made in the law so that a person who is sitting at the wheel of a towed car and who may actually be the driver, or be held to be the driver, in a penal statute, may at least be placed in the same position as the driver of another vehicle, and I see no reason why he should not be. If that happens, then, indeed, the argument of counsel for the appellant will not have been in vain.

Appeal dismissed with costs.

Solicitors: *Cummings, Marchant & Ashton* (for the appellant); *Treasury Solicitor* (for the respondent).

A [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CROSSLAND *v.* CROSSLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 22, 1946.]

B *Divorce—Decree absolute—Pronouncement in court—Intervention prior to filing of document recording decree—Finality of pronouncement.*

Judgments—Order—Decree absolute—Pronouncement in court—Whether final.

The filing, in the Divorce Registry, of the document recording a decree absolute is not essential to the validity of the pronouncement of the decree. When the judge in court has, with his lips, pronounced a decree C absolute, the steps which are taken subsequently to that pronouncement are merely ministerial acts which have no relation to the validity of the decree or its immediate effectiveness at the time of its pronouncement.

[**EDITORIAL NOTE.** As a general rule the court has power to reconsider its own judgment or order before it is entered or drawn up. In *Geering* v. *Geering and Mockford* ((1921) 38 T.L.R. 109), it was held that the court had power to set aside an order dismissing a co-respondent from the suit since no order had been drawn up and the D judgment had not been sealed. A decree absolute, however, is a decision *in rem* affecting the status of the parties, and WALLINGTON, J., decides in the case now reported that the judicial pronouncement in court is final and absolute.

AS TO EFFECT OF ENTRY OR DRAWING UP OF JUDGMENTS OR ORDERS, see HALSBURY, Hailsham Edn., Vol. 19, p. 260, para. 560; and FOR CASES, see DIGEST, Practice, pp. 815-817, Nos. 3759-3777.]

INTERVENTION by a member of the public to set aside a decree absolute E which had been pronounced in court but not filed. The facts are fully set out in the judgment.

F. S. Laskey and *Roger Ormrod* for the petitioner.

R. Bush James, K.C., and *Hon. Victor Russell* for the respondent.

Neville Faulks and *Anthony Gordon* for the intervener.

Colin Duncan for the King's Proctor.

WALLINGTON, J.: The question before me is whether the decree absolute F in this case, which I pronounced by my lips on Feb. 11 last, is a final and effective decree, or whether any further steps were necessary in order to give it permanent and effective validity.

The point raised by the intervener is that, in view of the circumstances disclosed in his affidavit, and admitted in the affidavit filed on behalf of the petitioner, the petitioner was not entitled in law to that decree absolute because he had, G during the period of six months after the decree *nisi*, been guilty of adultery with the wife of the intervener; and on behalf of the intervener it has been argued that although I had with my lips pronounced a decree absolute, it was not binding and effective or completely valid until the registrar had signed the document recording the decree and that document had been filed in the Divorce Registry; and it is said that, before that was done—at all events before the filing was done—the intervener in person had attended before me and H asked that the decree should not be made absolute. There is some discrepancy in the testimony and in the views of those representing the parties as to the exact time at which the intervener appeared; but on the information that has come to me it is agreed, or not disagreed, by counsel representing the various parties, that in fact this decree, or rather, the document recording the decree, was signed by the registrar at a time which, in all probability, was earlier than the time at which the intervener attended to object; and I feel no doubt that that was the case. Counsel for the intervener has argued that that decree still remained ineffective because it had not been filed.

A great many authorities have been cited to me and have proved very useful. They relate to a number of cases in which there were questions as to the effectiveness of judgments in the Probate Division, the King's Bench Division, the Chancery Division, the Bankruptcy Court, the Companies Court, and so on, until certain things may have happened to them subsequently to the actual pronouncement of the order by the lips of the judge in court. I have given full attention to all those authorities, and the result is that, in my opinion, they do not affect the question before me, which resolves itself ultimately into one point, namely, whether the filing of the document recording the decree is essential to the validity of the pronouncement of the decree.

I am quite satisfied, on the authorities, that when the judge in court has with his lips pronounced a decree absolute, there is an end of the matter, and that the steps which are taken subsequently to that pronouncement are merely ministerial acts which have no relation to the validity of the decree, or to its immediate effectiveness at the time of its pronouncement.

I, therefore, must dismiss this intervention.

Intervention dismissed.

Solicitors: *Aukin, Courts & Co.* (for the petitioner); *Tarlo, Lyons & Co.* (for the respondent); *Lawrence Dennis & Co.* (for the intervener); *King's Proctor.*

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Dictum of LORD SIMONDS, at p. 98, *doubted by* LORD DU PARCQ. CARROLL v. ANDREW BARCLAY & SONS, LTD. [1948] 2 All E.R. 386.

NICHOLLS *v.* F. AUSTIN (LEYTON) LTD.

[HOUSE OF LORDS (Lord Thankerton, Lord Macmillan, Lord Wright, Lord Simonds and Lord Uthwatt), March 12, 14, April 12, 1946.]

Factories—Dangerous machinery—Absolute duty—Circular saw—Guard complying with Woodworking Machinery Regulations, duty to guard against dangerous material ejected f *Act*, 1937 (*c.* 67), *s.* 14 -*Woodworking Machinery R* *O.*, 1922, *No.* 1196), *reg.* 10.

Dicta of LORD THANKERTON *and* LORD MACMILLAN at pp. 95, 96, *considered.* DICKSON v. FLACK. [1953] 1 All E.R. 236.

The appellant, while employed in the respondents' factory at a woodworking machine known as a straight line edger, was injured by a piece or sliver of wood which flew out of the machine and struck her left hand. The machine consisted of a circular saw, fitted on a table and driven by an electric motor. The front edge of the saw was about 2ft. from the front of the table at which the operator stood. The wood to be worked was conveyed from the front of the table, which was 3ft. 2ins. from the floor level, towards the cutting edge of the saw, by a mechanical conveyor, driven by a separate gearing, and by rollers which assisted the conveyor. There was a metal hood over the whole of the rollers, conveyors and circular saw. In front of the machine there was a self-adjusting guard in the form of a row of metal fingers, which rested on the top of the ingoing wood. There was a space of about 4ins. between the bottom edge of the wood and the surface of the table, which might be reduced by the depth of the ingoing slab. At the time of the accident the appellant was engaged in feeding wooden slabs about 12 to 15ins. long, about 9ins. in width and 2ins in depth, which were being cut into strips. The appellant's hand was struck by an off-cut from the left hand side of the slab which flew out, probably through the space at the left hand side of the machine between the bottom of the hood and the surface of the table. In an action for damages in respect of personal injuries the main case of the appellant rested on an alleged breach by the respondents of a statutory duty imposed on them by the Factories Act, 1937, s. 14, in that they failed to fence the saw so as to prevent the danger of material which was being operated on being ejected by the machine and causing injury. Alternatively the appellant sought to impose liability on the respondents, at common law, in respect of their negligence in supplying improper plant, by supplying a machine which was dangerous and unsafe. The Secretary of State had made no regulations under the last paragraph of sect. 14 requiring the fencing of materials or articles which were dangerous while in motion in the machine :—

HELD: (i) the obligation imposed by the Factories Act, 1937, s. 14, to fence securely every dangerous part of any machinery was an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, an obligation which in this case had been amply fulfilled; the obligation did not also extend to fencing the dangerous part so as to prevent any part of the material on which the machine was working from flying off and striking the operator, that matter depending solely on the making of regulations by the Secretary of State under the last paragraph of the section.

(ii) there was no evidence of breach by the respondents of their common law duty to the appellant.

Decision of the Court of Appeal ([1944] 2 All E.R. 485) *affirmed on other grounds.*

[**EDITORIAL NOTE.** The decision in the Court of Appeal turned upon the question whether there remains any residual duty under the Factories Act, 1937, s. 14, notwithstanding compliance with the Woodworking Machinery Regulations. The House of Lords affirm this decision upon the ground that sect. 14 does not impose an obligation to provide protection against the ejection of dangerous materials while the machine is in motion, unless regulations dealing with such materials are made by the Secretary of State. No such regulations applied in the present case.

AS TO ABSOLUTE DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 594, para. 1130; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.]

Case referred to:

*(1) *Miller* v. *William Boothman & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] 1 K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187.

APPEAL by the factory worker from a decision of the Court of Appeal (MACKINNON and LAWRENCE, L.JJ., and CASSELS, J.), dated Oct. 23, 1944, and reported ([1944] 2 All E.R. 485). The facts are fully set out in the opinion of LORD THANKERTON.

Sir Charles Doughty, K.C., and *S. R. Edgedale* for the appellant.

F. W. Beney, K.C., and *R. Marven Everett* for the respondents.

The House took time to consider its opinion.

LORD THANKERTON: My Lords, the appellant claims damages against the respondents in respect of personal injuries sustained by her while employed as a factory hand at their factory. On May 29, 1943, while employed at a woodworking machine known as a straight line edger, the appellant's ring and middle fingers of her left hand were injured, the middle finger being severely injured.

The machine in question consisted of a circular saw fitted on a table, and driven by an electric motor. The front edge of the saw is about 2ft. from the front of the table, at which the operator stands. The wood to be worked is conveyed from the front of the table, which is 38 ins. from the floor level, towards the cutting edge of the saw by a mechanical conveyor, driven by a separate gearing, and by rollers which assist the conveyors. There is a metal hood over the whole of the rollers, conveyors and circular saw. In the front of the machine there is a self-adjusting guard in the form of a row of metal fingers, which rests on the top of the ingoing wood. There is a space of about 4ins. between the bottom edge of the hood and the surface of the table. The 4in. gap might be reduced by the depth of the ingoing slab. At the time of the accident, it appears that the appellant was engaged in feeding wooden slabs about 12 to 15ins. long, about 9ins. in width and 2ins. in depth, which were being cut into strips for chair bearings. There does not seem to be much doubt that the appellant's hand was struck by an off-cut from the left-hand edge of the slab, which flew out—probably through the space at the left-hand side of the machine between the bottom of the hood and the surface of the table. In the course that the case has taken, that would appear to be a sufficient statement of the circumstances at the time of the accident, since, although the appellant originally maintained that the fencing of the circular saw did not comply with the Woodworking Regulations, 1922, reg. 10, and that the respondents were therefore in breach of their statutory duty thereunder, this contention was negatived by STABLE, J., who tried the case, and was not maintained in the Court of Appeal or before this House.

The main case of the appellant rests on an alleged breach by the respondents of a statutory duty imposed on them by the Factories Act, 1937, s. 14, in that they failed to fence the saw so as to prevent the danger of material which is being operated on being ejected by the machine and causing injury. Alternatively, the appellant seeks to impose liability on the respondents at common law, in respect of their negligence in supplying improper plant, by supplying a machine which was dangerous and unsafe.

The Factories Act, 1937, s. 14, provides as follows :

> (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced : Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.
>
> (2) Where the Secretary of State is satisfied that there is available and suitable for use in connection with machinery of any class any type or description of safety device which—(*a*) prevents the exposure of a dangerous part of machinery whilst in motion ; or (*b*) stops a machine forthwith in case of danger, he may make regulations directing that the type or description of device shall be provided for use in connection with such class of machinery as may be specified in the regulations : Provided that, in any proceedings in respect of a contravention of this subsection, it shall be a sufficient defence to prove that a device at least equally effective was being used in connection with the machinery in respect of which the contravention occurred.
>
> (3) Any part of a stock-bar which projects beyond the head-stock of a lathe shall be securely fenced unless it is in such a position as to be as safe to every person employed or working on the premises as it would be if securely fenced. The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine.

The Woodworking Regulations, 1922, were made under the Factory and Workshop Act, 1901, s. 79, which Act was repealed by the Factories Act, 1937, but by sect. 159 (1) of the Act of 1937, it was provided that any regulation made :

> . . . . under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made . . . under this Act, and, in so far as it could have been made . . . under a particular provision of this Act, shall be deemed to have been made . . . under that provision. . .

Sect. 60 of the Act of 1937 gives a general power to the Secretary of State to make special regulations for safety or health, and under subsect. (2) (*c*) it is provided that such regulations may :

> modify or extend with respect to any class or description of factory any provisions of Part I, Part II or this Part of this Act, being provisions imposing requirements as to health or safety ;

which include sect. 14 of the Act.

At the trial, the first point argued before the judge was whether the obligation to fence imposed by subsect. (1) of sect. 14 is an obligation not only to protect against direct injury by contact with the machine, but also against indirect injury from something that flies off from the machine. The judge accepted the wider construction. The second point was whether the result of the provisions of sect. 60 (2) (*c*) as to modification of the provisions of the Act was that the Woodworking Regulations, 1922, in effect, became substituted for sect. 14, so that compliance with the regulations operated as a discharge of the obligations imposed by sect. 14. The respondents maintained that the regulations did so operate, and that it had been so decided by the Court of Appeal in *Miller* v. *William Boothman & Sons* (1). In that case a workman had had his thumb taken off by the cutting edge of a circular saw ; the saw was fitted with a guard of the best standard pattern in existence which complied with the Woodworking Regulations, 1922, reg. 10, but, of necessity, part of the cutting edge of the saw was exposed when in use. It was admitted that reg. 10 had been complied with, and the Court of Appeal held that reg. 10 modified the provisions of subsect. (1) of sect. 14, and that the defendants had not committed a breach of a statutory obligation. The judge distinguished the case of *Miller* (1) from the present case, on the ground that in *Miller's* case (1) they were dealing with the direct danger from the cutting edge of the saw, against which the regulation had specifically prescribed the dimensions and nature of the guard to be provided, whereas, in the present case, the regulations were silent about the indirect danger of bits of wood thrown out at the side of the machine. The judge, accordingly, held that the respondents were under the obligation to fence securely imposed by subsect. (1) of sect. 14; that there would be no practical difficulty in providing a perfectly satisfactory guard to prevent the pieces of A wood from flying out; and that they were in breach of their statutory obligation. He awarded the appellant £350 in name of damages.

The Court of Appeal reversed this decision, holding that the decision in *Miller's* case (1) was not distinguishable. MACKINNON, L.J., says ([1944] 2 All E.R. 485, at p. 488):

> It seems to me clear, so far as the statement of claim in this case alleges breaches of the statutory duty imposed by the 1937 Act, it being admitted that the defendants B fully complied with the requirements of the regulations of 1922, any attempt to say that there was any surviving or additional duty upon them by sect. 14 is erroneous and is not justified having regard to that decision of this court.

LAWRENCE, L.J., and CASSELS, J., agreed. The judges of the Court of Appeal appear to have assumed that subsect. (1) of sect. 14 included protection against danger from portions of wood ejected from the machine.

C My Lords, on consideration of the terms of sect. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by subsect. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred D on him by the last paragraph of the section. This view appears to be amply confirmed by the language used. In the first place, subsect. (1) is dealing with fencing of dangerous parts of any machine, and not with dangerous machines, whereas the dangerous materials or articles do not necessarily emanate from a dangerous part of a machine; further, the reference to the exception where the position or construction is such that it is as safe to every person employed or working on the premises as it would be if securely fenced suggests safety from E contact with the dangerous part, and this is stated in terms at the end of the proviso to subsect. (1). Secondly, subsect. (2) (*a*) continues the same idea of guarding against contact by referring to prevention of the exposure of a dangerous part. Thirdly, the last paragraph of the section appears finally to put the proper construction of the section beyond doubt, in that it does not refer to parts of machinery which are dangerous because they eject materials or articles in F such a manner that they are liable to cause injury but it is the materials that are characterised as dangerous. I will only add that if subsect. (1) was intended to include fencing against the ejection of materials or articles, I would not expect to have two separate provisions for the making of regulations, or to have the second one in a separate general paragraph at the end of the section, instead of in a subsection of its own, for the last paragraph of the section is clearly not part of subsect. (3).

G It being admitted that no regulations have been made under the last paragraph of sect. 14, I am of opinion that there is no obligation imposed by sect. 14 upon the respondents as regards these flying bits of wood, and, therefore, they are not in breach of any statutory obligation, and the appellant's main contention fails. I should add that this conclusion renders it unnecessary to deal with the decision in *Miller's* case (1), and I express no view on its correctness.

On the appellant's alternative claim at common law, I am of opinion that H no case has been made out. The judge made no finding that there was common law negligence, and I agree with the comments of MACKINNON, L.J., and LAWRENCE, L.J., as to the absence of any adequate evidence on this aspect of the case.

In my opinion, the appeal fails and should be dismissed with costs, and the order of the Court of Appeal should be affirmed.

LORD MACMILLAN: My Lords, the appellant while operating a circular saw was struck by a fragment which flew off from a block of wood which she was engaged in cutting into strips and thereby suffered injury to her hand. She sues her employers, the respondents, for damages on the ground that, in breach of their statutory duty under the Factories Act, 1937, s. 14, they failed so to fence the circular saw as to prevent fragments of wood flying off and striking the operator. It is not quite clear how the fragment of wood which struck the appellant flew out but it was probably thrown off through a space between the hood covering the saw and the table.

The question of importance in the case is whether the statutory duty imposed by sect. 14 of the Act of 1937 to fence securely every dangerous part of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it; or whether the duty also extends to fencing the dangerous part so as to prevent any part of the material on which the machine is working from flying off and striking the operator.

The circular saw was admittedly a dangerous part of the woodworking machine which the appellant was operating. It was therefore the duty of the respondents securely to fence it. They observed and indeed more than observed all the requirements of the Woodworking Machinery Regulations under the Act for the fencing of circular saws. But the fencing did not prevent a fragment of wood flying off while the saw was working. Was it the statutory duty of the respondents so to fence the saw as to prevent this possibility?

In my opinion, the statute imposes no such duty. The obligation under sect. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled. That this is the correct reading of the statute is made plain by the proviso to sect. 14 (1) which enacts that:

> . . . in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.

Moreover the statute clearly recognises the distinction between danger arising from the operation of the machine itself and danger arising from the material on which the machine is operating, for in subsect. (3) of sect. 14 it empowers the Secretary of State:

> . . . as respects any machine or any process in which a machine is used [to] make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine.

No such regulations have been made and in the absence of any such regulations there is no statutory duty to fence materials or articles which are dangerous while in motion in a machine. The accident suffered by the appellant was accordingly in my opinion not due to any breach by the respondents of any statutory duty incumbent upon them.

On my reading of the statute it becomes unnecessary to consider the question whether the observance by the respondents of all the requirements of the Woodworking Machinery Regulations under the statute exhausted their duty to fence under sect. 14 (1), as was held by the Court of Appeal in the present case, following *Miller* v. *William Boothman & Sons, Ltd.* (1), and I, therefore, express no opinion on this topic.

The appellant also pleaded that the respondents had been guilty of negligence at common law. I agree with the Court of Appeal that the evidence entirely fails to support any such case.

The appeal should be dismissed.

LORD WRIGHT [read by LORD SIMONDS]: My Lords, I agree that the appeal should be dismissed. I shall merely add a few observations on my own part to explain why I do so.

The appellant, the plaintiff in the action, is a young woman who was employed by the respondents as a factory hand. At the time of her injuries she was working at a machine, known as a straight line edger and was operating a circular saw. She suffered injuries to the ring and middle fingers of her left hand, for which STABLE, J., who tried the case, awarded her £350 as damages. Her left hand had been struck by some small object, presumably a small piece of wood, causing a laceration which later became septic. No one could speak as to the exact

nature or size or shape of the object but it has been taken that it was a piece of wood. No witness saw it or from whence it came. The appellant seems to have been standing at the time feeding pieces of wood into the machine to be dealt with by the saw. There was evidence that very small pieces of wood called slivers do fly out of the machine in front, but no evidence that they had caused injury to anyone. In the front of the machine there was a line of small objects called fingers, a little above the level of the table; the appellant said
A the little piece of wood may have come through them, or perhaps may have come from under the metal hood at the side. The saw itself was completely covered and the requirements of the Factories Act as to safety were fully satisfied. The appellant did not put her hand anywhere near the saw, nor had she any need to do so. The wood was pushed on to the conveyor which carried it to the saw. There was no suggestion of contributory negligence against the appellant. It was not clear how so small an abrasion could have resulted in the actual injury.

B The appellant based her claim on sect. 14 of the Factories Act of which she said there was a breach and also on the Woodworking Machinery Regulations, reg. 10; she further said there was a breach of the common law duty. In my opinion she has failed on each head.

The Factories Act, 1937, s. 14, requires that every dangerous part of any machinery, other than prime movers and transmission machinery, shall be
C securely fenced. The full terms of the section are before your Lordships and I need not repeat them. But it is essential to note that the governing words are "every dangerous part of any machinery." The appellant has been unable to point to any part of the machine that could satisfy the description of a dangerous part, that is, excluding such parts as were securely fenced. Thus it is clear that the requirements of the Woodworking Machinery Regulations, 1922, were satisfied. Those regulations were issued under the Factory and Workshop
D Act, 1901, which preceded the Act of 1937, but were made applicable to the later Act by sect. 159. These regulations deal in particular with circular saws and the like.

Sect. 14 of the Act of 1937 does however contain an additional paragraph at the end of the section which is in the following terms:

> The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are
> E dangerous while in motion in the machine.

But no regulations have been made under this clause, which is left in the air. It might indeed have been made use of to prevent the small slivers thrown off by the back of the saw, being at large within the metal case in which the machine works, and coming out and striking the operator. It is not clear why no regulations have been made with this object. Perhaps it has not in experience been found of sufficient importance. But the fact remains that no regulations
F have been made to give effect to the additional clause appended to subsect. (3). Hence that clause has remained of no effect in itself at least up to the present. Similarly the wide powers of modifying or extending provisions imposing requirements as to health and safety remain unemployed so far as might affect the particular claim in this case. Sect. 60 (1) (*b*) does indeed also give power to make regulations to limit or control the use of any material or process. I am
G not clear how far the power to make regulations under this would extend, but no regulations material to this case have been referred to.

But the additional clause to sect. 3 (3) does point the contrast between the fencing of dangerous parts of the machine and the fencing of materials and articles which are dangerous while in motion in the machine and are to that extent adverse to the appellant's claim and confirms the construction which the respondents put on the section. This, I think, is fatal to her claim.

H In this view of the position, it is not necessary to express any opinion on the soundness of the decision of the Court of Appeal in *Miller* v. *Boothman* (1).

I agree with the reasoning of the Court of Appeal which led them to hold that there was no evidence of breach by the respondents of their common law duty to the appellant. That the common law duty exists in proper cases is unquestionable. But it is limited to reasonable exercise of care and skill to guard against danger which as reasonable people, the employers ought to have anticipated. The injury suffered by the appellant was, it seems, outside normal experience, and such as could not reasonably have been anticipated. That, I think, justifies a conclusion that there was no negligence at common law.

I should dismiss the appeal.

Lord Simonds: My Lords, this appeal raises in the first place a short question of construction of the Factories Act, 1937, s. 14. If that question is decided in favour of the respondents, it becomes unnecessary to consider the further question what is the effect upon that section of certain regulations for the use of woodworking machinery made under an earlier Factories Act, but continued under the Act of 1937.

The appellant, who was at the material times employed by the respondents as a factory hand working on a machine known as a straight line edger, the main feature of which is a circular saw, was on May 29, 1943, while so employed, injured by a piece or sliver of wood which flew out of the machine and struck her left hand. The damage was more serious than might have been expected and she brought her action against the respondents, alleging that they had committed a breach of their statutory duty under sect. 14 of the Act or under the said regulations, and alternatively that they had been guilty of negligence at common law.

The first question is, I think, correctly stated in the appellant's case in these words: Whether the words " every dangerous part " referred to in the Factories Act, 1937, s. 14, refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury so that such parts only are required to be fenced by the said section, or whether the said words " every dangerous part " includes parts which are indirectly dangerous in that they are liable to throw out material with such force that the material is liable to cause injury to the worker so that such parts also are required to be fenced by the said section.

My Lords, I have no doubt that this question should be answered by saying that the words " every dangerous part " in their context refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury.

Sect. 14 follows sects. 12 and 13, the former of which deals with " prime movers " and the latter with " transmission machinery," and itself, by subsect. (1), provides that:

> Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.

There follows a proviso which is of great importance, but, apart from the proviso it seems to me clear that the subsection is dealing with a physical part of a machine, not with its function. Machinery, particularly in motion, is a constant source of danger to the workman, as the horrid story of factory accidents proclaims. " Prime movers " " transmission machines " " every dangerous part of any machinery," these in turn are things from which the worker is to be guarded by a secure fence. I find nothing in this language to suggest that the section aims at protecting the worker from any indirect danger arising out of the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that:

> . . . in so far as the safety of a dangerous part cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.

These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in. To the same conclusion I am led by subsect. (2), which contemplates the use of a safety device which:

> . . . (*a*) prevents the exposure of a dangerous part of machinery whilst in motion or (*b*) stops a machine forthwith in case of danger . . .

These again are expressions which show that the danger to be guarded against is in the contact of worker with machine.

Finally, the concluding words of sect. 14, which might well be in a separate section, confirm this view. For the Secretary of State is thereby authorised "as respects any machine or any process in which a machine is used" to make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine. Here a clear distinction is drawn between dangerous parts of the machine and materials or articles. The authority would be superfluous if the danger apprehended by subsect. (1) included danger not only from contact with a dangerous part but also from the materials which it might discharge.

Since the respondents have not in my opinion committed any breach of their statutory duty under sect. 14, I find it unnecessary to say anything about the decision of the Court of Appeal in *Miller* v. *William Boothman & Sons, Ltd.* (1).

I will only add that I see no possible ground for holding that the respondents were guilty of negligence at common law. The judge who heard the case did not so decide, and having read the evidence that he had before him I am satisfied that he could not properly have come to such a conclusion. I concur in the motion that this appeal should be dismissed.

LORD UTHWATT: My Lords, the appellant, while operating a machine known as a straight line edger, was injured as a result of the ejection by the machine of some of the wood upon which the machine was working. In respect of this injury she claims damages, alleging that the injury was due to a breach by the respondents of a statutory duty arising under the Factories Act, 1937, or alternatively to a breach by the respondents of their common law duty to take proper care to provide a safe system of working.

With respect to the first claim, it is argued that there was a breach by the respondents of the Factories Act, 1937, s. 14 (1): that *Miller* v. *Boothman* (1) was wrongly decided: and that accordingly the circumstance that the Woodworking Machinery Regulations, 1922, were duly complied with is no bar to the success of a claim based on subsect. (1) of sect. 14.

The first matter to be considered, therefore, is the effect of subsect. (1) of sect. 14. That subsection runs as follows:

> Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:
>
> Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.

It is not disputed that, apart from the absence of fencing precluding the ejection of material which was being worked upon by the machinery, all dangerous parts of the machinery were duly fenced as required by the subsection. The contention of the appellants is that the phrase "every dangerous part" in respect of which the obligation to fence is imposed by subsect. (1) of sect. 14 includes parts which are indirectly dangerous in that they are liable to throw out material with such force as to be liable to cause injury to the worker. Acceptance of this contention involves the view—indeed it is in the substance of the contention—that the obligation imposed by the subsection is to fence the machine, viewed as a single operating unit, so as to avoid the possibility of danger arising to the worker from its operation.

My Lords, in my opinion the subsection, whether it be read alone or be read in connection with the other provisions of the Act relating to machinery, negatives the contention. The lines on which the Act—so far as relevant here—proceeds is not to take into account any machinery as a whole, but to require the several parts of the machinery to be considered separately in light of their construction, position or dangerous nature. Under sect. 12 there are to be securely fenced flywheels and (subject to certain exceptions) every moving part of any prime mover, and under sect. 13 every part of the transmission machinery, unless it is safe by reason of its position or construction. Sect. 14 (1) applies to "every dangerous part of any machinery other than prime movers and transmission machinery." That dangerous part is to be securely fenced unless it—*i.e.*, the dangerous part—is in such a position or of such construction as to be safe. The proviso to the subsection is of assistance. Where a fixed guard is not practicable as respects a dangerous part, the provision of a device which prevents contact between the operator and that part is to satisfy the obligation contained in the leading provision of the subsection. The prevention of contact between the worker and the dangerous part is to be sufficient.

The matter is, I think, put beyond doubt by the circumstance that, under the concluding part of sub-sect. (3) of sect. 14, power is given to the Secretary of State to make, as respects any machine or process in which a machine is used, regulations requiring the fencing of materials, or articles which are dangerous while the machine is in motion. The machine is there treated as a single unit, and materials upon which the machine is operating are included in the subject matter in respect of which regulations may be made. The language of the subsection giving this power precludes one from reading it as enabling the Secretary of State to make regulations directed to working out an obligation arising under subsect. (1). The presence of the power renders it illegitimate to put the strained construction upon subsect. (1) for which the appellants contend.

In my opinion, therefore, the claim under the Act fails, and in the circumstances it is not necessary to express any opinion as to the correctness of the decision in *Miller* v. *Boothman* (1).

As regards the alternative claim, the trial judge, who found in favour of the appellants on their claim under the Factories Act, 1937, expressed no view as to the effect of the evidence. In my opinion—I do not propose to review the evidence—the appellants failed to show that the respondent was guilty of negligence.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the appellant); *Barlow, Lyde & Gilbert* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WARDALE *v.* BINNS.

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), May 7, 1946.]

Factories and Shops—Shop—Hours of closing—Sunday trading—Restriction—Sale of bread on Sunday—" Meals or refreshments "—Shops (Sunday Trading Restriction) Act, 1936 (*c.* 53), *ss.* 1, 2, *Scheds. I, para.* 1 (*b*), *II.*

A shopkeeper was convicted of an offence against the Shops (Sunday Trading Restriction) Act, 1936, in that he had not closed his shop for the sale of bread on a certain Sunday, but had sold a loaf to a customer. By sect. 1 of the Act, every shop is required to be closed on a Sunday, except for the transactions mentioned in Sched. I to the Act, which include the sale of " meals or refreshments whether or not for consumption at the shop at which they are sold." By sect. 2, a local authority can make " partial exemption orders " and by Sched. II such partial exemption orders may be made in respect of the sale of bread " in so far as such sales are not included amongst the transactions mentioned in Sched. I to this Act." No such order had been made in this case. On an appeal by the shopkeeper against his conviction, the recorder was of opinion that the loaf of bread was a meal or refreshment within Sched. I, para. 1 (*b*), to the Act and held that no offence had been committed. On appeal to the High Court, it was contended by the prosecution that, since no order had been made under sect. 2 and Sched. II of the Act, the sale was an offence against the Act :—

Held : (i) the sale of bread on a Sunday for the purpose of a meal or refreshment was not an offence because the sale of meals or refreshments was permitted under Sched. I to the Act. Sched. II merely provided that a partial exemption order might be made in respect of the sale of bread in so far as such sale was " not included amongst the transactions mentioned in Sched. I."

(ii) on the facts of the case, the court was not prepared to say that the recorder's decision was wrong. Where the provisions of an Act were

obscure, the benefit of that obscurity should be given to the accused.
London County Council v. *Lees* (1) *followed.*

[**EDITORIAL NOTE.** The history of the legislation relating to Sunday trading is an unhappy one. It is a highly controversial subject, and the present Act, after much amendment, reached the Statute Book in a form which elicited from LORD HEWART, L.C.J., in *L.C.C.* v. *Lees* (1), the comment : " Not often in the course of half a century of experience of the law have I had the opportunity of endeavouring to come to close quarters with such a piece of legislation." The provisions as to the sale of bread in Scheds. I and II, are well-nigh irreconcilable, and in the present case the court uphold the decision of the recorder quashing the conviction because, as HUMPHREYS, J., expresses it " If an Act of Parliament is so drawn as to make it really difficult to say what was intended and what facts come within it, the benefit of that obscurity should be given to the accused person."

AS TO SUNDAY TRADING, see HALSBURY, Hailsham Edn., Vol. 32, pp. 129-136, paras. 189-198, and Supplement ; and FOR CASES, see DIGEST, Vol. 42, pp. 936-939, Nos. 84-116, and Supplement.]

Cases referred to :

*(1) *London County Council* v. *Lees, London County Council* v. *Iafrate,* [1939] 1 All E.R. 191 ; Digest Supp. ; 160 L.T. 281.

*(2) *London County Council* v. *Davis,* [1938] 2 All E.R. 764 ; Digest Supp. ; 1 59 L.T. 44.

APPEAL by way of case stated from a decision of the recorder of the city of Liverpool quashing a conviction by the stipendiary of Liverpool for an offence against the Shops (Sunday Trading Restriction) Act, 1936. The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

E. E. Youds for the appellant.

G. B. H. Currie for the respondent.

LORD GODDARD, L.C.J. : This is a case stated by the recorder of the city of Liverpool, who quashed a conviction of the appellant by the stipendiary of Liverpool for an offence against the Shops (Sunday Trading Restriction) Act, 1936. The offence that was alleged against him was that on Sunday, June 24, 1945, he did not close his shop, 27, Hall Lane, Liverpool, for the sale of bread, but sold a 2lb. loaf of bread to a customer.

The facts, and the only facts, which are found in the case are these :

> On Sunday, June 24, 1945, the respondent sold to a small boy a 2lb. loaf of bread which bread was sold for human consumption off the premises. Shortly subsequent to the said sale, the respondent was interviewed by a Shops Acts inspector, one Tighe, and was asked why the shop was not closed on that day, Sunday, for the sale of bread. He was cautioned and said : " I will tell you the truth. I had some bread left on my hands and decided to sell it, because we cannot sell it on a Monday, as it is stale."

At the same time, there was a notice in the shop to the effect that the shop was open for the sale of sweets, minerals, tobacco and confectionery. On that it is said that the shop was not closed for the serving of customers with bread on a Sunday, and that, therefore, a breach of the Act had been committed.

The recorder was of opinion that the loaf of bread was a meal or refreshment within Sched. I, para. 1 (*b*), to the Act and held no offence had been committed. This, I think it is fair to say, is a conclusion he has come to as a matter of law on the construction of the Act, and is not in itself a finding of fact.

First, it is necessary to look at the Act. By sect. 1 of the Act it is provided :

> Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers on Sunday : Provided that a shop may be open for the serving of customers on Sunday (*a*) for the purposes of any transaction mentioned in Sched. I to this Act.

Before I go on, I will refer to Sched. I, which is headed :

> Transactions for the purposes of which a shop may be open for the serving of customers on Sunday.

They include :

> 1. The sale of . . . (*b*) meals or refreshments whether or not for consumption at the shop at which they are sold . . .

So to sell a meal or refreshment, whether for consumption on or off the premises, is not prohibited by the Act ; and I do not think it could be contended that the meal or refreshment must be for the person who actually buys. It is quite clear, it seems to me, that a person can send his servant to buy a meal or refreshment for him and bring it back to the house where the employer lives and will consume the food. In the same way, if two or three people are going out for a ramble on a Sunday and one goes into a shop to buy refreshments for that ramble, obviously the consumption by all three or more of the people would be also permitted by the Act.

Sect. 2 of the Act deals with " partial exemption orders " and provides :

> 1. The local authority may by order (in this Act referred to as a " partial exemption order ") made in accordance with the provisions of this Act provide that after the expiration of 9 months from the commencement of this Act shops situated in their area or in such part thereof as is specified in the order may for the purposes of such of the transactions mentioned in Sched. II to this Act as may be so specified be open for the serving of customers on Sunday subject to the limitations hereinafter provided.

No such order has been made in this case.

It is under Sched. II to this Act that the difficulty arises, because Sched. II, which sets out the " transactions in respect of which a partial exemption order may be made," is in these terms :

> The sale of (*a*) bread and flour confectionery, including rolls and fancy bread ; (*b*) fish (including shell-fish) ; (*c*) groceries and other provisions commonly sold in grocers shops ; in so far as such sales are not included amongst the transactions mentioned in Sched. I to this Act.

It is said that if a shopkeeper sells a loaf of bread he is committing an offence because the sale of bread is one of those matters which may be permitted by a special order, and, as Parliament has so provided, it follows from that that, unless an order is made under sect. 2 permitting the sale of bread, an offence is committed if you do sell bread : the Act, therefore, must be read as though it said that the keeping open of a shop on a Sunday and selling bread in that shop is in itself an offence. I think there would be a great deal of force in that argument if it were not for the words " in so far as such sales are not included amongst the transactions mentioned in Sched. I to this Act "—from which it follows that the sale of bread or flour confectionery, if sold for the purpose of a meal or refreshment, is not an offence : it is permitted by the Act because Sched. II only prohibits the sale in so far as the sale is not included amongst the transactions mentioned in Sched. I.

This Act came under the consideration of this court in 1939 in two cases which were heard together : *London County Council* v. *Lees* (1) and *London County Council* v. *Iafrate* (1). In those cases the respondents kept shops at which such things as cream buns, chocolate eclairs, veal and ham pies, Swiss rolls, and so forth, were sold. It was admitted that those articles were flour confectionery—at any rate, some of them were. I should think it is doubtful whether a veal and ham pie is flour confectionery, but, at any rate, the buns and the eclairs and the Swiss rolls would be flour confectionery. The court in that case pointed out (and, indeed, very eminent counsel who argued the case for the London County Council in that case agreed) that, taking the provisions of those two Schedules together and comparing and contrasting them with each other, they were unintelligible—and for this reason, that, although the sale of flour confectionery is dealt with expressly in Sched. II, as Sched. II says that those sales are not to be affected by Sched. II if they are included amongst the transactions included in Sched. I, and as these things were sold as refreshments and the sale was permitted, it could not be said that it was permitted under Sched. I to the Act and prohibited under Sched. II ; that makes nonsense. Therefore, said the court (as I understand the decision) : " We are not going to hold that a man is to be convicted of an offence under this Act when in one Schedule it says that he may do a thing, whereas, on the particular construction you ask us to put upon the other Schedule, he is not entitled to do such a thing."

In spite of the very excellent argument to which we have listened on behalf of the appellant in this case, although it would be straining language to say that a loaf of bread necessarily constitutes a meal (in certain circumstances it obviously may) I cannot understand how it can be said that a loaf of bread, sold for human consumption, is not a loaf of bread sold for refreshment. The word " refreshments " is not a term of art. When one talks about a person taking " refreshments," one means taking some article of food generally different from what I may call a full meal—something light—a refresher. Bread is a refreshment just as much as a bun is a refreshment, just as much as a ham sandwich

is a refreshment. It may not be such an attractive refreshment, but it is a
refreshment and part of a meal. That, I think, must be conceded. Therefore,
the position is that under Sched. I to this Act bread can be sold as a
refreshment. Therefore, to say that, unless there is a partial exemption
order, bread cannot be sold because of the provisions of sect. 1 creates
in my mind a very formidable difficulty. With the greatest respect, I think
one may say that it is possible that Parliament did not appreciate that
A by inserting the concluding words to Sched. II (the words "in so far as such
sales are not included amongst the transactions mentioned in Sched. I to this
Act") they were very largely stultifying, if not entirely stultifying, the provisions
of the Act with regard to the matters which they mention in Sched. I.
One of the provisions most commonly sold in grocers' shops is cooked meat.
I cannot appreciate how anyone can argue that the sale of cooked meat is not
the sale of a refreshment. I should think, indeed, that in very many cases
B it is the sale of a meal. Many people are content with a meal of cold meat.
If, therefore, cold meat, or cooked bacon, can be sold in a shop on a Sunday
—and it clearly can be, under the provisions of Sched. I—it seems to me that the
provisions of Sched. II do not make the sale an offence. So, too, I think, with
the case of bread. No doubt, in the ordinary way, a person does not buy dry
bread as a refreshment; but at the present time I can understand that there
may be many occasions on which a person would be only too thankful, on a
C railway journey, for instance, to buy a roll, which, perhaps, with a glass of
water, may be the only sustenance he or she can get upon a long journey. But
in any circumstances bread must be, it seems to me, a refreshment, and if
Parliament meant to say "you may sell bread by the slice but not sell it by
the loaf," they would have said so.

I think exactly the same difficulty arises in this case as arose in the *Lees*
D case (1). I am certainly not prepared to say that the recorder was wrong:
in fact, I think, in the circumstances I should have held in the same way myself.
My difficulty, as I say, is created by that part of the enactment to which I
have referred more than once, the concluding words of Sched. II. If difficulties
are created in this way and if decisions of this court are not in accordance with
what Parliament intended, Parliament can put it right, and Parliament, no doubt
will put it right.

E For the reasons I have endeavoured to give, in my opinion this appeal fails
and must be dismissed.

HUMPHREYS, J.: I am of the same opinion, and I desire to associate myself
heartily with some observations which fell from my Lord in the course of the
argument when he observed that he was very much averse to the notion that
any person should be convicted in this country upon the terms of an Act of
F Parliament which was obscure and which lawyers could not construe clearly.
If an Act of Parliament is so drawn as to make it really difficult to say what
was intended and what facts come within it, the benefit of that obscurity should
be given to the accused person.

The next thing I want to say is this. I have tried to see what it was that
Parliament was really intending and desiring to do in the passing of this Act,
which was by no means the first Act, by a great many, which had been passed
G with a view to restricting Sunday trading. I find that Parliament starts by
declaring:

> 1. Every shop shall . . . be closed for the serving of customers on Sunday.

Then it was thought necessary to make exceptions to that. What are the exceptions
and why are they made? I have found it quite impossible to arrive
at any conclusion as to what was in the mind of those who put in this list of
H exceptions, unless it amounts to this (I am not saying I think it does, but it
may possibly) that wherever you can think of anything which people are likely
to want on Sunday, then a shop may be kept open for that purpose. So you
find things which are not in the least necessary, which can never be necessary,
but which are the sort of things which the ordinary person may desire to purchase
on Sunday, although he could purchase them all perfectly easily on any
other day. They are such things as "sweets, chocolates, ice-cream." (I
will leave out intoxicating liquors; there may be a special reason there;
Sunday trading is dealt with in the Licensing Acts.) Why should people be

particularly allowed to buy sweets and ice-cream on Sundays, if all shops are to be closed on Sunday ? I do not know. What is the necessity for a flower shop to be open on Sunday ? It is very pleasant for some people to be able to buy flowers on Sundays, but nobody can say it is necessary. " Fruit and vegetables " are things which you eat, and one can understand it in that case. Then you get " aircraft, motor, or cycle supplies or accessories." I can only imagine that that is to help the broken-down motorist or even the person who is travelling by air ; but it is a little unlikely that a person who is travelling by air, and has found it necessary to make a forced landing, would go to the sort of shop which would be open on Sunday in order to get what was necessary to make his aircraft airworthy. Then, " tobacco and smokers' requisites." No doubt, it is a convenience for a great many people to be able to buy tobacco on Sunday. Then :

> . . . newspapers . . . books and stationery . . . guide books, postcards, photographs, reproductions, photographic films and plates and souvenirs . . .

For some reason or other, people may open their shops on Sunday in order to sell all these things.

We are dealing here with bread. Is bread forbidden ? Certainly not. Not only is the sale of bread not forbidden on Sunday, but it is expressly allowed, because one of the things which is specifically allowed is any meal ; and, therefore, if a person goes into a shop and says, " I want some beef and vegetables and bread and butter and cheese," if the shopkeeper has those things with which to supply him there is no question at all that bread may be sold, because it is part of a meal ; it is not the whole meal, but part of it, and one is entitled to buy a meal, including bread.

The next word is " refreshments." I respectfully agree with my Lord : I think the word " refreshments " is really equivalent in this statute, as I think it is in ordinary parlance, to a light meal, something less than a solid meal. What article of food is there which is more appropriately described as " refreshment " than something made of flour, something in the nature of bread ? It seems to me quite impossible to say that bread does not come within the ordinary term " refreshments," which are specifically allowed to be sold on Sunday—and not merely if they are to be consumed on the premises ; they may be taken off the premises. If, therefore, the hypothetical person is one who does not want to eat his meal at the shop, he may buy his meal at the shop and take it home ; and, in order that he may eat that meal at home, one of the things he most assuredly may buy is his bread, whether or not he buys something else.

If that be so, the difficulty here is created, it seems to me, by the last words in Sched. II to the Act, because that Schedule, which deals with the making of a partial exemption order, says that it may be made in respect of bread. If the matter rested there, I agree that a strong argument might be put up to the effect that the sale of bread on Sunday must be illegal (unless as a meal or refreshment) *prima facie* because a partial exemption order may be made in order to enable the sale of bread on Sunday. But then there are these words :

> . . . in so far as such sales are not included among the transactions mentioned in Sched. I to this Act.

(I do not want to spend time in further considering these words because my Lord has dealt with the matter fully and I agree with every word he has said.) The sale of bread, therefore, is apparently forbidden because it is only allowed under a partial exemption order if made. But look at Sched. I. If bread is part of a meal or refreshment, then it is permitted. It is those words, as I understand it, which caused eminent counsel in the *Lees* case (1) to say—and almost caused Lord Hewart, L.C.J., to say—that the two Schedules are contradictory. The view taken by the court in that case was one which I myself had taken earlier—not on quite the same words, but dealing with the Shops (Hours of Closing) Act, 1928, which contained somewhat similar words—in *London County Council* v. *Davis* (2). In that case Branson and du Parcq, JJ., had come to the conclusion that newly baked bread came within the words " newly cooked provisions " in the Act of 1928. I myself had very great difficulty in arriving at that conclusion for the reason which I then gave (and I see no reason to withdraw it) that I did not think any ordinary person would ever talk about " newly cooked bread," and in all the Acts of Parliament that I was at that time able to find the expression was never used. Nobody talks about "cooking" bread; it is always "baked"—"newly baked bread." I said then, and I say now, that, where the matter is as doubtful as that, and certainly where other members of the court take a different view, I am not prepared to say in a criminal case that the magistrate who has acquitted the particular person charged before him is wrong.

That was the view taken by this court in *London County Council* v. *Lees* (1), where LORD HEWART, L.C.J. (whose decision was agreed with by CHARLES and SINGLETON, JJ.), said he was not prepared to differ from the view of the magistrate who had held that no offence was committed. I take the same view in this case. I do not put my judgment higher than this: it seems to me quite obvious that bread may be sold on Sunday in a shop in certain circumstances which are, I think, indistinguishable from the circumstances in this case. What Parliament meant exactly, if it meant anything, by those concluding words of Sched. II, I do not profess to know or to understand. But the tribunal which has stated this case for our consideration has come to the conclusion that the most reasonable view to take of the matter is that the person who sold bread on a Sunday to a boy for human consumption had sold it either as a meal or refreshment.

I come to the conclusion that the recorder was quite justified in taking that view, and, this being a criminal case, I decline to say I differ from him.

SINGLETON, J.: While appreciating the arguments which have been addressed to the court, I am bound to say that I regard this as a case which it is very much easier to argue than one in which to give judgment. That often occurs. There are many difficulties in the Act which give scope to the argument of counsel but which present difficulty in giving a judgment.

The respondent, a shopkeeper, has a shop in which various articles of food are sold, and, on Sunday, June 24, 1945, he sold to a small boy a 2lb. loaf of bread, which bread, one must assume, was sold for human consumption off the premises. When the respondent was seen by an inspector, he said, after caution:

> I will tell you the truth. I had some bread left on my hands and decided to sell it, because we cannot sell it on a Monday as it is stale.

He was served with an information under the Shops (Sunday Trading Restriction) Act, 1936, s. 1, which provides:

> Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday (*a*) for the purposes of any transaction mentioned in Sched. I to this Act.

Sect. 2 of the Act deals with "partial exemption orders" and brings into play Sched. II to the Act. I do not propose to refer to it because no partial exemption order has been made by the local authority, although it is to be observed that the words of Sched. II, and, in particular, the concluding words, provide an argument that has succeeded before now in cases under this Act. When the information was heard, the magistrate found the charge proved. There was an appeal to quarter sessions and the recorder of the city, having presented the facts which I have already stated, found in para. 12:

> I, being of opinion that the loaf of bread sold was a meal or refreshment within Sched. I, para. 1 (*b*) to the Act, held that no offence had been committed.

That may be a statement of opinion; it may be, to some extent, fact. Indeed, in *London County Council* v. *Lees* (1), to which reference has been made by my Lord, LORD HEWART, L.C.J., speaking of the facts in that case said ([1939] 1 All E.R. 191, at p. 196):

> I will only add that among the many doubts which this case and this legislation present to my mind is the doubt whether we are really dealing here with a question of law at all, or whether, upon the true construction—if there is a true construction—of this statute, that with which the magistrate was coming to terms was a pure question of fact.

I confess I have some doubt in my mind as to what the facts found by the recorder were. He did not hear any evidence on behalf of the respondent; he did hear the evidence of the inspector.

Speaking for myself, and assuming I had not any authority before me, if I was faced with those facts alone I should be very much inclined to come to the conclusion that on that Sunday morning the respondent's shop was not closed for the serving of customers. But there are certain difficulties. The case of *Lees* (1) was before this court in Jan., 1939. The facts were different, and, again speaking for myself, I can see that there may well be a difference between the sale of two eclairs or a Swiss roll and the sale of a loaf of bread. It may be (to a certain extent, at least) that the *Lees* case (1) covers this case. But, on the whole, I am not satisfied that it does. I should have felt very considerable difficulty on this matter apart from that case and apart from the view which has been expressed by my Lord and by Humphreys, J.; but I take cover, if I may use such an expression in this matter, in that which was said in the *Lees*' case (1) by Lord Hewart, L.C.J. ([1939] 1 All E.R. 191, at p. 196) :

> Not often in the course of half a century of experience of the law have I had the opportunity of endeavouring to come to close quarters with such a piece of legislation. Sir William Jowitt, appearing on one side in this case, frankly admitted that the provisions of these two schedules, taken together, and compared and contrasted with each other, were, to his mind, unintelligible.

I confess I do not find them easy to interpret. This court expressed an opinion about them several years ago, and the fact that all the members of this court have again expressed an opinion upon them may lead Parliament to think that it is quite time that legislation of this kind was made a little clearer. I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Cree & Son*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the appellant); *Lester Davidson*, Liverpool (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re FRY, CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION, LTD. *v.* FRY AND OTHERS.

[Chancery Division (Romer, J.), April 16, 17, May, 15, 1946.]

Gifts—Incomplete gift—Transfer of shares—Intending transferor resident outside sterling area—Regulation prohibiting transfer without consent of Treasury—Transfer executed, but death of intending transferor before licence from Treasury obtained—Intended transferee not entitled to shares—Defence (*Finance*) *Regulations*, 1939, *reg.* 3A (1), (4) (*as amended by S.R. & O.*, 1940, *No.* 1254).

F., who was resident in the United States of America, desired in 1940 to make a gift to his son of certain shares which he held in an English company. A transfer was executed and sent to the company for registration. Under the Defence (Finance) Regulations, 1939, reg. 3A (as amended) the transfer of any securities or any interest in securities in which a person resident outside the sterling area had, immediately before the transfer, any interest, was prohibited unless permission from the Treasury had been obtained; and registration of any such transfer was prohibited without permission from the Treasury. The company, therefore, replied to F., that certain forms would have to be completed by the transferor and transferee and that a licence from the Treasury would have to be obtained for the transfer. The necessary forms were filled up by F., and the son, but F. died before the licence from the Treasury could be obtained. The question to be determined was whether the son was entitled to require F.'s personal representatives to obtain for him legal and beneficial possession of the shares:—

Held: (i) since the requisite consent of the Treasury had not been obtained, and the company was, therefore, prohibited from registering the transfer, the son had not acquired the right to be clothed with a legal title to the shares in question.

(ii) there had not been a complete gift to the son of the equitable interest in the shares, because F. had not obtained the consent of the Treasury and, therefore, he had not done all that was necessary to divest himself of his equitable interest in favour of his son.

Holt v. *Heatherfield Trust, Ltd.* (6) *distinguished.*

(iii) inasmuch as a transferee of such shares was prohibited under the Finance (Defence) Regulations, 1939, reg. 3A, from acquiring any interest therein without licence from the Treasury, the court could not recognise a claim to such an interest where the consent of the Treasury had not been given.

(iv) since F.'s intention to transfer the shares to his son had not been fully and completely implemented before his death, the son was not entitled to call upon F.'s personal representatives to obtain for him legal and beneficial possession of the shares.

Milroy v. *Lord* (1) *applied.*

[**EDITORIAL NOTE.** This is an interesting point, upon which there is no previous authority, on the effect of an attempted transfer of shares by a non-resident without the consent of the Treasury as required by the Defence (Finance) Regulations. It is held that in such circumstances the transferor has not done everything required of him in order to divest himself of the legal and equitable title to the securities and that the attempted gift to the transferees accordingly fails. An argument based upon the fact that the British Treasury regulations would have no operation by the law of the transferor's domicil or the *lex loci actus* is also rejected, since there was an intention to create an immediate interest which was in violation of the regulations.

AS TO INCOMPLETE GIFTS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 738-740, paras. 1278, 1279; and FOR CASES, see DIGEST, Vol. 25, pp. 529-531, Nos. 195-209.

FOR THE DEFENCE (FINANCE) REGULATIONS, 1939, reg. 3A, see HALSBURY'S STATUTES, Vol. 33, pp. 707, 708.

Cases referred to:

*(1) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264; 25 Digest 530, *206*; 31 L.J.Ch. 798; 7 L.T. 178.

(2) *Roots* v. *Williamson* (1888), 38 Ch.D. 485; 43 Digest 715, *1531*; 57 L.J.Ch. 995; 58 L.T. 802.

*(3) *Re Williams, Williams* v. *Ball* ,[1917] 1 Ch. 1; 25 Digest 532, *221*; 86 L.J.Ch. 36; 115 L.T. 689.

(4) *Ellison* v. *Ellison* (1802), 6 Ves. 656; 25 Digest 533, *233*.

(5) *Donaldson* v. *Donaldson* (1854), Kay 711; 43 Digest 627, *666*; 23 L.J.Ch. 788; 23 L.T.O.S. 306.

*(6) *Holt* v. *Heatherfield Trust, Ltd., and Bridgewater, Ltd.*, [1942] 1 All E.R. 404; [1942] 2 K.B. 1; 111 L.J.K.B. 465; 166 L.T. 251.

ADJOURNED SUMMONS to determine whether the plaintiffs, Chase National Executors and Trustees Corporation, Ltd., as personal representatives of the testator, ought to execute any such confirmatory transfer or other instrument as might be requisite to enable the defendant Sydney Fry to be registered as the holder of 2,000 ordinary shares of £1 each, and the defendants Cavendish Investment Trust Co. (Liverpool), as the holders of 280 ordinary shares of £1 each, in Liverpool Borax, Ltd. (of which shares the testator had executed transfers in his lifetime) and to account to such defendants respectively for the dividends on such shares declared since the execution of the said transfers or since any and what date, on the basis that the testator had made valid gifts of the said shares to such defendants respectively in his lifetime; or whether the said shares formed part of the testator's estate. The facts are fully set out in the judgment.

J. W. Brunyate for the plaintiffs.

Humphrey H. King for the testator's son.

A. H. Droop, *E. M. Winterbotham* and *M. O'C. Stranders* for the other defendants.

Cur. adv. vult.

ROMER, J.: The facts relevant to the case are somewhat complicated. The testator died on Oct. 22, 1941, in the State of New Jersey, in the United States of America. He was at his death domiciled in the State of Florida. The defendant Sydney Fry is a son of the testator and he deposes that in 1936 his father invested £400 of his (Sydney Fry's) money in the purchase of certain shares in a concern which turned out to be a complete failure, and that, when he was visiting the testator in America, the testator told him that, as a recompence for the loss, he would transfer to the deponent 2,000 shares in Liverpool Borax, Ltd. Sydney Fry exhibited a letter to him from the testator, written on Nov. 22, 1940, from New York, in which the testator told him he had sent a signed transfer of those shares in favour of Sydney Fry to one Toon, who was at that time the branch manager of the Putney branch of Barclay's Bank, Ltd. To a later affidavit Sydney Fry exhibited this transfer. It purports to be in consideration of £4,000 paid by the transferee and is signed by the testator in the presence of a witness. It was subsequently dated Mar. 1, 1941. Cecil I. Robertson swore an affidavit to which he exhibited a letter from the testator to Toon which accompanied the share transfer and in which the testator stated that he was inclosing also a cheque for £120 in respect of stamp duty. In addition to this transfer of shares to Sydney Fry, the testator was also minded, at the same time, to transfer other shares in Liverpool Borax, Ltd., to the Cavendish Investment Trust, which was a private company, all the shares in which were held by the testator and various members of his family. Accordingly he sent to R. Duncan French & Co., of Liverpool, who acted as accountants and auditors to the Cavendish Trust, a share transfer of 1,058 ordinary and 280 preference shares of £1 each in Liverpool Borax, Ltd. This share transfer, which was in favour of the Cavendish Trust, was received by R. Duncan French & Co., on Dec. 14, 1940. The transfer was executed by the testator in the presence of a witness, and purported to be in consideration of the sum of 10*s*. paid by the transferee. The seal of the Cavendish Trust was duly affixed to the said transfer, and, following such sealing, the transfer was dated Dec. 24, 1940. The 3,058 ordinary and the 280 preference shares in Liverpool Borax, Ltd., hereinbefore mentioned comprised the testator's entire holding in that company and he had deposited the certificates for those shares with the Putney branch of Barclay's Bank, Ltd.

At the time when the share transfers to which I have referred arrived in this country, and at all material times subsequent thereto, the relevant war-time restrictions upon the transfer of securities were those introduced into the Defence (Finance) Regulations, 1939, by S.R. & O., 1940, No. 1254, and the regulation material to this case was reg. 3A, para. (1) of which was in the following terms :

> Subject to any exemptions which may be granted by order of the Treasury, no person shall, either on his own behalf or on behalf of any other person, agree to transfer or acquire, or transfer, or acquire otherwise than by operation of law or by inheritance, any securities or any interest in securities, unless the Treasury or persons authorised by or on behalf of the Treasury are satisfied that no person resident outside the sterling area has, immediately before the transfer, acquisition, or agreement, any interest in the securities : Provided that nothing in this paragraph shall prohibit any agreement, transfer, or acquisition which is effected with permission granted by the Treasury or by a person authorised by them or on their behalf.

Para. (4) of reg. 3A was as follows :

> Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by the Treasury or by a person authorised by them or on their behalf, enter any transfer of securities in any register or book in which those securities are registered or inscribed unless there has been produced to him such evidence that the transfer does not involve a contravention of this Regulation as may be prescribed by instructions issued by or on behalf of the Treasury.

Inasmuch as the testator was resident in America, it follows that the transfers of shares which he desired to effect were prohibited by this regulation unless permission from the Treasury was obtained pursuant to the proviso to para. (1). The application to the Treasury by a non-resident for permission to sell or transfer a security had to be made on a form which was called form L. Further, on any transfer of a security the transferee had to sign a form (called form D) stating whether or not any person acquiring an interest under the transfer was "resident" for the purposes of the Defence (Finance) Regulations, 1939. This form had also to be signed by the transferor.

R. Duncan French (of R. Duncan French & Co.) communicated with Toon with reference to the testator's intended transfer of 1,058 ordinary and 280 preference shares of Liverpool Borax, Ltd., to the Cavendish Trust, and Toon sent to French the certificate for the 280 preference shares, and informed him that the Putney branch would also send the certificate for the ordinary shares as soon as possible as a prior transfer was in course of registration—by which Toon was intending to refer to the transfer of the 2,000 ordinary shares to Sydney Fry. In the meantime French, acting on the instructions of the directors of the Cavendish Trust, had the transfer to that company stamped £24, being £1 per cent. on the aggregate value of £2,396, treating the ordinary shares as of the value of £2 per share and the preference shares as worth par. The testator had stated that that was the value of the shares respectively in the letter which he had sent to R. Duncan French & Co., accompanying the transfer to the Cavendish Trust. French deferred forwarding the stamped transfer to Liverpool Borax, Ltd., for registration because of the communication from Toon concerning the certificate for the ordinary shares to which I have just referred. On Feb. 24, 1941, he did send the said stamped transfer to Liverpool Borax, Ltd., together with the certificate for the preference shares on hearing from the Putney branch that they had sent the share certificate for 3,058 ordinary shares to Liverpool Borax, Ltd. On Feb. 25, 1941, the secretary of Liverpool Borax, Ltd., wrote to French acknowledging receipt of the said transfer to the Cavendish Trust and stating that it would be placed before the directors at their next meeting. On Mar. 12, 1941, the secretary of Liverpool Borax, Ltd., wrote again to French saying that it would be necessary for form D to be completed by the transferor and transferee under the Defence (Finance) Regulations, 1939, and that, as the testator was a non-resident, it would also be necessary to obtain a licence from the Treasury for the transfer of the shares. French immediately communicated with the Liverpool branch of Barclay's Bank, Ltd., which he knew had acted for the testator, and on behalf of the Cavendish Trust requested them to complete form D both on behalf of the Cavendish Trust and on behalf of the testator. The Liverpool branch accordingly did so on Mar. 24, 1941. The form, as completed by them, stated that the persons who directly or indirectly had any interest in the 1,058 ordinary shares and 280 preference shares in question were not all residents for the purposes of the said regulations, but that the persons who would have an interest in the said shares by virtue of the transfer thereof were all residents for such purposes. About the same time, the Liverpool branch of the said bank completed on behalf of the testator a form L with respect to the said 1,058 ordinary shares and 280 preference shares, the transaction being therein stated to be a gift. This form included both the said ordinary shares and the preference shares in the application for permission to sell. French sent this form and the said form D to the Putney branch with instructions to send them to the Securities Control Department of the Bank of England. Accordingly, a representative of the stock exchange branch of the said bank attended at the Securities Control Department and was told that the said form L could not be accepted as it dealt with both preference and ordinary shares and that a separate form for each class of share was required. Subsequently, the said form L was altered so as to relate to preference shares only and a form L relating to the 2,000 ordinary shares to be transferred to Sydney Fry was altered so as to cover all the 3,058 ordinary shares. This last mentioned form L (which is exhibit "R.D.F.4"), as hereinafter appears, was sent out to the testator in America and he signed it himself. The consideration for the sale of the ordinary shares was originally expressed to be £4,000, but this was altered to "nominal."

Robertson, in his affidavit, states that it is not possible after this lapse of time to state definitely whether or not exhibit "R.D.F.4" was re-exhibited to the Bank of England, but he assumes that it was because, immediately following the communication to the Bank of England of the testator's replies to the questionnaire next mentioned, statutory declarations concerning the circumstances of all the transfers were called for. The representative of the said stock exchange branch had already been informed by the said department that certain information regarding the proposed transfers to the Cavendish Trust and to the defendant Sydney Fry was required, and, as this information could only be furnished by the testator, the Putney branch sent to him a memorandum asking certain questions, which memorandum was received back by the Putney branch with the testator's replies on Sept. 23, 1941. The testator had written upon this memorandum certain comments in which he made it clear that the proposed transfers both to Sydney Fry and to the Cavendish Trust were intended by him to be gifts. He returned the memorandum to the Putney branch together with a letter dated Sept. 8, 1941, and written from Florida. In his letter the testator said:

> I have given these shares to Sydney Fry and Cavendish Investment Trust many months and months ago so please get transfers completed, or, failing that, hand them the signed transfers with the scrip, and they can hold them.

The memorandum and the testator's replies were submitted by the stock exchange branch to the said department, which then required a statutory declaration to be made on behalf of the Cavendish Trust, and, on Oct. 7, 1941, the Putney branch wrote to the Cavendish Trust so informing them and inclosing the necessary form of declaration. By a resolution of the directors of the Cavendish Trust passed on Oct. 10, 1941, the defendant, Mrs. Gee, was appointed to make this statutory declaration on their behalf and she did so on Oct. 12, 1941. This declaration was to the effect that 1,058 ordinary and 280 preference shares of Liverpool Borax, Ltd., had been offered to the Cavendish Trust and that, if they were accepted, the Cavendish Trust should thereby become the sole and absolute owner of the shares and no other person would have any interest therein and that the said shares would not have been acquired by the company by virtue of any contract or option or arrangement of any kind under which the company should have agreed or might be required to sell back or re-transfer the said shares or similar securities or make any payment or give any other consideration for the said shares. The said resolution and declaration were sent to the Putney branch who did not, however, receive the same until after the testator's death, which occurred on Oct. 22, 1941. Consequently, no further steps were taken by the bank to obtain a licence for the said transfer in favour of the Cavendish Trust.

Certain further facts require to be stated with regard to the 2,000 ordinary shares intended to be transferred to the defendant Sydney Fry. On Dec. 17, 1940, the Putney branch sent the said transfer (which had been executed by Sydney Fry) to the registrar of Liverpool Borax, Ltd., for registration. They also sent to Liverpool Borax, Ltd., at a later date, the certificate for the 3,058 ordinary shares. On Dec. 20, 1940, Liverpool Borax, Ltd., returned the transfer to the Putney branch stating that it would be necessary to obtain the consent of the Bank of England thereto and that form D would be required to be completed both by the transferor and transferee. On Jan. 2, 1941, a form D and a form L were sent by the Putney branch to the testator in America for signature and were subsequently returned signed by him. This form D and a declaration were signed by the defendant Sydney Fry and on Mar. 20, 1941, the said transfer (with forms D and L and the said declaration) was returned to Liverpool Borax, Ltd., for registration. The said form L was returned to the Putney branch by Liverpool Borax, Ltd., in order that application might be made to the Bank of England. On Sept. 26, 1941, the said stock exchange branch sent a form of statutory declaration to the Putney branch which the said department of the Bank of England required in connection with the 2,000 shares and the Putney branch sent this to the defendant Sydney Fry on Sept. 27, 1941. This statutory declaration, duly made on Oct. 12, 1941, but unstamped, was returned to the stock exchange branch by the Putney branch on Oct. 24, 1941. This was after the death of the testator and consequently the Putney branch took no further steps to obtain a licence for the said transfer to the defendant Sydney Fry.

The question which I have to determine, upon the facts as above related, is whether the defendants Sydney Fry and the Cavendish Trust are entitled to call upon the plaintiffs to co-operate with them in obtaining legal and beneficial possession of the shares which the testator was minded to transfer to them. In considering this question, it was conceded on their behalf that they are to be regarded as volunteers, for no consideration passed, or was ever intended to pass, from them to the testator. The case is accordingly one where a person, having formed the intention to make a gift, dies before that intention has been fully and completely implemented. The law generally applicable to such a position was stated by Turner, L.J., in *Milroy* v. *Lord* (1) as follows (4 De G.F. & J. 264, at p. 274):

> I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I

understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

As the testator intended the gifts now in question "to take effect by transfer," it follows from these observations of TURNER, L.J., that no question as to the creation of a trust in favour of the donees can arise, and, indeed, no argument so based was advanced on their behalf.

Sydney Fry and the Cavendish Trust clearly had not acquired, at the date of the testator's death, the legal title to the shares which they now claim, because the transfers had not been registered by Liverpool Borax, Ltd. Had they, however, arrived at the position which entitled them, as against that company, to be put on the register of members? Had everything been done which was necessary to put the transferees into the position of the transferor? If these questions, which are suggested by *Roots* v. *Williamson* (2) could be answered affirmatively, the transferees would have had more than an inchoate title; they would have had it in their own hands to require registration of the transfers. Having regard, however, to the Defence (Finance) Regulations, 1939, it is impossible, in my judgment, to answer the questions other than in the negative. The requisite consent of the Treasury to the transactions had not been obtained, and, in the absence of it, the company was prohibited from registering the transfers. In my opinion, accordingly, it is not possible to hold that, at the date of the testator's death, the transferees had either acquired a legal title to the shares in question, or the right, as against all other persons (including Liverpool Borax, Ltd.) to be clothed with such legal title.

As no question of trust arises, I must next consider whether there had been a complete gift of an equitable interest in the shares. As to this, the argument for the transferees was put on more than one ground. It was said that the testator executed documents which were appropriate to the subject-matter of the gifts, *viz.*, share transfers; that these documents, being under seal, were irrevocable; that he did everything he could, and that was necessary for him to do, to divest himself of his legal and equitable interest in the shares in favour of the transferees; and that, even if he failed to succeed in his purpose so far as the legal title was concerned, he must be regarded as having passed to them his equitable interest in the shares. In *Re Williams* (3) WARRINGTON, L.J. (adopting the language of TURNER, L.J., in *Milroy* v. *Lord* (1)), said ([1917] 1 Ch. 1, at p. 8):

> Claiming as she does as a volunteer and alleging that the assignor made this gift to her, she can only succeed if she can show that the assignor did everything which according to the nature of the property comprised in the assignment was necessary to be done in order to transfer the property and render the assignment binding upon him.

This, say the transferees, they have succeeded in showing in the present case.

In illustration of the principle, they refer to such cases as *Ellison* v. *Ellison* (4) and *Donaldson* v. *Donaldson* (5) as establishing that, in an assignment of an equitable interest in property, the validity and effect of the assignment as between assignor and assignee is not affected by the absence of notice to the trustees in whom the property is vested. In further illustration, I was referred to *Holt* v. *Heatherfield Trust, Ltd.* (6), in which it was recognised that where there is an absolute assignment of a debt, the absence of notice to the debtor does not affect the efficacy of the transaction as between the assignor and assignee. ATKINSON, J., said ([1942] 1 All E.R. 404, at p. 407):

> Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment . . . it seems beyond argument that the absence of notice does not affect the efficacy of the transaction as between assignor and assignee.

So here, it is contended, the absence of registration of the share transfers does not affect the efficacy of the transaction as between assignor and assignee, and the transactions must be treated as complete assignments of the testator's equitable interest in the shares. Now, I should have thought it was difficult to say that the testator had done everything that was required to be done by him at the time of his death, for it was necessary for him to obtain permission from the Treasury for the assignment and he had not obtained it. Moreover, the Treasury might in any case have required further information of the kind referred to in the questionnaire which was submitted to him, or answers supplemental to those which he had given in reply to it ; and, if so approached, he might have refused to concern himself with the matter further, in which case I do not know how anyone could have compelled him to do so. Apart, however, from considerations of this kind, it appears to me that the Defence (Finance) Regulations, 1939, reg. 3A, prevents me from giving effect to the argument, however formulated, that at the time of the testator's death a complete equitable assignment had been effected. The interest in the shares so acquired by the assignees would indubitably be an "interest in securities," within the meaning of reg. 3A ; and, inasmuch as they are prohibited from acquiring such an interest except with permission granted by the Treasury, this court cannot recognise a claim to such an interest where the consent of the Treasury was never given to its acquisition. The assignment and acceptance of the interest would both be equally incapable of recognition in the absence of Treasury sanction, and that sanction was never in fact obtained ; it might indeed (although the probabilities are certainly otherwise) never have been forthcoming at all.

An argument—designed to avoiding the consequences of reg. 3A—was then urged by Mr. Droop, on behalf of one of the claimants. This argument was, as I understood it, as follows. The testator was at all material times domiciled in the State of Florida. Neither the law of that State nor the law of New Jersey (where he executed the share transfers) prohibited the assignment by the testator of his full equitable interest in the shares in question. Such an assignment might be prevented from receiving any effect in this country by reason of the Defence (Finance) Regulations, 1939, but those regulations had no operation either on the conscience or on the proceedings of any person domiciled in Florida or taking action in New Jersey. It was accordingly open for any person so domiciled or taking action to assign his equitable interest in the shares subject to a condition, *viz.*, that the assignee should obtain permission from the Treasury to acquire that interest. This, says Mr. Droop, is how the acts of the testator should be regarded, *viz.*, as assignments, effective and valid by the law of the domicil and of the *lex loci actus*, of his equitable interest but conditional upon the assignees obtaining the requisite permission to enjoy the fruits of the assignments ; and, if such permission were refused, then the assignments must be regarded as nugatory *ab initio* and for all purposes. As an essential part of the argument, it is said that no effective equitable interest became vested in the assignees at all until the Treasury permission was obtained.

Counsel for the plaintiffs was prepared to agree, for the purposes of the argument, that the law of the States of Florida and New Jersey was as suggested by Mr. Droop. Even so, however, it is not, I think, possible for this argument, notwithstanding its ingenuity, to succeed. Assuming that, had the testator been so minded, he could by appropriate means have created the somewhat nebulous interests and highly artificial position involved in the argument of Mr. Droop, and conferred on his son and the Cavendish Trust equitable interests in the shares which had no effective existence in this country until Treasury sanction was obtained, I am bound, nevertheless, to look to what he did in fact and to the legal results which flowed therefrom. And what he did in fact cannot, in my judgment, be regarded as having the effect which Mr. Droop invites me to attribute to his actions. What the testator did was to sign two documents of the kind appropriate to the intention to pass, and to pass immediately, his entire legal and beneficial interest in the shares in question. In other words, he executed two share transfers in the ordinary form. He, or his agents, also performed certain other acts, referred to in the evidence, with a view to obtaining registration of the transfers. It seems to me that I must regard these share transfers and other acts as either passing an interest in the shares to the transferees or not. If they did not, then there was not a complete gift of any interest in the shares at the testator's death. If, on the other hand, they did pass an interest, then such interest had no element of contingency or futurity about it, but was a present and effectual equitable interest and the acquisition thereof by the assignees was in violation of reg. 3A ; and a claim to it cannot, as I have already said, be entertained by this court. The argument, accordingly, in my judgment, cannot, on any view, sustain the claims which it is sought to base upon it and it is not open to me to accept it.

In the result, I have arrived at the conclusion (with regret, as I frankly confess) that there is no principle which enables me to hold that Sydney Fry and the Cavendish Trust are entitled to the shares which the testator undoubtedly desired them to have.

Declaration accordingly.

A Solicitors: *Linklaters & Paines* (for the plaintiffs); *Ellis, Bickersteth, Aglionby & Hazel* (for the testator's son and another defendant); *Hancock & Scott* (for the other defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

B BOWMAKER LTD. *v.* WYCOMBE MOTORS LTD.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), May 30, 1946.]

Lien—Particular—Motor repairer—Motor car let on hire-purchase agreement—Repairs at request of hirer after determination of agreement—No lien against owner.

C *Hire-purchase—Motor car—Repairs at request of hirer after determination of agreement—No lien against owner.*

By a hire-purchase agreement, dated Aug. 1, 1945, the respondents let a motor car to one P., on the terms, *inter alia*, that P. was to keep the vehicle in good order, repair and condition at his own expense, and was not to be deemed to have any authority to pledge the owner's credit for repair D of the vehicle or to create a lien thereon in respect of such repairs. On Dec. 12, 1945, P. being then in arrear, the respondents, in accordance with the agreement, terminated the agreement by letter, and on Dec. 19, 1945, issued a writ against P. for the arrears and claiming the return of the vehicle. On Dec. 27, 1945, P., who had disregarded the notice, met with an accident and left the car on that date at the appellants' garage for repairs. On Jan. 30, 1946, judgment was obtained against P. by the respondents, who E obtained leave to proceed, and on Mar. 1, 1946, the sheriff levied execution at the appellants' garage in respect of that judgment. The appellants claimed an artificer's lien for the amount of the repairs, and an interpleader by the sheriff was filed and the hearing of the issue took place. The master decided that the lien could not prevail:—

HELD: the authority to the hirer, P., had been duly determined under F the terms of the agreement, and at the time when he took the car to the appellant's garage, he had no more right to the car than a thief would have; in those circumstances the appellants could not establish a lien on the car against the owners, who were no parties to placing it with them for repairs.

Per LORD GODDARD, L.C.J.: An arrangement between the owner and the hirer that the hirer shall not be entitled to create a lien does not affect G the repairer. A repairer has a lien although the owner has purported to limit the hirer's authority to create a lien in that way. Once an artificer exercises his art upon a chattel, the law gives him a lien upon that chattel, which he can exercise, against the owner of the chattel, if the owner of the chattel is the person who has placed the chattel with him or has authorised another person to place the chattel with him.

[**EDITORIAL NOTE.** This case is of importance to garage proprietors and to those H letting out cars on hire-purchase terms. It is clear on authority that the common law lien arising on execution of repairs to a car is only enforceable against the owner if the hire purchaser had authority to send the car for repair, and that such authority is normally implied while the hirer is in lawful possession of the car. When the hire purchase agreement has terminated, however, the possession is against the will of the owner and it is held that a repairer cannot exercise a lien for repairs which the hirer has no longer any authority to have executed.

FOR PARTICULAR LIEN FOR WORK DONE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 563-566, paras. 711-713; and FOR CASES, see DIGEST, Vol. 32, pp. 247-252, Nos. 311-381.]

Cases referred to :

*(1) *Buxton* v. *Baughan* (1834), 6 C. & P. 674 ; 32 Digest 220,*48*.

*(2) *Singer Manufacturing Co.* v. *London & South Western Ry. Co.*, [1894] 1 Q.B. 833 ; 8 Digest 220, *1398* ; 63 L.J.Q.B. 411 ; 70 L.T. 172.

*(3) *Green* v. *All Motors, Ltd.*, [1917] 1 K.B. 625 ; 3 Digest 95, *255* ; 86 L.J.K.B. 590 ; 116 L.T. 189.

*(4) *Albemarle Supply Co., Ltd.* v. *Hind & Co.*, [1928] 1 K.B. 307 ; Digest Supp. ; 97 L.J.K.B. 25 ; 138 L.T. 102.

*(5) *Keene* v. *Thomas*, [1905] 1 K.B. 136 ; 3 Digest 95, *254* ; 74 L.J.K.B. 21 ; 92 L.T. 19. A

APPEAL by the claimant from an order of a master on an interpleader issue which raised the question as to whether a repairer had an artificer's lien for the price of repairs on a motor car, let under a hire-purchase agreement which, on default by the hirer, had been duly determined. The facts are fully set out in the judgment of LORD GODDARD, L.C.J. B

Stephen Chapman for the appellants.

A. C. Longland, K.C., and *B. B. Stenham* for the respondents.

LORD GODDARD, L.C.J. : This is an appeal from a decision of a master given on an interpleader issue which arises in this way : On Aug. 1, 1945, the plaintiffs in the issue, Bowmakers, who are people who finance hire purchase agreements, and who for this purpose it is agreed were the owners of a particular motor car, entered into a hire purchase agreement with a man called Payne, C under which they let to him on hire with a view to his ultimate purchase a certain motor car upon the terms of an agreement, one of which was that the hirer was :

> To keep the vehicle in good order, repair and condition, and to be responsible for all risks of whatsoever kind, fire included. If and whenever any repairs are required they shall be carried out at the expense of the hirer provided that the hirer shall not have or be deemed to have any authority to pledge the owner's credit for the repair of the vehicle or to create a lien thereon in respect of such repairs or for any other D purpose or thing whatsoever.

It was also provided that if the hirer made any default the owners could forthwith retake possession of the vehicle and terminate the agreement. Then there was a further provision :

> A demand by the owners for the return of the vehicle given orally or by their duly appointed representative or in writing left at or sent by prepaid post addressed to the E hirer at his last known address or the address set out in the preamble to this agreement shall be sufficient notice of termination of this agreement by the owners.

On Dec. 1, 1945, £43, part of the hire, was in arrear, and on Dec. 12, 1945, the plaintiffs terminated the agreement by letter of that date, and on Dec. 19, they issued a writ against Payne for the arrears, claiming the return of the vehicle. On Dec. 27, Payne, who had disregarded the notice that was given to him and was wrongly at that date in possession of the vehicle, had met with an F accident and left the car on this date at the defendants' garage for repairs, and the repairs amounted to £115 15*s*. 0*d*. On Jan. 30, 1946, judgment was obtained against Payne by the plaintiffs in the action, who obtained leave to proceed, and on Mar. 1, the sheriff of Buckingham levied execution at the defendants' garage in respect of that judgment. They claimed to hold the car on an artificer's lien for the amount of the repairs, and an interpleader by the sheriff was filed, and the hearing of the issue took place. The master decided G that the lien could not prevail, and in my opinion he was clearly right.

The position was that at the date when this car was left at the garage, Payne had no right or title to the car whatsoever ; he was holding the car against the will of the true owners. First of all, let us see what the position is with regard to liens generally created on the property of what I may call third persons. The first case to which I may refer is the well-known decision in *Buxton* v. H *Baughan* (1), in which the facts were these :

> A. put a phaeton into the possession of M. for him to paint it and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months :—*Held :* B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. placed it there by the authority of A.

ALDERSON, B. summing up to the jury, stated the law in this way, (6 C. & P. 674 at p. 675) :

> The defendant cannot set up a bargain made by Mackenzie, unless Mackenzie had authority from the plaintiff to make such a bargain. If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods. The fact that the plaintiff's servant was three months before he could find out where the phaeton was does not look much like the plaintiff having authorised a bargain to be made for the defendant to keep it at hire. A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me, or between him and some agent authorised by me.

So the lien in that case failed.

With regard to hire purchase agreements, the law has been extended, as I understand it, to this extent, that if the owner of a chattel lets it to another on a hire purchase agreement, he puts the hirer into possession of the vehicle with authority to use it as though it were his own during the time that the hiring exists, and to use it in all manners necessary for his enjoyment. Accordingly, he may deal with it in such ways as are necessary for its use and enjoyment.

In *Singer Manufacturing Co.* v. *London & South Western Ry. Co.* (2), a man who was in possession under a hire purchase agreement of a Singer sewing machine placed it in a railway cloak room during the time that the hiring was in existence and, the hiring having come to an end, the owners of the machine claimed it from the railway company, who set up a warehousemen's lien, and COLLINS, J., in giving his judgment in that case put it in this way ([1894] 1 Q.B. 833 at p. 837):

> I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloakroom if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine, who had not determined the hire purchase agreement at the time that those rights were acquired by the railway company.

So, too, it has been held in the cases to which our attention has been called, more especially *Green* v. *All Motors Ltd.* (3) and *Albemarle Supply Co., Ltd.* v. *Hind & Co.* (4), that where it is necessary that a motor car should be kept in running condition and repair during the time a hire purchase agreement is current and valid, the hirer has a right to take it and get it repaired and, if he takes it and gets it repaired, the repairer can exercise an artificer's lien upon it because at the time when the motor car was left with him, he, the hirer, had got the right, whether you call it by implied authority or by legitimate authority, to use that car in all reasonable ways, and among those ways is a right to get the car repaired and kept in running order. Therefore he is placing it with the repairer with the consent of the owner and the artificer's lien on that account will prevail against the owner.

But these cases have also held, and quite understandably, that an arrangement between the owner and the hirer that the hirer shall not be entitled to create a lien, does not affect the repairer. A repairer has a lien although the owner has purported to limit the hirer's authority to create a lien in that way. That seems to me to depend upon this: Once an artificer exercises his art upon a chattel, the law gives the artificer a lien upon that chattel, which he can exercise, against the owner of the chattel, if the owner of the chattel is the person who has placed the goods with him or has authorised another person to place the goods with him. If I send my servant with my chattel to get it repaired, the artificer will get the lien which the law gives him on that chattel although I may have told my servant that he is not to create a lien. The fact is that the lien arises by operation of law because the work has been done upon it.

In this case, the authority to the hirer had been duly determined under the terms of the agreement, and at the time when the hirer took the car to Wycombe Motors, Ltd., he had no more right to the car than a thief would have. He had been placed in possession of the car. The consent of the owner of the car to the bailment had ceased, and if the hirer converted it to his own use by selling it, it seems to me that he would have been guilty of larceny, though, as has been pointed out during the course of the argument, every time he drove the car he was driving it without the consent of the owner and was committing an offence under the Road Traffic Act.

In these circumstances, it seems to me impossible to say that Wycombe Motors, Ltd., can establish and insist on a lien against the owner of the car, who was no party to placing it with them, and indeed it was placed with them against their rights. The case is no doubt of some importance to people who finance hire purchase transactions or let out cars on hire purchase terms, A and it is also of importance to garage proprietors who do repairs. It is well-known that a very large number of cars are on hire purchase at the present time. It is also very well-known, unfortunately, that a great many cars are stolen at the present time; and it is one of the risks which a garage proprietor who does repairs—one of the risks of his trade—that he may find either because a hire purchase agreement has been terminated or for some other reason, whether by reason of a theft or not, the person who brings the car has no right to deposit B the car for repairs; and he may find he has no lien and cannot enforce his rights against the car or recover the money from the thief or person in illegal possession of the car.

It seems to me impossible to hold that the common law lien can have prevailed against the owner of the car when the person who placed the car for repairs had no right to do so. In my opinion, the Master's decision was right, and this appeal fails. C

HUMPHREYS, J.: I agree, and it is only because the case has been said to be of some importance that I add that in my opinion the proposition contended for by counsel for the appellants has been decided in each of several authorities all of which are binding upon us. I turn particularly to the judgment of BANKES, L.J., in *Green* v. *All Motors, Ltd.* (3), in which he observed as follows ([1917] 1 K.B. 625, at p. 632): D

> In *Keene* v. *Thomas* (5) the point, as stated by LORD ALVERSTONE, C.J., was "whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain." That is the first point to be decided. The question, therefore, is whether on Oct. 31, when Price [for whose name Payne may be substituted] made the bargain with the defendants for the repair of the motor car, he had authority from the plaintiff to do so. In my opinion, he clearly had authority unless the plaintiff had determined the hire purchase agreement before that date. E

Agreeing with that view, SCRUTTON, L.J., observed (*ibid.*, at p. 633):

> Accordingly the hirer had by contract a duty as well as a right, until the hire was terminated, to have the car repaired, with the ordinary consequences of giving the repairer a lien on the car for the proper cost of the repairs.

He then posed the question for decision in that case as being: F

> Had the bailment been determined when the order to do the repairs was given by the hirer?

On the facts of this case it seems to me to be unarguable that at the time when the order to do the repairs was given, there was no authority in Payne to give any such order.

G

SINGLETON, J.: I am of the same opinion. Under the hire purchase agreement the owners had power in certain events to terminate the hiring immediately. They did that on Dec. 12, by notice in writing. From that time the hirer had no right to use the car, still less had he a right to pledge anyone else's credit for the incurring of expense upon the car.

The authorities cited to us by counsel for the appellants show that all of them really are decided upon the question as to whether or not the hirer had authority. H In *Keene* v. *Thomas* (5) it was shown that in the circumstances of that case the hirer had authority to send the car to be repaired and, therefore, the plaintiff's lien was good not only against the hirer but also against the plaintiff. In the circumstances of this case, the hirer had no authority to send the motor car to be repaired, and the claim to a lien accordingly fails.

I would only add this, that the argument for the appellants seems to me to be an effort to extend the right to a lien beyond anything which has ever been contemplated. That is shown, as I think, by the two passages just referred to by HUMPHREYS, J., in the judgments of BANKES, L.J., and SCRUTTON, L.J., in *Green* v. *All Motors, Ltd.* (3).

Appeal dismissed with costs.

Solicitors: *L. Bingham & Co.* (for the appellants); *Peacock & Goddard*, agents for *W. Parkinson Curtis*, Bournemouth (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HEMSWORTH *v.* HEMSWORTH.

[KING'S BENCH DIVISION (Denning, J.), January 23, 24, 25, 1946.]

Income Tax—Deduction of tax—Annual payments—Allowance to wife under separation deed—Necessity for calculation and notification of deduction—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 19 (1).

Husband and Wife—Separation agreement—Payments without deduction of income tax—Arrears—Payments discharged only in respect of amount actually paid—Tax deductible on balance only—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 19 (1).

In order to exercise his right of deduction under the Income Tax Act, 1918, All Schedules Rules, r. 19 (1), the person making any payment or part payment in pursuance of his obligation must make a calculation in order to ascertain the amount of the deduction and of the residue, and must then notify the other person of the deduction and pay him the residue.

[**EDITORIAL NOTE.** This case decides that before making a deduction in respect of income tax from payments under a separation deed it is necessary to notify the wife of the amount of the deduction upon the basis of the decision in *Taylor* v. *Taylor* (1). Reference may be made to *Johnson* v. *Johnson* ([1946] 1 All E.R. 573), in which LORD MERRIMAN, P., discusses the scope of *Taylor* v. *Taylor* (1), and finds that it does not justify a husband in making deductions for arrears of tax which will result in the wife being completely without maintenance.

AS TO DEDUCTION OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 237, para. 477; and FOR CASES, see DIGEST, Vol. 28, pp. 72, 73, Nos. 381-391.]

Case referred to:

*(1) *Taylor* v. *Taylor*, [1937] 3 All E.R. 571; [1938] 1 K.B. 320; Digest Supp.; 107 L.J.K.B. 340.

ACTION by a wife against her husband for arrears of instalments alleged to be due under a separation deed dated Apr. 16, 1938, by which the husband agreed to pay to the wife £365 a year, subject to a proportionate reduction in the event of a reduction in his income, and the wife undertook as a condition precedent to the husband's obligation to pay, that she would not annoy him. The husband paid the full amount, without deduction of income tax, until June, 1940. On that date the husband's solicitors wrote saying that, owing to a diminution in the husband's income, the amount payable to the wife was £22 a month, which in January, 1941, was reduced to £11 a month, and in July, 1941, to £2 10*s.* a month. In fact the husband's gross income was not reduced. After a temporary increase, in June, 1942, to £5 a month, the husband, in Nov., 1942, stopped the allowance altogether and made no further payments. The husband's defence was that the condition precedent not to annoy him had been broken by the wife. DENNING, J., found that the wife had continued to perform and observe the stipulations on her part to be observed in the deed and that the sums were payable subject to arriving at a calculation.

The extract from the judgment deals solely with the question of quantum and income tax.

G. R. Mitchison for the plaintiff.

Hon. T. G. Roche for the defendant.

DENNING, J.: . . . Some of the observations in *Taylor* v. *Taylor* (1) are not easy to reconcile with the actual decision in the case, but upon the true construction of the Income Tax Act, 1918, All Schedules Rules, r. 19 (1), coupled with the decision in *Taylor* v. *Taylor* (1), I am of opinion that in order to exercise his right of deduction the person making any payment or part payment in pursuance of his obligation must make a calculation in order to ascertain the amount of the deduction and of the residue, and must then notify the other person of the deduction and pay him the residue. Unless such notification is made, the person to whom the payment is made has no information on which to allow such deduction and cannot be called on to allow it, and unless the person paying has made such a calculation he is not acquitted and discharged of so much money as is represented by the deduction, nor has he paid the residue. If the person pays without any such notification it must be taken to be a payment made without deduction and to be a discharge only in respect of the amount actually paid; and when the creditor sues for the balance which remains due over and above the sums actually paid, the debtor, when he comes to pay that balance, is entitled to deduct tax on that balance and pay the residue. That right only arises on payment, but *Taylor* v. *Taylor* (1) shows that judgment should be entered only for the residue. In this particular case the debtor made payments without making any deduction and without making any notification to the creditor on the matter. The payment which he made I find only discharged the debt in respect of the amounts actually paid. In regard to the judgment in the case, tax can be deducted on the balance which is sued for and only on that balance. In the result, I hold that the calculation submitted by the plaintiff is correct and judgment should be entered for the sum of £474 19*s*. 8*d*., with costs.

Judgment for the plaintiff with costs.

Solicitors: *Freke Palmer, Romain & Romain* (for the plaintiff); *Andrew, Purves, Sutton & Creery* (for the defendant).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

Re HORN, *deceased*. WESTMINSTER BANK LTD. *v*. HORN.

[Court of Appeal (Lord Greene, M.R., Morton and Somervell, L.JJ.), May 1, 2, 1946.]

Wills—Hotchpot clauses—Advances—Money lent "to be taken in or towards satisfaction" and "brought into hotchpot"—Estate insufficient to provide for all legacies—Whether clause operating as discharge of debt.

The testator, during his lifetime, lent to his son, the appellant, a considerable sum of money. His will contained a clause which provided that all money lent to any child should be taken in or towards satisfaction of the share of such child or his or her issue taking by substitution in his residuary estate and should be brought into hotchpot and accounted for accordingly. The estate was insufficient to provide for all the legacies, the appellant disputed his liability to discharge his debt to the estate and relied on the above-mentioned clause, which, he said, on its true construction, operated as a discharge of the debt:—

Held: (i) there being no residue, there was no room for the operation of the clause, because it was a clause which was to come into operation only on the occasion stated and for the purpose stated, *viz.*, when residue was being distributed and for the purpose of equalising the distribution.

(ii) the words "taken in or towards satisfaction" meant the same thing as "brought into hotchpot" and were not words of discharge but words of charge.

(iii) the clause was an ordinary hotchpot clause and there could not be extracted from it any words sufficient to release or forgive the debt, and, in the events which had happened, the appellant was bound to make good to the estate the sum in question.

[**EDITORIAL NOTE.** This case deals with the construction of a hotchpot clause which had been adapted to meet the case of outstanding loans instead of, as in *Re Cosier* (1), gifts for advancement. There was no residue upon which the hotchpot clause could operate, and it is argued that the terms of clause amount to a discharge of the debt to the estate. This argument the court rejects.

As to Hotchpot Clauses in Wills, see HALSBURY, Hailsham Edn., Vol. 34, p. 424, para. 470; and for Cases, see DIGEST, Vol. 44, pp. 1238-1250, Nos. 10697-10776.]

Cases referred to :

*(1) *Re Cosier, Humphreys* v. *Gadsden,* [1897] 1 Ch. 325 ; 66 L.J.Ch. 236 ; 76 L.T. 31 ; *affd., sub nom. Wheeler* v. *Humphreys,* [1898] A.C. 506 ; 44 Digest 1241, *10719.*
*(2) *Re Trollope, Game* v. *Trollope,* [1915] 1 Ch. 853 ; 44 Digest 1242, *10722* ; 84 L.J.Ch. 553 ; 113 L.T. 153.
(3) *Limpus* v. *Arnold* (1884), 15 Q.B.D. 300 ; 44 Digest 531, *3479* ; 54 L.J.Q.B. 85.
(4) *Re Schweder, Oppenheim* v. *Schweder* (1893), 37 Sol. Jo. 249 ; 23 Digest 431, *5021.*

APPEAL by the defendant from an order of COHEN, J., dated Apr. 17, 1946. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. N. Gray, K.C., and *E. G. Eardley-Wilmot* for the appellant.

Andrew Clark, K.C., and *Gwyn Rees* for the respondents.

J. V. Nesbitt for the trustees.

LORD GREENE, M.R. : If it had not been for certain observations in previous cases, I myself should not have thought that the present question was really open to argument. The testator left surviving him four children, two sons and two daughters. The benefits that he conferred upon his children by the will were of this nature : First of all, by cl. 4 he gave certain legacies of large amounts, two of them settled on the daughters and their issue, and two settled on the sons and their issue. There was also another small legacy for the benefit of the children of one of the daughters. The son's legacies were £45,000 each and those were settled. Then, in cl. 5, he provided that if his estate should not be sufficient to provide in full for all the legacies, the legacies bequeathed by cl. 3—with which we are not concerned—and the daughters' settled legacies were all to rank *pari passu* and in priority to the settled legacies of the two sons, which were to abate accordingly. By cl. 12 of the will, he bequeathed the remainder of his property on trust to sell, call in and convert in the usual way and to pay the funeral and testamentary expenses and pay or provide for the legacies. As to the residue, under cl. 14 he bequeathed it in equal shares to those of his four children who survived him and the issue *per stirpes* of any who predeceased him. In point of fact, all the four children did survive him. Then in cl. 15 there is this provision, which I will read in full :

> All money which I have lent or covenanted or agreed to lend or which I may hereafter lend or covenant or agree to lend to any child of mine on his or her marriage or otherwise for his or her advancement or establishment in life and the interest on all such money shall in default of any direction to the contrary in writing under my hand be taken in or towards satisfaction of the share of such child or his or her issue taking by substitution as aforesaid in my residuary estate and shall be brought into hotchpot and accounted for accordingly.

The facts are quite short. The estate was insufficient to provide for all the legacies. In his lifetime, the testator had lent to his son Geoffrey, the present appellant, a sum of £13,700, carrying interest at 5 per cent. It has been assumed for the purpose of the discussion that this was a loan of the nature specified in cl. 15 of the will, namely, a loan on marriage or for advancement or establishment in life. Some question was raised as to whether, on the facts, that was so, but having regard to the view that we take of the construction of the will, we need not go into that. Now, the only amount available for the two £45,000 legacies to the two sons, was the sum of £43,000 ; that is to say, there was enough in the estate to provide roughly for a half of each of those legacies. Accordingly, if, as COHEN, J., has held, Geoffrey remains liable to pay into the estate the amount of his loan, the whole of what he pays in will go towards filling up the deficiency in these settled legacies ; there was not, and in no event can there ever be, any residue left for division under cll. 14 and 15 of the will.

In those circumstances the son, Geoffrey, disputes his liability to discharge his debt to the estate and relies on cl. 15 of the will, which he says, on its true construction, operated as a discharge of the debt. The words on which he relies are the words which say that the money lent should be " taken in or towards satisfaction of the share of such child or his or her issue taking by substitution in my residuary estate." Those words, he says, on their true construction, are words which give the debt to the debtor and, therefore, operate as a release of the debt notwithstanding that there is no residue at all.

I have said that, apart from observations in previous cases, I should have thought the answer to this question was clear. Of course, there is no set formula required for the release or forgiveness of a debt in a will ; all that is required is that the testator shall have made his intention clear. But one thing that is quite certain in this case, is that the testator has not in terms forgiven or released a debt. The release must be spelt in some way out of the direction in cl. 15, that the money lent is to be taken in or towards satisfaction of the share in the residue. It is, in my opinion—and I am speaking now without reference to the authorities—reasonably clear that you cannot concentrate on the word " taken " and say that that is a word of gift : you must read it in its context and it is quite untrue to say that the testator has said that his son shall " take " anything at all *simpliciter*. He has said " taken in or towards satisfaction of the share in the residue." That is not a direction for absolute taking, but a direction for taking in certain conditions and for certain purposes and for no other purposes at all, as it seems to me. A

In the present case there is no question, of course, of any share of residue on the facts, and it is argued by the respondents that there is no room for the operation of this clause, having regard to the position, because it is a clause which is only to come into operation on the occasion stated and for the purpose stated, namely, the occasion when residue is being distributed and for the purpose of equalising the distribution. That, in my opinion, is the correct view, but the matter must also be looked at from a rather broader angle and in relation to what has been said with regard to the meaning of those words " be taken in or towards satisfaction." Therefore, I do not rest my judgment entirely on the view that this clause cannot operate unless there is a residue. If there was even a small residue, that argument would, or might, fail to have effect and it appears to me that even if that argument be disregarded or be thought to be wrong, cl. 15 by itself does not produce the result of extinguishing the debt in any circumstances save where there is sufficient residue to enable the directions to be carried out, namely, that the amount of the money owing is to be taken " in or towards satisfaction " of the share. In other words, this must not be construed as forgiveness either in whole or in part of the loan. B C D

Now cl. 15, as it appears to me—again without reference to authority—is nothing more nor less than an ordinary hotchpot clause. It is a hotchpot clause which has been adapted to meet the case not of gifts for advancement, but of outstanding loans. It was suggested that to construe this as a mere hotchpot clause, in the case of a loan, would be really to give it no operative effect, because, in the case of a loan, the debtor would be bound in any event to bring into account, before he could take any share, the amount outstanding of his debt. As was pointed out by Morton, L.J., in the course of the argument, that cannot possibly be right in the case of the substitutional gift to issue because, apart from some such clause as this, the outstanding debt owed by a father who had predeceased the testator could not be brought into account as against the share given to his issue by substitution and, therefore, it is manifest that cl. 15 on any view was a necessary clause. E F

The argument of counsel for the appellant involved giving two totally different meanings to the two limbs of the clause, namely, the limb which says that the money owing is to be taken in or towards satisfaction, and the limb which says " shall be brought into hotchpot and accounted for accordingly." He agrees that the latter is, what I may call, an ordinary hotchpot clause, but he says that the former limb is something more and is a gift or release. In my opinion, this is merely a verbose way of expressing the ordinary hotchpot provisions and both limbs mean really the same thing. That is confirmed by the use of the word " accordingly." He is really putting it in two forms of language, one the popular language understandable by the layman, " taken in or towards satisfaction of the share," and the other the technical language understandable by a lawyer, " shall be brought into hotchpot " ; and really the two expressions mean the same thing. The words " shall be taken in or towards satisfaction " are not, in my view, words of discharge. To use the language of Sargant, J., they are words of charge. They are not saying " The debt is extinguished " at all, but they are saying how the debt is to be dealt with in the distribution of the estate. It seems to me that to read out of the word " taken " a gift or release or forgiveness of a debt would be to interpret in a forced and unusual sense words inserted *alio intuitu*. G H

One cannot shut one's eyes to the fact that the courts are sometimes disposed, very naturally disposed, to view favourably a rather strained interpretation, if that is considered necessary to achieve the overriding purpose of the will or to avoid some blatant inequality or unfairness; but it is to be observed that to construe those words in the way suggested in the present case, so far from avoiding unfairness or inequality, would in fact create it, because the result would be that the son Geoffrey would obtain in the result a far higher benefit from his father than his brother: he would get a share, for instance, in the settled legacy, or, rather, he and his family would have a settled legacy equal to that taken by his brother and his family and, in addition to that, he would be discharged from his existing liability. That seems to me to be entirely contrary to the general scope and intention of this will and I am certainly not prepared to put what I consider would be a forced construction on the words relied upon in cl. 15 when it is going to produce such a result.

Now, having said that and having approached the matter entirely without reference to previous cases, I must now say a word about the cases on which reliance is particularly placed. The appellant's sheet anchor is the case of *Re Cosier* (1), in this court. That was a case where there was a clause which, save in one respect, was practically, with immaterial differences, identical with cl. 15 in the present case. There was the same provision about certain sums being taken in or towards satisfaction of children's shares, and the direction that they should be brought into hotchpot and accounted for accordingly. As a matter of fact, that is a common form which appears frequently, and the difference between that form and that in the present case consists entirely of the fact that, instead of the sums dealt with being sums which had been given or covenanted to be given to the child, as in *Re Cosier* (1), they were here sums which were lent to the child; so that what has happened is that that particular form has been taken and used with the substitution of a reference to loan for the reference to advancements. It was a curious case. The question related to a sum of £10,000 in which, in the events which had happened, the father had a reversionary interest. He had covenanted on the marriage of his son to settle that sum and he retained a reversionary interest in it. The question was whether that sum was to be treated as part of his estate and, therefore, divisible equally between the son and the daughter under the will or whether the son was to take it as part of his share and as against a similar sum given to the daughter out of the general estate. The latter result would have produced equality between the two children; the former result would have benefited the daughter at the expense of the son. CHITTY, J., had held that the £10,000 was divisible equally between the son and the daughter. The matter came before this court and the decision of CHITTY, J., was reversed, and it was held that the £10,000 went to the son and the daughter, of course, would get the corresponding £10,000 out of the estate.

The grounds upon which this court appear to have based their judgment were that the hotchpot clause covered the whole of the £10,000, notwithstanding the fact that the son had only received a life interest in it; then, secondly, they held that upon the true construction of the hotchpot clause, the word "taken" amounted to a word of gift. There is no question, of course, in that case of release, because the matter was not a debt but was an asset of the testator, and they construed the word "taken" as being a word of gift. The word, the meaning of which we have to decide, did not arise nor anything like it, but there are certain *dicta* which have a bearing on our present question. LINDLEY, L.J., said this ([1897] 1 Ch. 325, at p. 331):

> It was contended that this is to render a hotchpot clause operative as a gift, which is not its function. But that is only a half truth, and is very misleading. A hotchpot clause in a will has always to be construed together with some other clause which is a clause of gift, and the question always is, What is the true effect of the clause of gift and of the hotchpot clause which has to be construed with it? The combined effect of the two clauses is always, so far as I know, to pass to the legatee of what is given, the testator's interest, if any, in that which is to be brought into hotchpot.

There he is referring to the combined effect of the hotchpot clause and of the gift in the will under which the residue was given equally between the son and the daughter. Then he says this:

> Take the very common case put by my brother RIGBY in the course of the argument. Suppose a father lends his son £1,000, and then bequeaths to him a share of his residuary estate, and directs that the £1,000 shall be brought into hotchpot. What is this but a gift to the son of the £1,000 as part of the share given to him?

One thing is quite clear there, to my mind, that LINDLEY, L.J., is considering, and considering only, the possible case where there is sufficient residue to enable the estate to be divided without cancelling any part of the debt, because he says:

> What is this but a gift to the son of the £1,000 as part of the share given to him ?

He treats, as I say, the combined effect of the gift and the hotchpot clause as a gift. I should have thought myself, with respect, that where a testator directs that a debtor's son shall take the debt as part of his share of residue, the release of the debt takes place not by virtue of the word "take" or of A any particular word, but by virtue of the very nature of the transaction which takes place when the accounts of the residue are settled up. The debt obviously could not survive the final distribution of the estate on the basis indicated.

RIGBY, L.J., carries the matter a little further. He says (*ibid*, at p. 333) :

> Suppose, however, that the testator has lent a child money, say £10,000 instead of giving it, and has, to make the transaction clear, taken from the child a bond for repayment. Or, suppose again, that he has lent the money to a stranger on mortgage. If B the testator says, "I declare that the money spent by me on my son's education shall be taken in or towards satisfaction of his share," it is plain that, as to that particular subject-matter, there can be no gift. In each of the other cases the £10,000 is an existing asset of the testator, available for the payment of creditors, but, subject to their claims, entirely at the testator's disposal. If then he says, "I declare that the £10,000 owing to me on bond by my son, or the £10,000 lent by me on mortgage to A, shall be taken in or towards satisfaction of my son's share under my will," it would, C in my judgment, be repugnant to common sense to say that the son was not released from the debt in the first case, and made the owner of the mortgage debt in the second. This, however, is the same thing as saying that the words operate as words of gift.

There, again, I should have thought myself that the release of the debt takes place by virtue not of the words but of the very nature of the transaction. It is said in argument that those observations of RIGBY, L.J., are intended to apply not merely to the case where the residue is ample but to the case where D the suggested release of the debt will involve an additional benefit to the son. I very much doubt whether the Lord Justice was thinking of that case at all. It seems to me much more probable that he was merely elaborating the point that he had put in argument, as referred to by LINDLEY, L.J., One thing I think, is clear, that he was construing the language of the hotchpot clause as equivalent to language of gift.

Those observations, whatever their extent may be, are, of course, only *dicta*, E and, with great respect, I am unable to follow the reasoning on which they are based, which would appear to have the effect of giving a forced construction to a word inserted *alio intuitu* for the purpose of avoiding what in that case would have been a gross inequality between two children. That was the only way which this court saw of escaping from that inequality.

The case went to the House of Lords and the House of Lords succeeded in escaping from the inequality by a totally different construction of the will. F I need not go into the details of it, but the construction that they put on the will involved no reliance on any part of the words in the hotchpot clause as amounting to words of gift. LORD MACNAGHTEN, who delivered the leading opinion, said that the hotchpot clause was in the common form ; it was a clause which is textually the same as this with the exception that one related to gifts and one related to loans. He treats it as an ordinary common form of hotchpot clause, but he says more than that. He refers to the judgment of this court G and he says ([1898] A.C. 506, at p. 510) :

> The Court of Appeal are more fortunate in finding a way of escape. By inverting the hotchpot clause they arrive at a correct result. The whole fund, they say, must be brought into hotchpot by the son. It has, therefore, to be taken towards satisfaction of his share ; the direction that it is to be so taken implies a gift, and, therefore, whatever interest the father retained in the fund is given to the son by the hotchpot clause, as RIGBY, L.J., thinks, or, as the other members of the court held, by the conjoint H operation of that clause, and the gift in the earlier part of the will.

That is his summary of the reasoning of this court and he then proceeds as follows (*ibid.*) :

> Now I must say I cannot follow this reasoning. It seems to me plain that the testator's reversionary interest in the fund cannot come under the operation of the hotchpot clause. Nothing was to be brought into hotchpot but what the testator had covenanted or agreed to give. The hotchpot clause is in the common form. The clause must have its ordinary effect.

Then he says (*ibid.*, at p. 512):

> . . . I desire to rest my judgment on the plain language of the will without putting any strained construction on any words in the hotchpot clause or giving it a peculiar or unusual effect.

Now those words of criticism, it is said, must be taken as having been directed solely to that effect given by this court to the hotchpot clause when they construed it as covering the father's reversionary interest in the £10,000. I do not agree that those criticisms are limited to that. I read them as extending to the whole of the reasoning of the Court of Appeal and it is to be observed that LORD MACNAGHTEN set out the whole of the reasoning, including the interpretation this court had put on the word "take" or "taken," and says: "I cannot follow this reasoning." That, I should have thought, meant the whole of the reasoning that he had summarised in his proceeding paragraph. I am all the more disposed to think I am right in construing the observation of LORD MACNAGHTEN in that way because, if I may say so, it seems to me that it is the result which one would have come to without any authority at all. As I have said, this appears to me to be an ordinary hotchpot clause of a rather verbose form and the words "taken in or towards satisfaction" were inserted as indicating the working and machinery of such a clause and not for the purpose of producing a result by way of gift or by way of forgiveness of an existing loan.

As I have said, *Re Cosier* (1) is the sheet anchor and I do not think that I need refer at any length to any other cases except the case before ASTBURY, J., on which reliance was placed, *Re Trollope* (2).That is a case in which it appeared very likely that the estate would be deficient and would not cover the whole indebtedness of a debtor son. The will was not precisely in this form, but it did contain a provision that the advances to the son should be taken in full or in part satisfaction of the benefits given to him under the will. That the judge construed as amounting to a release of the debt. I am bound to say, with the utmost respect, that I do not think that that case has any real bearing on the question we have to decide. The judge's reasoning does not induce me to think that the views that I have expressed on this subject are in any way wrong. He bases himself almost entirely on the observations of the Court of Appeal in *Re Cosier* (1), to which I have referred, and he treats the criticisms of those observations in the House of Lords as not really affecting the view of the Court of Appeal or their persuasiveness in the case he had to deal with. In my opinion, the judge misconstrued the effect of the criticisms of the House of Lords, which, as I read them, entirely take away from the observations in *Re Cosier* (1) any persuasive effect which those *dicta* might otherwise have had. He also, I think, placed too much weight on the earlier case of *Limpus* v. *Arnold* (3) and he disregards a decision in *Re Schweder* (4). He says of that case ([1915] 1 Ch. 853, at p. 862):

> . . . it certainly does look as if CHITTY, J., formed a definite opinion that a proviso that a debt owing by a legatee should be taken in full or part satisfaction of his or her legacy did not amount to a release of that debt if, and to the extent that, the debt exceeded the amount of the benefit.

He had that authority before him. True it is not a very full report, but that is his interpretation of it, and he declines in effect to be guided by it, because he thought that *Re Cosier* (1) was too strong. That case of CHITTY, J., as understood by ASTBURY, J., was, in my view, decided correctly and ASTBURY, J., ought not to have disregarded it. In so far as he is bound to take into account decisions on other wills, he should not have disregarded it on the ground that *Re Cosier* (1) lays down some other principle or method of construction.

I do not think that I need refer to any of the other cases which have been cited to us. In my opinion, putting it quite shortly, this is an ordinary hotchpot clause and there cannot be extracted from it any words sufficient to release or forgive the debt and in the events which have happened the son, the appellant, is bound to make good to the estate the sum in question. What has happened, I think, must be what so frequently happens, that a rather unintelligent copying and adaptation of a common form has been made without really considering whether the words are suitable or convenient or not. If the testator desired to forgive a debt, he could quite easily have said so. It is not, in my opinion, legitimate to extract such an intention out of these words and particularly so where the result of so doing would be not to avoid but to create a gross inequality and injustice. The judge's judgment, which unfortunately we have not before us because no note was taken of it, was perfectly right in his conclusion and this appeal must be dismissed.

MORTON and SOMERVELL, L.JJ., agreed.

Appeal dismissed. Costs of all parties between solicitor and client.

Solicitors: *Marshall & Hicks Beach* (for the appellant); *Wrentmore & Son* (for the respondents); *Murray, Hutchins & Co.* (for the trustees).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HOLMES *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Simon, Lord Macmillan, Lord Porter, Lord Simonds and Lord du Parcq), May 6, 7, 8, 9, 10, July 4, 1946.]

Criminal Law—Murder—Provocation—Wife's confession of adultery—Whether sufficient provocation to reduce murder to manslaughter—Functions of judge and jury.

(1) In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as a matter of law, and what the jury decides as a matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is important to consider, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had "time to cool."

(2) The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised, *viz.*, the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule; but it has been rightly laid down that the exception cannot be extended.

(3) A sudden confession of adultery by either spouse without more can never constitute provocation of a sort which might reduce murder to manslaughter.

(4) The duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

Decision of the Court of Criminal Appeal ([1946] 1 All E.R. 524), *affirmed.*

[**EDITORIAL NOTE.** The House of Lords uphold the Court of Criminal Appeal, holding that a sudden confession of adultery without more can never constitute sufficient provocation to reduce murder to manslaughter, and the *dictum* of BLACKBURN, J., in *R.* v. *Rothwell* (7) implying the contrary, is no longer good law. LORD SIMON reviews the respective duties of judge and jury in regard to provocation in case of felonious homicide, and, finally, points out that the sentence for murder being fixed, provocation alters the nature of the offence in a way which is unnecessary in lesser offences where it can be allowed for in the sentence.

A As TO PROVOCATION, see HALSBURY, Hailsham Edn., Vol. 9, p. 434, para. 745; and FOR CASES, see DIGEST, Vol. 15, pp. 776-782, Nos. 8305-8384.]

Cases referred to:

*(1) *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232; 25 Cr. App. Rep. 72.
*(2) *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 28 Cr. App. Rep. 65.
B *(3) *R.* v. *Maddy* (1671), 2 Keb. 829; 15 Digest 781, *8376*; 1 Vent. 158; *sub nom. R.* v. *Manning*, T. Raym. 212.
*(4) *R.* v. *Pearson* (1835), 2 Lew. C.C. 216; 15 Digest 781, *8378.*
*(5) *R.* v. *Morley* (*Lord*) (1666), 6 State Tr. 770; 15 Digest 779, *8340*; 1 Sid. 277.
*(6) *R.* v. *Mawgridge* (1706), Kel. 119; 15 Digest 777, *8306*; 17 State Tr. 57; Fost. 274, 296; 1 East, P.C. 276, 278; *sub nom. Mawgridge's Case*, Holt K.B. 484.
*(7) *R.* v. *Rothwell* (1871), 12 Cox C.C. 145; 15 Digest 780, *8350.*
*(8) *R.* v. *Jones* (1908), 72 J.P. 215; 15 Digest 780, *8352.*
C *(9) *R.* v. *Palmer*, [1913] 2 K.B. 29; 15 Digest 780, *8354*; 82 L.J.K.B. 531; 108 L.T. 814; 8 Cr. App. Rep. 191.

APPEAL from a decision of the Court of Criminal Appeal, dated Apr. 5, 1946, and reported ([1946] 1 All E.R., 524), dismissing an appeal against a conviction of murder at a trial before CHARLES, J., at Nottingham Assizes, on Feb. 28, 1946. The facts are fully set out in the opinion of VISCOUNT SIMON.

D *P. E. Sandlands, K.C.*, and *Elizabeth K. Lane* for the appellant.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *Anthony Hawke* and *Rodger Winn* for the Crown.

The House took time to consider its opinion.

VISCOUNT SIMON: My Lords, the appellant was charged with murdering his wife and was convicted of this crime at Nottingham Assizes, at a trial before E CHARLES, J., and a jury, on Feb. 28, last. On his applying to the Court of Criminal Appeal for leave to appeal against this conviction, that court (LORD GODDARD, L.C.J., WROTTESLEY and CROOM-JOHNSON, JJ.) treated his application as the actual appeal and dismissed it for the reasons given in a judgment read by WROTTESLEY, J., on Apr. 5. On Apr. 12, the appellant obtained from the Solicitor-General (who was acting in place of the Attorney-General under the Law Officers Act, 1944) a certificate that the decision of the Court of Criminal F Appeal involved a point of law of exceptional public importance, and that it was desirable that a further appeal should be brought to this House. The point of law is whether CHARLES, J., was right in telling the jury that, upon the evidence at the trial, and having regard to the law, it was not open to the jury to find a verdict of manslaughter, and that the statement by the accused's wife to him that she had been unfaithful to him was not such provocation as could justify a G verdict of manslaughter instead of murder. More generally, the question we have to consider is what are the respective functions of judge and jury in such cases, and how the law draws the line between instances of provocation which would, and those which cannot, make it proper for the jury to be left to decide on the facts on the appropriate verdict.

The appellant killed his wife, according to his own evidence, on the night of Sunday or in the early hours of Monday, Nov. 18 or 19 of last year, in the kitchen H of the house where they lived. On the previous Saturday he had telegraphed to a Mrs. X, who lived in a different part of the country and with whom he admitted that he had previously had sexual relations, that she might expect him on the Sunday or Monday; he travelled on the Monday to Mrs. X and told her that his wife had left him. In fact, his wife's dead body was discovered next day in the room where he had killed her. She had received a severe wound on the head caused by the hammer-head for breaking coal which was close to his hand, and she had many bruises on her body, but the final cause of death was manual strangulation. The appellant's story was that there was a quarrel between them on the Saturday night, originating from some persons winking in the direction of his wife in a public house that evening; he said that he had entertained suspicions of his wife's conduct with regard to other men in the village, and that there had been some suggestion made to him with regard to her and his own younger brother. The quarrel, he said, culminated in his wife saying, "Well, if it will ease your mind, I have been untrue to you," and she went on, "I know I have done wrong, but I have no proof that you haven't—at Mrs. X.'s" "With this," the appellant's statement continued, "I lost my temper and picked up the hammer-head and struck her with the same on the side of the head. She fell on her knees and then rolled over on her back, her last words being, 'It's too late now, but look after the children.' She struggled just for a few moments and I could see she was too far gone to do anything. I did not like to see her lay there and suffer, so I just put both hands round her neck until she stopped breathing, which was only a few seconds." In the witness-box, the appellant was asked in cross-examination, "When you put your hands round that woman's neck and gave pressure through your fingers, you intended to take your wife's life, did you not?" and he answered, "Yes."

There was no corroboration at the trial to support the accused's statement that his wife admitted her unfaithfulness, but for the purpose of deciding whether CHARLES, J.'s direction to the jury was correct, it must be assumed that she did, and that either her confession or her pertinent inquiry about his own misconduct provoked him to lose his temper. The House was unanimous in holding that the direction given by the judge was correct; there were no circumstances of special aggravation, and confession of adultery, grievous as it is, cannot in itself justify the view that a reasonable man (or woman) would be so provoked as to do what this man did. The House accordingly dismissed the appeal, while taking further time to pronounce upon the more general questions of law and principle discussed in the course of the argument.

In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had "time to cool."

The distinction, therefore, is between asking "Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?" (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: "Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?" and, if so, "Did the accused act under the stress of such provocation?"

Woolmington's case (1) shows that if the jury, after a proper summing up, entertains a reasonable doubt as to the answers to these questions, it ought to give the accused the benefit of the doubt. *Mancini's* case (2) points out the importance of considering the nature of the weapon used in retort—in that instance, MACNAGHTEN, J., was held to be justified in excluding the possibility of mere manslaughter when a dagger was employed in resentment to a blow aimed at the accused with a fist, for "the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter": [1941] 3 All E.R. 272, at p. 277.

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised, *viz.*, the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule : *Manning's* case (3). BLACKSTONE'S COMMENTARIES, Bk. IV, p. 192, justifies the exception on the ground that "there could not be a greater provocation." But it has been rightly laid down that the exception cannot be extended, *e.g.*, by PARKE, B., in *Pearson's* case (4), where he insisted on the condition of ocular observation. Even if Iago's insinuations against Desdemona's virtue had been true, Othello's crime was murder and nothing else.

Necessary self-defence, or action taken in the necessary defence, for example, of wife or child from outrage or maltreatment, stand apart, as in such cases there is no crime at all committed.

This brings me to the question which, as I understand, was the actual reason why the law officer's certificate was given in this case : *viz.*, whether "mere words" can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in consequence of such verbal provocation. There is nothing in the decision of this House in *Mancini's* case (2) which was intended to prejudge this question, nor does the decision in fact do so.

It is first to be observed that provocation by "mere words" may have more than one meaning. It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment. The contrast with provocation by physical attack is obvious. A blow may in some circumstances rouse a man of ordinary reason and control to a sudden retort in kind, but the proverb reminds us that hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. It is in this sense that the constantly repeated statement in the old books that "mere words" (not being menace of immediate bodily harm) do not reduce murder to manslaughter is to be understood : see HALE'S PLEAS OF THE CROWN, Emlyn Edn., Vol. I, p. 456, citing the resolution of all the judges in 1666, in *Lord Morley's* case (5) (6 State Tr. 770, at p. 771) ; *Mawgridge's* case (6) (17 State Tr. 57, at p. 66), HAWKIN'S PLEAS OF THE CROWN, Bk. I, ch. 13, sect. 33 : EAST'S PLEAS OF THE CROWN, Vol. I, p. 233.

There is, however, a different sense which may sometimes attach to the meaning of "mere words," for they may be used, not as an expression of abuse, but as a means of conveying information of a fact, or of what is alleged to be a fact. This must be the sense in which BLACKBURN, J., spoke in *R.* v. *Rothwell* (7), when in the course of summing up to a jury in the case of a man charged with murdering his wife, he went so far as to say (12 Cox C.C. 145, at p. 147) :

> As a general rule of law no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect, for instance, if a husband suddenly hearing from his wife that she had committed adultery and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter.

It is to be noted that BLACKBURN, J., said "might," and not "would," and the illustration had no resemblance to the facts of the case he was trying.

BLACKBURN, J.'s *dictum* was applied in the accused's favour in *R.* v. *Jones* (8), and was not dissented from in *R.* v. *Palmer* (9), when, however, the Court of Criminal Appeal refused to extend the suggested exception to cover the case of a man engaged to be married to a young woman whom he killed when she confessed to illicit intercourse with someone else. CHANNELL, J., in delivering the judgment of the court, said that the reason for the exception suggested by BLACKBURN, J., was that a sudden confession is treated as equivalent to a discovery of the act itself.

In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter. The *dictum* attributed to BLACKBURN, J., and any cases which seem to accept or apply it, can no longer be regarded as good law. The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation, when, as Bracton said (see Pollock and Maitland's History of English Law, 2nd Edn., Vol. II, p. 406), she was *sub virga viri sui* and when the remedies of the Divorce Court did not exist. Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter.

It is not necessary in this appeal to decide whether there are any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder. It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violent provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

There are two observations which I desire to make in conclusion. The first is that the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone's Commentaries, Bk. IV, p. 191, citing an illustration in Kel. 135, that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays. The injury done to a man's sense of honour by minor physical assaults may well be differently estimated in differing ages. And, in the same way, one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But on the other hand, as society advances, it ought to call for a higher measure of self-control in all cases.

The remaining reflection is as follows: the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence. In the case of felonious homicide, the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation upon human frailty.

Lord Macmillan, Lord Porter, Lord Simonds and Lord du Parcq concurred.

Appeal dismissed.

Solicitors: *Ludlow & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

EDWARDS *v.* JACKSON AND DINGLE

[MANCHESTER SPRING ASSIZES (Morris, J.), May 7, 1946.]

Elections—Parliamentary—Nomination—Sufficiency of description of candidate—Opinion of returning officer—Removal of surplusage—Ballot Act, 1872 (c. 33), *Sched. I, Pt. I, rr.* 6, 9, 22.

The plaintiff was a candidate at a Parliamentary election. The defendants were the returning officer—the Lord Mayor—and the Town Clerk. The plaintiff's nomination paper described him as "Honorary Secretary, Moss Side Tenants' Protection Society," which was not a society in the ordinary accepted sense of the term. On the public notice and on the ballot paper the plaintiff was described as "Secretary." The plaintiff, on the ground that the notice and the ballot paper did not accord with the nomination paper, as required by the Ballot Act, 1872, Sched. I, Pt. I, rr. 9 and 22, claimed, against the defendants, the penalty provided by sect. 11 of the Act for wilful misfeasance or wilful act or omission in contravention of the Act, and for damages :—

HELD : (i) under Sched. I, Pt. I, r. 6, of the Act, the opinion in regard to sufficiency of description and of identification of the candidate was the opinion of the returning officer, who having honestly formed the opinion that the original words of the nomination paper were excessive, and that the word "secretary" was a description, which, in his opinion, was calculated sufficiently to identify the candidate, could not be said to have been guilty of a wilful misfeasance or wilful act or omission in contravention of the Act.

(ii) the notice and the voting paper did in fact accord with the nomination paper as altered by the returning officer to make it valid.

[**EDITORIAL NOTE.** There are a number of decisions on the sufficiency of nomination of candidates in municipal elections, but little authority on Parliamentary elections. This case decides that for the purpose of the rule 6 of the Ballot Act 1872, Sched. I, no proceedings can be maintained against a returning officer for insufficiency of description if he has honestly formed the opinion that the description given is sufficient to identify the candidate.

AS TO NOMINATION OF CANDIDATES FOR PARLIAMENTARY ELECTION, see HALSBURY, Hailsham Edn., Vol. 12, pp. 249-255, paras. 504-513 ; and FOR CASES, see DIGEST, Vol. 20, p. 68, Nos. 479, 480.]

Case referred to :

(1) *Thompson* v. *Gibson* (1841), 8 M. & W. 281 ; 42 Digest 954, *268* ; 9 Dowl. 717 ; 10 L.J.Ex. 241.

ACTION by a candidate at a Parliamentary election against the returning officer for a penalty under the Ballot Act, 1872, s. 11, and for damages. The facts are fully set out in the judgment.

The plaintiff appeared in person.

A. D. Gerrard, K.C., and *A. E. Jalland* for the defendants.

MORRIS, J. : The plaintiff in this action is a member of the Manchester City Council and at the Parliamentary election last year he was a candidate for the Moss Side Division. The first defendant was the returning officer and was the Lord Mayor of the city of Manchester at the time of the election, and the second defendant was the acting returning officer and was and is the town clerk of the city of Manchester.

The nomination paper which was handed in nominating the plaintiff as candidate for Parliament described him in the column under the heading "rank, profession or occupation" as the "Honorary Secretary, Moss Side Tenants' Protection Society." On the ballot paper he was ultimately described as "Edwards, Albert Richard, 36, Lincroft Street, Moss Side, Manchester, secretary." He had also so been described on the notice issued on June 25, 1945, by the acting returning officer. The plaintiff complains that the description which appeared both on the notice or poster of June 25, 1945, and also on the ballot paper was incorrect and inadequate and was a description which was unauthorised having regard to the fact that the nomination paper when handed in bore the description "Honorary Secretary, Moss Side Tenants' Protection Society." He claims that the nomination paper was accepted with the description that it bore at the moment that it was handed in. By his statement of claim, para. 5, he alleges that contrary to the Ballot Act, 1872, Sched. I, Pt. I, r. 9, the acting returning officer—that is the second defendant—issued posters describing him not as "Honorary Secretary, Moss Side Tenants' Protection Society," but as "Secretary," which was not the description shown in the nomination papers as required by r. 9. He further complains in his statement of claim, para. 6, that contrary to the Ballot Act, 1872, Sched. I, Pt. I, r. 22, ballot papers were provided for the election which described him as "Albert Richard Edwards, 36, Lincroft Street, Moss Side, Secretary," A and not as "Albert Richard Edwards, 36, Lincroft Street, Moss Side, Honorary Secretary, Moss Side Tenants' Protection Society" as shown in the nomination papers and as required by r. 22. He states his case in paras. 9, 10, and 11 of his statement of claim in the following way. He says that the description of him which the defendants caused to appear on the posters and ballot papers was calculated to prevent him from being recognised as the person who was the Honorary Secretary of the Moss Side Tenants' Protection Society. He claims B under sect. 11 of the Ballot Act, 1872, from both defendants the penalty provided by sect. 11 for what he alleges to be the wilful misfeasance, in contravention of the Ballot Act, 1872, in the manner alleged by him in paras. 5 and 6 to which I have referred. He further complains that having been prejudiced in the conduct of his election campaign by the acts of the defendants and having forfeited his deposit of £150 under the Representation of the C People Act, 1918, s. 27, he is entitled to recover as special damage from the defendants the sum of £150, being the amount handed to the acting returning officer on June 25 in the presence of the returning officer, the first defendant. He alleges that at that time the returning officer informed him that his nomination papers were quite in order. He, therefore, brings this action, claiming under the Ballot Act, 1872, s. 11, a penalty of £100 and claiming damages.

The plaintiff before approximately the year 1920 carried on the profession of D accountancy, though the evidence does not show that he was a chartered accountant. Since that time he has done but little accountancy work, but has from time to time held himself out to do some. For some years before the year 1940 his business was that of the distribution of circulars. He had an organisation which was called the Parents' Protection Society, which continued down to approximately the year 1934. The Parents' Protection Society was really a name by which he conducted certain public activities. He later changed the E name to that of the Moss Side Tenants' Protection Society: he changed it after the Rent Act of 1933 was passed. His activities were thereafter directed to the assistance of tenants who applied to him for help or advice in connection with their problems. When from time to time he stood as a candidate at the municipal elections he was on many occasions described on the ballot paper by reference to the Parents' Protection Society. When he stood from time to time after 1934 for the municipal elections he was from time to time described by F reference to his position as Honorary Secretary of the Moss Side Tenants' Protection Society. There is no society which by the ordinary acceptation of that term could be regarded as a society, but the name Moss Side Tenants' Protection Society is one which the plaintiff and his wife use when they carry out the work that they do for the assistance and advice of tenants. If cases require the services of a solicitor, then as the plaintiff is not a solicitor he passes G on the cases to an honorary solicitor. One of the honorary solicitors suggested that forms should be made available so that those who desired could apply to join the society, and a form for membership was printed and has been put in evidence. Those who desire to join the society have to declare they are not members of any political party and do not intend to become members of any political party. The society is a very loose organisation; it does not have any rules or constitution save to the extent that any rules can be found in the words H set out in the form of membership document. There are no minutes kept, and there are, as far as I know, no other officers of the society than the plaintiff and his wife, who acts in the capacity of assistant honorary secretary, and the honorary solicitor.

It is clear, therefore, that the word "society" is somewhat loosely employed and that in reality the Moss Side Tenants' Protection Society consists of the plaintiff and his wife and one or two others who together do their best to assist by counsel or in some practical form where tenants have grievances or problems which call for their assistance. At the present time the plaintiff has no profession or occupation as such but he has continued his work in the name and in the capacity of honorary secretary of the Moss Side Tenants' Protection Society.

Before considering the issues raised by the plaintiff in his statement of claim and the law applicable to those issues it is necessary that I should state the principal facts which have led to this litigation and to state the conclusions at which I have arrived. The plaintiff was minded to stand as a candidate for the Moss Side Division, and he had a form of nomination appropriate for a Parliamentary election. He caused that paper to be filled in at the top and he filled in the columns headed "Surname," "Other names," "Abode," "Rank, Profession or Occupation." He was then proposed and seconded by two registered electors of the constituency and he obtained the signatures of those who assented to his nomination. He then took the nomination paper on the Friday before June 25, to the Town Hall. June 25 was the day appointed for the election. A notice dated June 16, being a notice required by the Ballot Act Rules, stated that the returning officer for the Parliamentary Borough of Manchester would on Monday, June 25, between the hours of 10 o'clock in the forenoon and 12 o'clock proceed to the nomination and, if there was no opposition, to the election of a member for the Parliamentary Borough of Moss Side. The notice stated that every nomination paper must be signed by two registered electors as proposer and seconder respectively, and by eight other registered electors as assenting to the nomination. It further stated that every nomination paper had to be delivered to the acting returning officer by the candidate proposed or by his proposer and seconder between the said hours of 10 and 12 o'clock on June 25 at the Town Hall. The notice further stated who were entitled to be admitted to the room. The plaintiff took the nomination paper to the Town Hall and showed it to one Foley. Foley looked at and checked the names and put pencil ticks opposite to those names. It is clear that the procedure that was then followed was a procedure that is customary and that is in every way convenient; it is convenient for a candidate to know in advance whether those who have proposed and seconded him and have assented to his nomination are registered electors. The ticks appear opposite to the names, but do not appear opposite to the top part of the form, and in particular do not appear opposite the column headed "Rank, Profession or Occupation."

I am satisfied on the evidence that Foley did not give and did not purport to give any ruling on that occasion which had any or purported to have any binding effect. I am satisfied that Foley did not deal with the question of the description of the plaintiff in his conversation with the plaintiff, but that all that Foley was doing was to follow the convenient course of checking the names. The course was convenient from the point of view of those who would assist the returning officer and the acting returning officer because it would have the result that the possibly laborious work of checking the names could be done in advance and would not be left to be done during the period appointed on June 25. But it was no part of Foley's province at that time to deal with the question of the description of the plaintiff in any way.

On the Saturday before the Monday, Foley had a conversation with the town clerk, and it was deemed prudent to make preliminary arrangements with the printers who would be required eventually to print the ballot papers. Some time on the Saturday the town clerk told Foley that he considered that the advice he would tender to the returning officer would be that the description "Honorary Secretary, Moss Side Tenants' Protection Society" would not be appropriate and that the apposite description would be the word "Secretary." The town clerk, therefore, arranged with Foley that the draft to be sent to the printers of the ballot paper would be a draft containing the description in the one word "Secretary." At some time, I think on the Monday morning the printers were asked to set up the ballot paper in type. It seems to me that what took place between Foley and the town clerk and what took place with the printers was only something that was convenient and was not anything that had any conceivable legal effect. It must be difficult to arrange the printing of a ballot paper if no preliminary steps are taken before the time when nominations close, to get type set up and to have arrangements made with the printers; it is an eminently reasonable course to follow that some preliminary arrangements with the printers should be made ; nothing binding is done and it might be that if the course of the nomination day does not follow what was expected, some loss or expense might result to the printers or to someone else, but I do not think there was anything sinister or unfortunate in the fact that Foley, after his discussion with the town clerk and after ascertaining what was the provisional view formed by the town clerk as to the advice that he would tender to the returning officer, sent the papers to the printers in the manner and at the time when they were sent.

I come now to the events of Monday, June 25, which was the day appointed for the election, or, as it is commonly called, nomination day. It is not easy to be precise in regard to times, but I think that the plaintiff arrived in the Lord Mayor's parlour, which was the room appointed for the election, a minute or two after 11 o'clock. There was a representative of the city treasurer's department present and seated near to the Lord Mayor, the returning officer. The plaintiff brought with him his nomination papers consisting of the top paper which had been seen and ticked by Foley at the end of the previous week, and a number of other papers nominating him as candidate. He was accompanied by his proposer, Pheasey, and he brought with him a certified cheque for the amount of £150.

A discussion of some kind took place. The town clerk had announced that he would not receive cheques, but would receive either cash, legal tender, or a banker's draft. The town clerk considered that it might be unfortunate to depart from the ruling or announcement that had been made and to accept a cheque from one candidate if cheques were not to be accepted from others, and I am satisfied that any conversation or discussion that took place —though it may not have been a conversation audible to the plaintiff— was directed to that matter. No sort of suggestion was made or has been made that the plaintiff's cheque was not a good and valid cheque or that it was not one that would be met. In fact, the cheque was accepted, and at some stage I consider that the Lord Mayor did use the words, "It is quite all right." I accept what the first defendant says, that when he used those words he was referring to the cheque. At some stage also inquiry was made as to whether the nomination was in order, and I think that inquiry was directed as to whether the names of the proposer and seconder and those who assented had been verified and checked, and an answer was made that the names had been checked. The nomination paper having been handed in and the cheque having been accepted, the plaintiff then handed in a letter by which he appointed himself his own election agent, left the part of the room where the Lord Mayor was, and had a conversation with his wife and with a councillor. The plaintiff and his wife then went out of the Lord Mayor's parlour, looked at the new council chamber and at other parts of the building in the vicinity, and then went home, arriving at approximately 12 noon. After the plaintiff had left the Lord Mayor's room a question was raised as to the description of the plaintiff on the nomination paper. The point was mentioned to the town clerk, who mentioned it to the returning officer, and after discussion the returning officer formed the provisional or tentative view that the description was excessive and that the word "Secretary" might replace the words on the nomination form. When that situation arose a messenger was sent without success, to try to find the plaintiff. When the message came that the plaintiff could not be found, the returning officer, the first defendant, came to the conclusion that the description as it was in the nomination paper of the plaintiff was a description that he did not think ought to stand, and the nomination paper was altered by crossing through all the words with the exception of the word "Secretary." The first defendant accepts full responsibility for the alteration that was made, though it was physically made by the second defendant and was not actually seen to be made or seen after having been made by the first defendant. That alteration I consider on the evidence in this case was made some time approximately 10 minutes after the time when the plaintiff had first presented the nomination paper to the returning officer. I think that the objection that was raised to the form of description was an objection that was made at or immediately after the time of the delivery of the nomination paper within the Ballot Act, 1872, Sched. I, Pt. I, r. 6 : on this point see *Thompson* v. *Gibson* (1).

After the nominations had all been received posters were published and were dated June 25, by which the acting returning officer gave notice that each of the candidates set out in the notice had been duly nominated as a proper person to serve in Parliament as a member for the Moss Side Division, and the names of four candidates were set out. The plaintiff was described as follows: "Candidate's surname—Edwards. Other names—Albert Richard. Abode—36, Lincroft Street, Manchester. Rank, Profession or Occupation—Secretary." Then came the names of his proposer, seconder, and those who assented to the nomination. Notice was given that the names of the candidates would be printed in the ballot paper in the order stated.

On June 28, the town clerk wrote a letter to the plaintiff, the first paragraph of which was in these terms:

> Dear Councillor Edwards,—After the Lord Mayor as returning officer had received the nomination paper relating to yourself and after the notice that you had been nominated had been posted up outside the Town Hall my attention was drawn to the way you were described in the nomination paper in the column that is headed "Rank, Profession or Occupation." You were described as "Honorary Secretary, Moss Side Tenants' Protection Society." [The letter then goes on:] I thought I ought to let you know that it has been decided that although your nomination was valid, the description of your occupation set out above contains several words which can only be regarded as surplusage. [Then after examples were given:] In the circumstances it has been decided that your occupation should appear on the ballot papers as "Secretary." I am also informing Councillor Pheasey and Mr. J. E. Frost, who nominated you. I hope this will be satisfactory and agreeable to you.

Letters in similar terms were sent to Pheasey and Frost. The plaintiff received this letter some time on the Friday afternoon, that is, the Friday afternoon following the Monday of nomination day.

The plaintiff did not in fact issue any election addresses, and he states that after he received that letter and was informed of the description that would appear on the ballot paper he felt as though his enthusiasm had been dissipated, and it seems clear that thereafter he took few of the normal steps and conducted few of the normal activities that would be conducted by other candidates. When the figures of the election were counted it appeared that the plaintiff received 446 votes. That compared with 10,201 votes for the candidate who was successful, 7,423 for the next candidate, and 2,525 for the other candidate. The plaintiff forfeited the deposit of £150 which he had been required pursuant to statute to give.

The questions which arise on those facts are whether the defendants, or either of them, have done anything which was contrary to law and anything that gives rise to a cause of action in the plaintiff, and if so, what damages have been proved or ought to be awarded; further, if so, what penalty ought to be awarded.

It is necessary to consider the terms of the Ballot Act, 1872, and in particular Sched. I, Pt. I, r. 6, is of great consequence in this case. Sect. 1 of the Ballot Act, 1872, provides:

> A candidate for election to serve in Parliament for a county or borough shall be nominated in writing. The writing shall be subscribed by two registered electors of such county or borough as proposer and seconder, and by eight other registered electors of the same county or borough as assenting to the nomination, and shall be delivered during the time appointed for the election to the returning officer by the candidate himself, or his proposer or seconder.
>
> If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, and return their names to the clerk of the Crown in Chancery; but if at the expiration of such hour more candidates stand nominated than there are vacancies to be filled up, the returning officer shall adjourn the election and shall take a poll in manner in this Act mentioned. A candidate may, during the time appointed for the election, but not afterwards, withdraw from his candidature by giving a notice to that effect, signed by him, to the returning officer: Provided, that the proposer of a candidate nominated in his absence out of the United Kingdom may withdraw such candidate by a written notice signed by him and delivered to the returning officer, together with a written declaration of such absence of the candidate . . .

Sched. I., Pt. I., r. 6 is in these terms:

> Each candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate;

> the description shall include his names, his abode, and his rank, profession or calling, and his surname shall come first in the list of his names. No objection to a nomination paper on the ground of the description of the candidate therein being insufficient, or not being in compliance with this rule shall be allowed or deemed valid, unless such objection is made by the returning officer, or by some other person, at or immediately after the time of the delivery of the nomination paper.

R. 8 provides as to who may be present, and provides that the candidate and his proposer and seconder and one other person selected by him shall be entitled to attend. R. 9 makes provision for the giving of public notice, and I have referred to the notice dated June 25 which was issued. R. 11 provides :

> The returning officer shall, on the nomination paper being delivered to him, forthwith publish notice of the name of the person nominated as a candidate, and of the names of his proposer and seconder, by placarding or causing to be placarded the names of the candidate and his proposer and seconder in a conspicuous position outside the building in which the room is situate appointed for the election.

That was done by Foley, who wrote out the names from time to time and they were published outside. It is to be noted that the statutory requirement does not compel the description of the candidate to be added. In r. 12 it is provided as follows :

> A person shall not be entitled to have his name inserted in any ballot paper as a candidate unless he has been nominated in manner provided by this Act, and every person whose nomination paper has been delivered to the returning officer during the time appointed for the election shall be deemed to have been nominated in manner provided by this Act, unless objection be made to his nomination paper by the returning officer or some other person before the expiration of the time appointed for the election or within one hour afterwards.

R. 13 says :

> The returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final; but if allowing the same, shall be subject to reversal on petition questioning the election or return.

It is provided by r. 22 :

> Every ballot paper shall contain a list of the candidates described as in their respective nomination papers, and arranged alphabetically in the order of their surnames, and (if there are two or more candidates with the same surname) of their other name : it shall be in the form set forth in the Second Schedule to this Act or as near thereto as circumstances admit, and shall be capable of being folded up.

It is further necessary to refer to sect. 11 of the Act, which provides :

> Every returning officer, presiding officer, and clerk who is guilty of any wilful misfeasance or any wilful act or omission in contravention of this Act shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission a penal sum not exceeding one hundred pounds.

It is clear from a consideration of the Act and the rules, and of the forms, that it is undesirable to have some kind of advertisement that parades under the guise of description. It would seem from a consideration of the rules and of the forms that it would be undesirable that political labels should be attached to a ballot paper.

The plaintiff, by para. 8 of his statement of claim says this :

> The plaintiff paid his deposit of £150 on being informed that the nomination papers were quite in order and in the belief that his description in the nomination papers would be so shown on the official posters and the ballot papers and therefore get full publicity for the fact that he was the tenants' candidate.

It seems to me that the scheme of the rules and the forms does not indicate that publicity to particular views or publicity to any attachment to a particular party is to be given by the nomination form or by the ballot paper. I think further that a consideration of Sched. I., Pt. I., r. 6, makes it clear that the opinion in regard to sufficiency of description and of identification of a candidate is to be the opinion of the returning officer, and it is no part of my duty in this case, as I conceive it, to express any opinion as to whether I do or do not think that the opinion formed by the returning officer was a correct one. I could quite conceive that if a returning officer found on a nomination paper some phrase such as "The People's Friend" under the column "Rank, Profession or

Occupation," or some such words as "Free Trade Candidate," or "Cheap Food Advocate," the returning officer might think and might honestly form the opinion that such words were not correct words of description so as sufficiently to identify a candidate.

The rule provides that the candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated "to sufficiently identify" such candidate. The first defendant by his evidence states that he formed the opinion that the original words of the nomination paper were excessive words and that the description "Secretary" was a description which, in his opinion, was calculated sufficiently to identify the candidate. It is not for me to substitute my opinion. I conceive that on this part of the case I have to decide whether the returning officer did form that opinion and whether he honestly formed that opinion. I am satisfied that the returning officer did honestly form that opinion.

It is clear further from a consideration of r. 6 that it cannot be determined in advance whether a particular description will or will not be in the opinion of the returning officer calculated sufficiently to describe a candidate. A nomination paper may come in which is wholly unexpected. The mere fact that it is very frequently known in advance which candidates are to be nominated is only something that happens in practice, but a nomination paper may be presented of which a returning officer has no conceivable kind of previous knowledge; he cannot have any opportunity in advance to form an opinion, and those who present the nomination paper cannot know in advance what will be the opinion of the returning officer. It can only be known either at or immediately after the time of the delivery of the nomination paper what is the opinion of the returning officer. In this case the paper was presented by the candidate, the plaintiff, and by his proposer. It may be that a candidate and his proposer and seconder will be present, but it is not obligatory for them to be present, and sect. 1 of the Act to which I have referred shows that the nomination paper may be delivered either by the candidate or by his proposer or seconder. They therefore need not all be there, and it is apparent, therefore, that there would not be or might not be opportunity for the three of them to be consulted by a returning officer on any question of description.

Many points have arisen for consideration during the course of the argument of this case. It was considered whether the rule means that on an objection being taken which is upheld the returning officer must reject the nomination paper and reject, therefore, the nomination. If that were the position the result might be that because of some error of description in a particular case there would be the necessity to reject the nomination. It might be much too late to get another nomination paper signed within the time appointed for the election. Another question which has been debated is the question whether, if objection is raised to a description (and an objection, therefore, on which the returning officer has to decide) it is essential that the candidate should be given an opportunity to be heard. But, as I have pointed out, a candidate might not be present. The rules show that there are certain time limits imposed upon the returning officer. It might be, therefore, that a candidate would not be present and that within the time available there would be no opportunity to secure his presence. I think that r. 6 must be construed reasonably, and as it is the opinion of the returning officer which is decisive, the view that I have formed (which is a view that relates solely to the facts of this particular case) is that if a returning officer takes objection or if his attention is directed to a description of a candidate, and if he thinks that the description contains surplus matter, there is no obligation on him to reject the nomination altogether if by the mere omission of the purely surplus words the nomination can be regarded by him as valid.

It is to be seen that r. 6 provides that the objection must be made by the returning officer or some other person at or immediately after the time of the delivery of the nomination paper. The candidate and his proposer and seconder might not be available at the moment that the objection is taken; they might not be available at any time up to the expiration of the hour after the time appointed for the election, which is the time set out in these rules. If a description is too elaborate, and if, therefore, it does not comply with the rule as being one which in the opinion of the returning officer is calculated sufficiently to identify the candidate, I see no reason why the returning officer should reject that nomination altogether. If a candidate has been proposed—and a candidate presumably wishes to stand—he can only stand if his nomination paper complies with the rules. If the returning officer thinks it does not do so because it contains some surplus words, but thinks it can be made to comply by striking out some words which are mere surplusage, I can see no reason why in such a case the returning officer should not make the amendment and so ensure the regularity of the nomination.

In this case I am satisfied that the returning officer formed the opinion that he states, and that he formed it honestly. His act in striking out or in causing the striking out of some words was an act merely to give effect to his opinion. In my view r. 6 makes it obligatory on the returning officer to give consideration to the question as to whether the description is or is not sufficient. I think that must also mean that he must give consideration to the question as to whether the description is more than sufficient. He must, in my view, raise an objection to any piece of blatent surplusage. If, by striking out some words of excess, he can make the nomination paper comply with the rules, this cannot in my view be a wilful act on his part which is in contravention of the Ballot Act. This is a decision which I limit, as I said before, to the facts of this particular case.

The plaintiff takes the point that he could have withdrawn his candidature if he had known that the description on his nomination paper was not to be accepted. But it is to be pointed out that the withdrawal of a candidate can only take place during the time appointed for the election. It might well be that a candidate would be nominated a minute or two before the time appointed for the election expired and that the objection to his description could validly be taken in accordance with the Act at a moment after it was too late for him to withdraw his candidature. But the candidate can only stand if his nomination paper is regular and in order, and it is only in order if the description is what is in the opinion of the returning officer sufficient.

The plaintiff must be taken to know that his nomination paper must pass the scrutiny of the returning officer. His complaint, in my opinion, lacks substance and merit when it is seen that his nomination paper has been preserved and made valid by the action of the returning officer. When the paper was handed in it was not known whether it complied with r. 6 or not in fact. When the point was raised it was found that it did not. When it was altered it did. The compelling statutory provision ordaining that each candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate was then obeyed, and the returning officer cannot, in my view, be said to be acting in contravention of the Act if all he does is to strike out surplus words from the nomination paper so as to make it valid according to the Act.

It is clear that it is most desirable whenever possible that a candidate should be informed of any objection to the description that may be taken. It is most important that a candidate should be given an opportunity to be heard, and in ordinary circumstances a rule providing that the returning officer shall decide something must I think involve that he should hear all points of view before deciding. In this case the plaintiff went away not unnaturally thinking that all was in order. But having considered these rules, I cannot find that it is essential to hear a candidate in these circumstances. It might well be that a candidate would not be available or could not be found and that a decision on an objection taken would have to be made within the timetable laid down by these rules.

For the reasons that I have given, I do not think that the returning officer did anything wrong on the facts of this case in permitting the alteration to be made of striking out words of surplusage. The defence as pleaded in para. 3 of the defence is in substance established. I think, therefore, that there was no wilful misfeasance and no wilful act or omission in contravention of the Act. This view that I have formed makes it unnecessary for me to deal with many other points raised by counsel for the defendants in the course of his argument. For example, he submitted that if a returning officer was exercising a judicial function cast upon him by the Act of Parliament he would not be liable to be sued if he acted in good faith.

The actual complaint in this case, as I have indicated by reference to the statement of claim, is that the posters and the ballot paper did not accord with the nomination paper. Actually they did accord with the nomination paper as altered, because as altered (and as altered, in my view, so as to make it valid) the nomination paper contained the description "Secretary." The posters and the ballot paper did, therefore, accord with the nomination paper. But I have not decided the case on any technical point because I have given full consideration in the part of the judgment I have just concluded to the question as to whether the alteration made in the limited circumstances of this case was or was not irregular. The defendants did comply with the rules for the reason that the nomination paper was altered so as to keep it alive and valid and subsisting, following upon the opinion formed by the returning officer who was obliged to arrive at an opinion upon the matter.

That really concludes the determination of the matters that I have to decide in this case. I think it is only fair that I should add that after hearing this case I have not the smallest reason to think that either of the defendants was ill-disposed towards the plaintiff. It is unfortunate, particularly as the attention of the town clerk and Foley had been directed to this matter of the description on the Saturday, that the plaintiff was not told of this point when he presented his nomination paper. It is unfortunate that after the decision which was arrived at by the returning officer the plaintiff was not sooner informed; he might have been informed by telephone. He is on the telephone and is a city councillor and is well known. It is unfortunate that the letter informing him of what had happened did not reach him until the Friday afternoon, and the letter itself is not as fully informative as perhaps it might have been. None of these considerations, however, in my view, affects the decision in this case.

I think it also right to add that even if the plaintiff had established to my satisfaction that there was any irregular act upon the part of the defendants, I should be very, very far from satisfied that the plaintiff had in fact proved any real damage. The plaintiff states that he was deprived of support. I thought that one witness expressed the matter very moderately and reasonably when he said "There is every likelihood that you lost some support by not being advertised in that way. As to the degree of it, that is a matter of opinion." Some support may have been lost, but it would be quite impossible for any judge to form an opinion as to the measure of the support that was lost. The average elector would, I am sure, have decided before he entered the ballot booth as to the candidate for whom he purposed to vote. I think it is a wild assumption to suggest that votes are influenced by the particular words of description to be found on the actual ballot paper; I am sure that votes are influenced by meetings, by canvassing, by literature, and by all the other methods normally used by candidates to ensure adherence to their cause. There was only one Edwards standing, and his address was given. He had been at various times well known to the public. To say that he was robbed of his identity because he was not more fully described on the ballot paper is, in my view, to employ the language of rhetoric and fancy and not of sober reality. The posters which were issued dated June 25, to which I have referred, were posters that gave the full name and address of the plaintiff and described him as "Secretary." I cannot conceive that by such posters are votes swayed, and to speak about being stabbed in the back is on the facts of this case to allow metaphor to run riot and to cast all reasonable sense of proportion aside. I find that this claim fails on the facts and on the law.

There must be judgment for the defendants with costs.

Solicitor: *P. B. Dingle*, Manchester, (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re A QUESTION BETWEEN GRACE MARJORIE SIMS AND JOHN SIMS.

[Chancery Division (Wynn-Parry, J.), May 2, 3, 6, 1946.]

Husband and Wife—Army separation allowance—Purpose of allowance—Whether wife's absolute property—Allowance used by wife to pay instalments of building society mortgage on house purchased by husband as matrimonial home—Whether wife has lien on proceeds of sale of house.

After his marriage a husband purchased a house as a matrimonial home. He paid a deposit on the purchase and the balance of the purchase money was secured by a building society mortgage. He also purchased some furniture under a hire-purchase agreement. Until Sept., 1939, when he was recalled to the army (being on the reserve list), he paid all the instalments due under the mortgage and the hire-purchase agreement. On his return to the army, he gave his wife the remainder of his savings, which was about £60, and he asked her to do what she could in the way of paying the instalments while he was away. While the husband was in the army, the wife received the army separation allowance which amounted, for the greater part of the time, to 32*s*. a week. Of this sum, 7*s*. represented the compulsory basic allotment made by the husband, 18*s*. represented the state's contribution and the remaining 7*s*. represented an entirely voluntary allowance made by the husband. This army allowance was more than sufficient to cover payments in respect of the building society mortgage and the furniture. During the husband's absence, the wife paid all the instalments that were due. These payments were made by her out of a mixed fund consisting of her own earnings, possibly the remainder of savings she had made before her marriage, the £60 given her by the husband and the army allowance. The husband returned from the army in 1943. Later, differences arose between the husband and the wife, they parted and the house was sold. The wife claimed a lien on the proceeds of sale of the house and the furniture which was subject to the hire-purchase agreement, on the ground that the instalments paid by her while her husband was away had been paid out of her own money. It was contended on her behalf that the army allowance (except for the amount representing the husband's voluntary contribution) was her own property for all purposes :—

Held : (i) army separation allowance was paid to the wife not simply to spend on herself but for the purpose of helping her to maintain herself and to keep the home going during the husband's absence. The object of the allowance was to compensate not merely the wife but both parties, and particularly the husband for the change in his financial circumstances. The payments made to the building society and under the hire-purchase agreement were, on the facts of the case, proper payments for the wife to make, as part of her maintenance, out of the allowance.

(ii) the wife could only succeed in establishing her claim to a lien on the proceeds of sale of the house and furniture if she demonstrated that she must have used her own, or part of her own, moneys because she had been supplied with insufficient moneys by her husband. This she had failed to do. She had, therefore, no lien on the proceeds of sale of the house or the furniture.

[**EDITORIAL NOTE.** This case considers the nature and purpose of an army separation allowance. Such an allowance consists, normally, of a compulsory basic allotment payable by the soldier, and a contribution by the State, together with such other sum as the soldier may voluntarily decide to pay. The whole amount is payable to the wife for the maintenance of herself and the marital home during the period of service, and she is not entitled to a charge on any real or personal estate which has been purchased with it unless she can prove that her own money has been expended by reason of the insufficiency of the allowance. The interesting question of the ownership of accumulations out of the allowance does not fall to be decided in this case.

As to Dealings by Husband and Wife with Each Other's Property, see HALSBURY, Hailsham Edn., Vol. 16, pp. 673-675, paras. 1073-1079 ; and for Cases see DIGEST, Vol. 27, pp. 146-149, Nos. 1185-1206.]

Cases referred to :

(1) *Pitt* v. *Pitt* (1823), Turn. & R. 180 ; 27 Digest 148, *1197*.

(2) *Outram* v. *Hyde* (1875), 24 W.R. 268 ; 27 Digest 148, *1195*.

Adjourned Summons by the wife under the Married Women's Property Act, 1882, for the determination of the extent of her interest in a freehold house and in certain furniture. The husband and wife were married on Apr. 3, 1938, the husband being at the time a private in the regular army. In June, 1939, after his discharge from the army, the husband purchased the house as a matrimonial home. A deposit was paid on the purchase and the balance of the purchase money was secured by a building society mortgage under which the husband was the mortgagor and the money secured was repayable by monthly instalments. In July, 1939, the husband purchased the furniture under a hire-purchase agreement. He made the initial payment out of his savings, but, since he was on the reserve list, the furniture company would not enter into a hire-purchase agreement with him and the agreement was, therefore, made out in the wife's name. The husband also purchased a gas-stove on hire-purchase terms. Until he was recalled to the army in Sept., 1939, the husband paid all the instalments due under the building society mortgage and the hire-purchase agreements. On his return to the army, the husband gave his wife about £60 (the remainder of his savings) and asked her to do what she could in the way of paying the instalments while he was away. While the husband was away, the wife paid all the instalments that were due. The husband came back from the army in 1943. By Aug., 1945, differences between the husband and wife had developed, with the result that they parted, and the house was sold.

A. J. Belsham for the applicant.

Hon. Charles Russell for the respondent.

Wynn-Parry, J.: This is an originating summons dated Sept. 12, 1945, taken out by the applicant, Grace Marjorie Sims, to whom I shall refer as the wife, against the respondent, who is her husband, and to whom I will refer as the husband. The relief originally claimed was the determination of the question: What is the extent of the interest of the wife in the freehold property known as 11, Braycourt Avenue, Walton-on-Thames, in the county of Surrey, which was the marital home ? At the husband's request, the summons was amended so as to raise the question regarding the ownership of certain furniture, household effects and other articles which were, or had been, at the premises but which had been removed by the wife later.

The wife's case as regards the house, the furniture subject to the hire-purchase and the gas-stove is that all the payments which were made in respect of those matters while the husband was away were made by her out of her own money. It is not disputed that the payments were made by her in the sense that she sent, or paid over, the money that was actually paid. She does not attempt to prove that any particular payment was made out of a particular fund. Her case, as I understand it, rests upon this. All she had from her husband while he was away was the army separation allowance, which amounted for a time to 31*s*. a week, for most of the time to 32*s*. a week, and for a period a further 12*s*. a week was paid. That was for a period of 6 months. It is agreed that the 32*s*. a week was more than sufficient to cover the payments in question in respect of the building society mortgage, the furniture subject to the hire-purchase agreement and the instalments in respect of the gas-stove.

The case of counsel for the wife involves analysing the build-up of the 32*s*. a week separation allowance. 7*s*. represents the compulsory basic allotment which has to be made by the soldier in order to obtain the state's contribution, 18*s*. represents the state's contribution, and the remaining 7*s*. represents a further but entirely voluntary payment made by the husband. Counsel for the wife says that the 18*s*. contributed by the state is clearly entirely the wife's property for all purposes; further, that the 7*s*. a week basic compulsory allotment should be regarded as the wife's, and only the final 7*s*. voluntary allotment can be regarded as an allowance out of the husband's moneys for which she can be asked to account, on the analogy of savings made by a wife out of housekeeping money provided by her husband for which she is accountable to her husband. But it must be remembered, in my view, that, in claiming the lien which the wife claims upon the proceeds of sale of the house, which has now been sold, upon the furniture subject to the hire-purchase agreement and upon the gas-stove, the wife is seeking equitable relief. She is not in a position to prove, as clearly emerged from the cases which were cited to me, particular payments out of a particular fund which could be traced. The payments which she made were payments out of a mixed fund consisting of her earnings, the remainder, if any, of her savings, the £60 which I find the husband gave her and the army allowance. The actual source of any payment cannot be traced.

The wife can only succeed if she demonstrates that she must have used her own, or part of her own, moneys and that she did that because she was supplied with insufficient moneys by her husband. I do not feel called upon to decide in this case, as a matter of law, what part of the 32*s.* a week, if any, passed to the wife absolutely free from any obligation whatsoever towards the husband. That question may have to be decided if a husband, returning from the army, claims from his wife savings which can be shown to have accumulated out of, and only out of, the army allowance ; but that question must be left until it is directly raised. In this case the onus is upon the wife, and I do not think that she discharges it by the case which she puts forward, and so entitles herself to equitable relief.

In my view, the true answer to her claim is that which was put forward by counsel for the husband in the second branch of his argument. The object of an army allowance, to which the state contributes, is, as I apprehend, a matter of compensating not merely the wife, but both parties, and in particular the husband, for the change in circumstances caused by his having to cease to be a wage-earner and to serve in the army, or whatever service is involved, at what is, admittedly, a comparatively low rate of remuneration. The provision for the payment of the allowance direct to the wife is, quite frankly, to ensure that it gets to the proper destination, but it is a payment which is made to the wife in respect of her husband. What, then, is her obligation in the eye of equity when she gets it ? In my view it is not paid to her simply for the purpose of enabling the wife to spend it on herself ; it is for the purpose of helping to maintain the wife, and to help the wife to keep herself and the home going during the absence of the husband. I do not go so far as to say that she is bound to apply the allowance in any particular order of priority. What I say is that the payments to the building society, to the furniture company under the hire-purchase agreement and to the gas company under the gas company's hire-purchase agreement, are payments proper to be made under the general heading of maintenance. But once this point is reached, then it necessarily follows that the wife in this case has not discharged the burden of proof in demonstrating that she made the payments out of her own moneys, as that phrase is understood in such cases as those cited to me, namely, *Pitt* v. *Pitt* (1) and *Outram* v. *Hyde* (2). I am not saying that the decision might not be otherwise in a case where the court has acceptable evidence that a wife in similar circumstances, well aware of the legal implications, so arranges her financial affairs that she shows beyond a peradventure out of what source each payment was made. On a claim made in such circumstances, different considerations would arise ; but this is not that case. I found my decision simply on this, that it would have been proper for the wife to make the payments out of the allowance as part of her maintenance, particularly in view of the arrangement she made with her husband that she would pay what she could ; and she has not demonstrated by her evidence that she did not do so.

I, therefore, reject her claim to a lien on the proceeds of sale of the house, the furniture which was subject to the hire-purchase agreement and the gas-stove.

Declaration accordingly. No order as to costs.

Solicitors : *Stileman, Neate & Topping*, agents for *Smart & Bowerman*, Walton-on-Thames (for the applicant) ; *Cree & Son*, agents for *T. K. Dobson*. Walton-on-Thames (for the respondent).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

RUSHDEN HEEL CO. LTD. *v.* KEENE (INSPECTOR OF TAXES) RUSHDEN HEEL CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Atkinson, J.), May 20, 21, 22, June 6, 1946.]

Income Tax—Deductions against profits—Cost of litigation—Expenses of ascertaining profits—Whether outlay in order to earn profits or disbursement of profits earned—Income Tax Act, 1918 (*c.* 40), *Sched. D. Cases I and II, r.* 3 (*a*).

Income Tax—Appeals—Case stated—Procedure—One appeal only in each case.

Revenue—Excess profits tax—Deductions against profits—Costs of litigation—Expenses of ascertaining profits—Whether outlay in order to earn profits or disbursements of profits earned—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, r.* 3 (*a*)*—Finance* (*No.* 2) *Act,* 1939 (*c.* 109), *s.* 14.

In computing their profits for both income tax and excess profits tax purposes the appellants sought to charge, as a deduction from such profits, the costs and expenses of an appeal to the Special Commissioners in respect of the incidence of excess profits tax. Those costs and expenses included solicitors' costs, fees of consulting accountants, fees of accountants acting generally for the company for professional services specially connected with the appeal and travelling expenses of witnesses. Accepting the statement of LORD MACMILLAN, in *L.C., Ltd.* v. *G. B. Ollivant, Ltd.* (2)—that it was a commonplace in tax law that, in ascertaining what deductions were permissible in computing the amount of the taxpayer's profits or gains, the question was whether the deduction claimed represented an outlay in order to earn profits or was a disbursement of profits earned—the question for determination was whether the expense of ascertaining the profits was an expense which was an outlay in order to earn profits or a disbursement of profits earned :—

HELD : (i) an expense properly and reasonably incurred in the final ascertainment of profits might properly be considered as an outlay in order to earn profits and not an outlay of profits, certainly not of ascertained profits, as the profits were at all times subject to that outstanding expense.

(ii) in this case none of the profits, whether profits divisible among the shareholders, profits subject to excess profits tax or profits available for income tax, was ascertainable for a certainty until the appeal had been heard and the final decision given.

(iii) all the expense in dispute was incurred before the final determination of what the profits, in any of those senses, amounted to ; consequently the expense was allowable as a deduction for income tax and for excess profits tax purposes.

Allen v. *Farquharson Bros. & Co.* (10) *doubted and distinguished.*

Semble : It is contrary to the usual procedure in tax appeals by way of case stated to include more than one appeal in one case ; there ought to be a case for each appeal.

[**EDITORIAL NOTE.** The successive steps in the reasoning upon which this decision is based are as follows : (1) an admissible deduction must represent an outlay in order to earn profits, as distinct from a disbursement of profits earned ; (2) an expense incurred in ascertaining the profits may be said to be an outlay in order to earn profits; (3) in the circumstances under consideration the profits were not ascertained until the appeal to the Special Commissioners had been heard and finally decided ; (4) the legal and accountancy expenses of the appeal were, therefore, deductible for both taxes.

FOR EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSES OF TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 152, para. 312 ; and FOR CASES, see DIGEST, Vol. 28, pp. 42-44, Nos. 215-226.]

Cases referred to :

*(1) *Strong & Co., Ltd.* v. *Woodifield,* [1906] A.C. 448 ; 28 Digest 57, *290* ; 75 L.J.K.B. 864 ; 95 L.T. 241 ; 5 Tax Cas. 215.

*(2) *L.C., Ltd.* v. *G. B. Ollivant, Ltd.,* [1944] 1 All E.R. 510.

*(3) *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.,* [1946] 1 All E.R. 58 ; 174 L.T. 162.

*(4) *Vulcan Motor & Engineering Co.* (1906), *Ltd.* v. *Hampson,* [1921] 3 K.B. 597 ; 9 Digest 545, *3595* ; 90 L.J.K.B. 1366 ; 125 L.T. 717.

*(5) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 28 Digest 59, *302*; 62 L.J.Q.B. 41; 67 L.T. 479; 3 Tax Cas. 185.
*(6) *Worsley Brewery Co., Ltd.* v. *Inland Revenue Comrs.* (1932), 17 Tax Cas. 349.
*(7) *Inland Revenue Comrs.* v. *von Glehn*, [1920] 2 K.B. 553; 28 Digest 46, *236*; 89 L.J.K.B. 590; 123 L.T. 338; 12 Tax Cas. 232.
*(8) *Income Tax Comrs., Bihar and Orissa* v. *Maharajadhiraj Sir Rameshwar Singh of Darbhanga*, [1932] 1 All E.R. 362.
*(9) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1942] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253. A
*(10) *Allen* v. *Farquharson Bros. & Co.* (1932), 17 Tax Cas. 59; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

J. Millard Tucker, K.C., and *J. W. P. Clements* for the appellants. B

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

ATKINSON, J.: In this case stated there are three appeals dealt with in one case. I am asked to draw attention to the fact that this is contrary to the usual procedure. There ought to be a case for each appeal. The taxing authorities for excess profits tax and income tax appeals are different. The taxes are C levied under different statutes and this may lead to inconvenience. Three orders would have to be drawn up in this case apparently. I am saying this without any knowledge of my own, but, as far as the King's Remembrancer and the office are concerned, they think this is not the better practice, but that there ought to be one case for each appeal.

These appeals arise in the following way. The Rushden Heel Co., Ltd., carries on a business, among other things, of manufacturing heels for boots and shoes. D Its capital consists of 2,000 £1 shares. Before Jan. 20, 1941, William Childs, Senior, held 1,971 shares, William Childs, Junior, 6 shares and Eric Childs another 6. There were three other children who held 6 or 5 shares apiece. In Jan., 1941, William Childs, Senior, transferred 100 shares to each of his six children so that each of them had 106 shares, leaving 1,364 in his own hands. On Feb. 24, 1942, the company claimed that William Childs, Senior, and William E Childs, Junior, and Eric Childs were working partners within the Finance (No. 2) Act, 1939, s. 13 (2). Sect. 13, which deals with the computation of standard profits, says, in subsect. (1):

> For the purposes of this Part of this Act, the standard profits of a trade or business shall, in relation to any chargeable accounting period, be taken, if the person carrying on the trade or business so elects, to be the minimum amount specified in subsection (2) of this section . . . F

Then subsect. (2) provides:

> The minimum amount referred to in subsection (1) of this section is one thousand pounds, or, in the case of a trade or business carried on by a partnership or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding three thousand pounds, as is arrived at by allowing seven hundred and fifty pounds for each working proprietor in the trade or business.

G

The Finance Act, 1940, s. 31 (1) amended that subsection and provided:

> For subsection (2) of section 13 of the Finance (No. 2) Act, 1939, there shall be substituted the following subsection: "(2) The minimum amount referred to in subsection (1) of this section is one thousand pounds, or, in the case of a trade or business carried on by a single individual, or by a partnership, or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding six thousand pounds, as is arrived at by allowing one thousand five hundred pounds for each working proprietor in the trade or business. H

Therefore, if the company's claim was well-founded, their standard would be at least £4,500, because there was no question, if the transaction were *bona fide*, about these three men being controlling directors and working directors.

But, on Mar. 26, 1943, the assessing Commissioners took the view that the main purpose of the transfer was to avoid excess profits tax; they refused to accept the assurance of William Childs, Senior, that it was not, and directed that the liability for that tax for the chargeable accounting period ending

Sept. 21, 1941, should be computed on the basis that the two sons were not working proprietors, but that their remuneration be allowed as an expense, and they gave a similar direction for all future accounting periods. In other words, the assessing Commissioners made a charge of bad faith against these gentlemen, which reduced their standard profits to £1,500.

On Aug. 31, 1943, the company appealed to the Special Commissioners and the appeal was allowed, the direction of the assessing Commissioners being discharged.

It is quite plain, therefore, that the company benefited to the extent of £3,000, less what salaries they would have been allowed as an expense, and the fund available for and subject to income tax was similarly increased.

The appeal cost the company in legal and accounting expenses £141 19*s.* 0*d.* In the accounts for the year ending Sept., 1943, £93 19*s.* 0*d.* was charged against the receipts of the company, and in the following year the balance of £48 was so charged and was, in fact, paid. The £48 might have been included in the earlier year as a debt, but nothing turns upon that. Of this sum of £141, the solicitors' costs amounted to £47 odd, the expenses of one set of accountants were £31 10*s.* 0*d.*, travelling expenses were £14 odd. The £48 was in respect of the accountants acting generally on behalf of the company.

In assessing the appellants for excess profits tax for the year, these payments on account of costs were disallowed as deductible expenses. In the following income tax assessment, although the profits assessable to income tax had been increased by a substantial sum, the expenses of obtaining that increase were again disallowed.

The first and main appeal is in respect of the income tax assessment for the year 1944-45, which, of course, was based on the previous year's accounts. In this year, 1943-44, the company had successfully resisted a claim for excess profits tax, reducing the amount claimed by a very substantial sum, thereby increasing the divisible profits of the company and the profits assessable to income tax to an equivalent amount. It is said that the expenses of securing that increase are to be disallowed. It is not claimed that the disallowance was fair or in accordance with commonsense or ordinary business methods, because plainly it was not, but it is said it is the result of certain decisions by which I am bound.

The only statutory direction is the Income Tax Act, 1918, Sched. D, Cases I and II, *r.* 3:

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation . . .

the material words here being "for the purposes of the trade,"

An explanatory dictum very much relied upon by the respondents was the statement by LORD DAVEY in *Strong & Co., Ltd.* v. *Woodifield* (1), where LORD DAVEY said that the expenditure must be made for the purposes of earning the profits. It might be just as well to read a little more of what he said ([1906] A.C. 448, at p. 453):

> I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

It is as well to remember that only a few lines before he had expressed himself a little more fully in the words:

> . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade . . .

It is not unimportant to realise what the question in that case was. A brewery company, which owned licensed houses in which they carried on the business of inn-keepers, incurred damages and costs to the amount of nearly £1,500 on account of injuries caused to a visitor staying at one of their houses by the falling of a chimney. It was held that the damages and costs were not allowable as a deduction in computing the company's profits. LORD LOREBURN, L.C., in dealing with the matter, said this (*ibid.*, at p. 452):

> In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accident in travelling might be deducted. A

It is very difficult to say that expenditure of that kind is incurred for the purpose of earning profits, but the statement of LORD DAVEY has been so often referred to and accepted that LORD MACMILLAN, in *Ollivant's* case (2) could say ([1944] 1 All E.R. 510 at p. 517): B

> It is indeed a commonplace in tax law that in ascertaining what deductions are permissible in computing the amount of the taxpayer's profits or gains the question is whether the deduction claimed represents an outlay in order to earn profits or is a disbursement of profits earned.

I must say that I could not help sympathising with and appreciating more and more as the case went on what LORD GREENE, M.R., said in *Commissioners of Inland Revenue* v. *Desoutter Brothers* (3) ([1946] 1 All E.R., 58, at p. 60): C

> Speaking for myself, I am always disinclined to accept any general definition or test for the purpose of solving this type of question. The question whether or not a particular piece of income is income received from an investment must, in my view, be decided on the facts of the case. The facts must be ascertained and then the question has to be answered. For the Court to find itself fettered by some apparently comprehensive attempt at a definition directed to the solution of the problem in relation to one type of property, I cannot help thinking is unfortunate. D

I cannot help thinking the same thing here.

If one were permitted to interpret unaided the words in r. 3, there would be no great difficulty about the case. But, accepting as I must what LORD MACMILLAN said, the problem I have to solve, as far as I can see, is this: Is the expense of ascertaining the profits an expense which is an outlay in order to earn profits, or is it a disbursement of profits earned? That seems to me to be the problem. E

It is very difficult to know exactly what is meant by an outlay in order to earn profits. Are the costs of an appeal against an assessment of business premises for rating purposes directed to the earning of profits? Is the expense of the charwoman who cleans the floors directed to such an end? Is the expense incurred in resisting an unjust claim so directed?

The statutory rule is comparatively simple of application. Was the expense a purely business expense, an expense purely for the purpose of the trade, not of "trade," but of "the trade"? Clearly it is a necessary operation for every trader to ascertain the sum due from him to the Crown for taxes. It is a part of the trade. It is a legal burden imposed upon him. Yet it is directed to the earning of profits only in the sense that it is made for reducing the claims of the Crown and thereby increasing the divisible profits. Profits, as it seems to me, must not be confused with receipts. Profits consist of a sum arrived at by adding up the receipts of a business and by deducting all the expenses and losses, including depreciation and the like, incurred in carrying on the business. F G

In *Vulcan Motor and Engineering Company* (1906) *Limited* v. *Hampson*, (4), the Court of Appeal held that the words "profit earned by a company" meant "profits divisible among the shareholders, in other words 'net profits.'"

Expenses necessarily and properly incurred in carrying on a business, in my judgment, are directed to the earning of profits. Profits are increased or earned by reducing expenses, just as much as by increasing receipts. Therefore, an expenditure directed to reducing expenses is just as much directed to earning profits as is an expenditure directed to increasing receipts. In both cases the expenditure must be of a revenue character. H

In taxation matters there are three different ascertainments of profits. First you have the commercial ascertainment, usually carried out—and indeed in the case of companies it must be so carried out—by qualified accountants.

It cannot be suggested that the expenditure in question could be treated by the company as anything but revenue expenditure, reducing the profits available for dividends. There is no auditor in the world who would pass such a payment as a capital payment in the computation for business accounts. It is clear that it would inevitably be treated as an expenditure reducing the divisible profits. The ascertainment of these profits cannot be reached finally until after the second computation, that is to say, until the computation for the A purpose of arriving at the excess profits tax has been completed, because excess profits tax is an expense and a debt to the Crown. Until that amount is ascertained, even the first ascertainment of profits cannot be more than provisionally arrived at.

The next ascertainment, that is, the one for the purpose of arriving at the amount of excess profits tax, is quite a different computation. It is under the Finance (No. 2) Act, 1939, s. 14:

B

> For the purposes of this part of this Act, the profits arising from the trade or business in the standard period or in any chargeable accounting period should be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Part I of the Seventh Schedule to this Act . . .

In ascertaining profits for the purposes of excess profits tax, there are all sorts of different rules to bear in mind. Salaries can be revised, many trans- C actions can be disregarded, any expense can be revised. It is really a different computation—it is enough to say that. The first or provisional ascertainment has to be corrected in accordance with those principles and with the schedules.

Following on the ascertainment of the amount of excess profits tax, you can then proceed to your computation for income tax purposes. There again that is a different computation, because many of the rules, which are applicable when computing the profits for the purposes of excess profits tax, do not apply D to the computation for the purpose of arriving at the profits for the purposes of income tax.

There are two quotations one might profitably remember with regard to the broad view which has to be taken in making these assessments. In the *Gresham Life Assurance* case (5), LORD HALSBURY, L.C., said ([1892] A.C. 309, at p. 315):

> The word "profits" . . . is to be understood in its natural and proper sense—in E a sense which no commercial man would misunderstand.

In *Worsley Brewery Co., Ltd.* v. *Inland Revenue Comrs.* (6) LORD HANWORTH, M.R., said, (17 Tax Cas. 349, at p. 356):

> Now, it is quite true that the assessment of profits and gains for income tax is an assessment which has to be corrected in accordance with the directions laid down F by the statute. That is clear and is stated in the judgment of WARRINGTON, L.J., in the case of the *Inland Revenue Comrs* v. *von Glehn* (7), but, subject to those corrections, the proper way of ascertaining the profits and gains is by the ordinary business methods whereby those profits and gains would be ordinarily determined by business men.

Would any business man, anywhere, treat this expenditure as anything but a business expense reducing the profits of the year? I suppose, notwithstanding G this broad principle, it is clear, that not every expense which a prudent trader would treat as a revenue expenditure can be deducted in computation of profits for tax purposes.

In the course of the second computation in this case the question arose as to the proper standard with regard to the excess profits tax. There was no finality with regard to this question until it had been settled by the Special Commissioners. Before that finality had been reached, this expense had been incurred. H Then came the third computation necessary for the assessment of income tax. That assessment could not be made until the amount payable for excess profits tax had been finally ascertained.

The point I want to emphasise here is this. All this expense which is in question was incurred before there was any ascertainment of profits, whether profits in the first sense, divisible among the shareholders, whether profits subject to excess profits tax, or whether profits available for income tax. The expense was incurred before the ascertainment of profits in any one of those three senses.

By sect. 18 of the 1939 Act, the payment of excess profits tax is to be deemed an expense. Three points can be noted in connection with this expense when considering the assessment for income tax purposes. The expense in dispute increased the profits available for income tax by a substantial sum. The expense incurred increased the profits available for income tax for all future years so long as excess profits taxation should exist. The expense incurred was incurred before the profits for income tax purposes or any other purpose were ascertained. Can it be said that this expenditure was not incurred solely for the purposes of the trade ? Can it be said that it was not directed to earning profits ? Lord Wright, in *Ollivant's* case (2) ([1944] 1 All E.R. 510, at pp. 519, 520), pointed out that the amount payable for excess profits tax never comes into the divisible profits but is bodily taken out of the profits which must be reduced accordingly. I know that Lord Simon and Lord Macmillan took a different view, but the majority of the Law Lords took Lord Wright's view. The payment of excess profits tax is not, therefore, to be deemed to be a payment of a part of the profits. It is an expense taken out of the volume of receipts. If there had been no appeal, £4,500 would have been bodily taken out of the receipts of the company. As a result of the appeal two-thirds of that was brought back.

What guidance can be obtained from the decided cases as to the meaning of this expression "directed to the earning of profits ?" Expenditure to get rid of a troublesome director has been allowed. The expenditure of maintaining the assets of the business, where costs were incurred in upholding the trader's title to property, was allowed. Costs incurred in recovering a trade debt, costs incurred in resisting a claim for damages arising out of a business transaction, costs incurred in resisting a claim for conspiracy and fraud have all been allowed.

There is a sentence in the authority for the last example, *Income Tax Commissioner of Bihar and Orissa* v. *Singh* (8), which is worth noting. The Privy Council was dealing with the appeal, and Lord Thankerton was expressing the opinion of the Board. The question was whether expenses incurred by the Maharajah in defending a claim for damages for fraud could be allowed as a deduction. The Maharajah had won his case. Lord Thankerton quoting Meredith, J., said ([1942] 1 All E.R. 362, at p. 365):

> Defence of such suits must be regarded in my view as a necessary though unpleasant part of the business of moneylending. [The Maharajah might have been sued in his personal capacity but he was sued in respect of transactions which had some connection with a moneylending business.] I am satisfied that the suit was primarily against the Maharajah in his capacity as a moneylender, and not merely as a rich nobleman, and it was based primarily upon breach of contract by the moneylender . . . In the opinion of their Lordships, the only right view as to the nature of the Agra suit, is that expressed by those judges.

In other words, if it was a necessary though unpleasant part of the business, the expense incurred was to be allowed.

I should imagine that the duty of the ascertainment of indebtedness to the Crown was a necessary, though unpleasant, part of the business of any trader.

Expenditure in order to reduce expenses is an example of another kind of allowable deduction: see the *Anglo-Persian Oil* case (9). Expenditure to get rid of an annual expense chargeable against revenue is allowable. The expense of keeping an accountant or an accountancy department is a proper deduction to be made. The expense of ascertaining profits by accountants, not merely for the purpose of the Companies Acts, but for the purpose of ascertaining profits for income tax, and excess profits tax purposes, is an expense which is also to be allowed. Indeed, the expenditure of accountants discussing and arguing the question with the inspector of taxes is properly to be deducted: *Allen* v. *Farquharson Bros* (10). If the expense of computing profits for excess profits tax or income tax is allowable and the expense of arguing matters arising with the inspector of taxes is an expense incurred for the purposes of earning profits, why is not the expense of arguing the same matters before the Special Commissioners on appeal also an expense for the purpose of earning profits ? The expense of arguing the matter in one room is allowed. The expense of arguing before the Special Commissioners in another room and saving between £2,000 and £3,000 for the business, it is said, must be disallowed. There is no difference in object or purpose between the first set of expenses and the latter expenses. The amount of the tax, as I have said, is to be treated as an expense. The expense in question reduces a larger business expense. It seems to me plain that the expense in dispute ought to be allowed and unless I am precluded by authority from so doing, I shall proceed so to hold. May I ? That is the real question in these appeals.

The case which is said to have settled the question adversely to the appellants is *Allen* v. *Farquharson Bros. & Co.* (10). That was a decision of FINLAY, J., Farquharson Brothers had appealed against an adjustment in an assessment, which had the effect of reducing the sum to be assessed from £10,000 to £2,570, less a deduction of £413 for wear and tear, which had been agreed. But the respondents claimed a further deduction of £100, which would leave the assessment in the sum of £2,470, less £413 for wear and tear. The sum of £100 so charged in the accounts consisted of the legal costs incurred by the respondents in the appeal to the Special Commissioners, and the question to be decided was whether that sum of £100 was an admissible deduction. The subject-matter of the appeal had been whether the respondents had succeeded to a business formerly carried on by somebody else, and the appeal was decided after two hearings. At the first hearing the Special Commissioners gave their decision in principle in favour of the respondents, that the respondents had succeeded to the business, and left the figures to be agreed between the parties. At the second hearing, a subsidiary point arose out of the terms of the previous decision and was decided in favour of the Crown. In the result, a very considerable reduction in the amount of profits assessed and income tax payable by the respondents for those four years was obtained by them. There were the usual contentions, the respondents saying that it was money wholly and exclusively and necessarily expended for the purposes of the trade, and the inspector contending that it was not. The Commissioners, who were business people, took the natural view, saying :

> We . . . determined that the sum of £100, having been expended to ascertain the true profits of the business, distributable amongst the partners and assessable on the firm for income tax, was money necessarily wholly and exclusively laid out for the purposes of the business . . . and was also a monetary loss connected with the trade . . .

There was an appeal and FINLAY, J., allowed it. It is important to observe that the appeal had nothing to do with the question of excess profits duty ; it was merely concerned with computation for income tax. FINLAY, J., clearly shows the distinction between the question that would have arisen if it had been an excess profits duty appeal, and the question arising in relation to income tax. He says (17 Tax Cas. 59, at p. 63) :

> The distinction, of course, is perfectly familiar and, in a general way, is recollected by anybody who has ever had anything to do with these things. Income tax is not a deduction before you arrive at the profits ; it is a part of the profits. It is, as has been expressed by some well-known person—I cannot remember who, but it does not matter—the Crown's share of the profits. Excess profits duty was quite a different sort of thing. That was a deduction, the sum to be deducted before you arrived at the profits for the purpose of computation, with the result that you deducted the excess profits duty in arriving at the computation and then if, as sometimes happened, later on, some excess profits duty was got back, that excess profits duty had to be brought in. Nothing of that sort, of course, is true of the income tax.

It seems to me the judge is saying that expenses incurred before arriving at the profits, as is the case in an excess profits tax appeal, would be in a different position from the expenses which he was considering. That seems to me the distinction that he is drawing there. If that is so, then the case does not at all decide the point with which I have to deal.

But I have felt considerable difficulty in following the argument of the judge. He says (17 Tax Cas. 59, at p. 65) :

> I do not doubt that there are expenditures connected, for example, with the accounts, which are habitually allowed and rightly allowed ; I do not doubt that the expenditure of keeping an accountant or, it may be, in the case of some of the very great businesses with which we are familiar, keeping a whole accountants' department, is a proper deduction to be made. I do not doubt, further, that the accountants' department will deal with the matters of income tax in the sense that they will prepare the accounts for income tax, and, as I suppose, sometimes discuss questions with the inspector of taxes or representatives from Somerset House which arise, and I do not suppose it would be sought to say that, by reason of that, the expenses of the accountants' department were not proper to be allowed. I have got to decide the case, in spite of

the invitation which has to some extent been given to me from both sides of the Bar, on the facts as they are found in the case, and in this case it seems to me that it is impossible to say that this was an expenditure for the purpose of earning the profits. The answer seems to me to be simple, that it was not an expenditure for the purpose of earning the profits and could not be.

May I stop there for a moment ? I ask, in all humility, why the accountant's charges should be allowed as an expense for the purpose of earning profits, and the costs of defeating the Crown's claim not be allowed as an expense for the same purpose ? The judge goes on :

> I cannot see that the profits were in the slightest degree altered, either decreased or diminished, as the result of this expenditure.

I do not know what that means in view of the finding that, in the result, a very considerable reduction in the amount of profits assessed for these four years was obtained. I do not follow that. The judge goes on :

> I feel compelled, on these facts as they are set out in this case, to hold that this was an application—I should think, as far as I can judge, an exceedingly proper application —of profits after they have been earned and was not an expenditure necessary to earn the profits.

That is the ground of the decision—an application of profits after they have been earned.

But, if that is the right view, logically, every accountancy expense incurred after the close of the chargeable accounting period should be disallowed. Ascertaining the true figures is something which is necessarily done after the profits have been earned. But the ascertainment of profits is a business duty cast upon the company. At the close of the accounting period it is a liability still to be discharged. A necessary preliminary step to the performance of the statutory duty of paying excess profits tax is the ascertainment of profits computed in accordance with the Finance Acts. A necessary preliminary duty to the payment of income tax is the ascertainment of the expense of excess profits tax and of the profits as computed for that purpose. If the correct ascertainment involves bringing the figures before the Special Commissioners on appeal, I cannot myself see any ground upon which the costs of so doing can be held to be money not wholly and exclusively expended for the purposes of the trade. It seems to me there are two reasons why I am free to give effect to my own view. First, this case does not touch the question with which I have got to deal. It does not touch the costs of an excess profits tax appeal. But the other reason, and perhaps the more important one, is this. In my view, that judgment is inconsistent with the later case, in the Court of Appeal, of *Worsley Brewery Co. Ltd.* v. *Commissioners of Inland Revenue* (6). I think the judgment in that case confirms the view I have formed. The Worsley Brewery Company had their accounts made up for seven years, ending with 1920. The accounts had been agreed. The amount due had been paid. Then, five years afterwards, for some reason which is not stated, they had reason to suppose that the accounts had been made out on a wrong basis ; or, at any rate, if the profits had been properly computed, they would not have had to pay so much. New accountants were engaged to go into the whole question of the seven years' accounts. They did, and they found out that a sum of £6,491 had been overpaid. A claim for repayment was made, the facts were put before the Commissioners, and repayments were made. £3,000 was repaid in the accounting year 1928, and the balance in the year 1930. The expenses incurred in securing the return of those sums amounted to £973.

There was no question, as far as I can see, but that those expenses would be properly allowable in the two years in which the repayments were received. But that would not have helped the company as much as if they could get the expenses thrown back to the earlier years, because excess profits duty had ceased to be payable. Therefore their claim was that the expenses should be thrown back and divided up over the seven years in respect of which the accounts had been re-opened, so that they could recover still further money which had been paid in excess profits duty. It would have been a very simple answer to say " But this is an expenditure of profits after they have been earned. The account is closed. The profits were earned years ago." It would have been the simplest thing in the world to say " There is really nothing to discuss." Yet it was conceded, as far as I can see, at any rate it was held, that it would be a proper allowance in the years in which the two sums were received, but that they could not be thrown back to the years in question.

Rowlatt, J., dealt with it in this way, (17 Tax Cas. 349, at p. 353):

> It seems to me that the accountants' charges which are allowed are not allowed as cleaving to any item [That had been argued—that they ought to be deemed to be cleaving to the item that was dealt with in the earlier years] . . . they are charged as a current item of the expenses in the current year and no more. It is a little bit metaphysical, but, if that is right, this charge is simply a current item of the expenses of the company. It is incurred in the later year; it may have become necessary in the later year because of some fumbling which was made in the preceding year.

Lord Hanworth, M.R., in the Court of Appeal, said (*ibid.* at p. 355):

> It would appear from the facts that it is the custom, and it is right, to allow accountancy charges in the computation of the profits for the purpose of excess profits duty. I do not desire to say more; I accept that proposition as one which is not contested in the present case. Secondly, it may be that it is right to employ not one but two sets of accountants. Again I make no comment upon that; I am going to assume that it was a legitimate expense for the company to undertake, but it is to be remembered that the expense was incurred by reason of the retainer given in the year 1925, and not before.

Then he proceeded to deal with the question whether this expense could be thrown back a number of years.

Now I come to a very important judgment of Romer, L.J., which, in my humble opinion, entirely confirms the view I have formed. He says, (*ibid.* at pp. 359, 360):

> I am prepared to assent to the view that, when ascertaining profits of a trading concern, whether for the purposes of income tax or excess profits duty, the expense of having the accounts investigated by an accountant usually employed, or by any accountant and the preparation of the profit and loss account and of the balance sheet, is an expense which the trading concern is entitled to deduct from its receipts for the purposes of ascertaining its profits. [Now, why?] That appears to be, or, at any rate, may be taken, I think, to be an expense incurred wholly and exclusively for the purposes of the trade, which means, in view of the statement made by Lord Davey, in *Strong* v. *Woodifield* (1) an expense made for the purpose of earning profits.

That is saying, in very plain language, all these accountancy charges to which he had been referring are expenses incurred for the purpose of ascertaining the profits and if so incurred, they are expenses incurred for the purpose of earning the profits. Then he says:

> I am not prepared to hold that, when all that has been done and the profits have been ascertained after the employment of the accountants in the normal way and a question arises at some subsequent period between the trading concern and some third party, which involves a consideration of the question whether the profits so ascertained were correctly ascertained, the expense of further investigating the accounts is an expense incurred for the purpose of earning the profits.

Where does Romer, L.J., draw the line? It seems to me he draws the line in this way: All expenses incurred for the purpose of ascertaining the profits are allowable, but, when the profits have been ascertained, any further expenditure is not allowable. When were the profits ascertained? If one looks up the word "ascertain" in a dictionary one finds this: "to render certain: to fix: to determine: to find out for a certainty." I think this is the dividing line. Any expense incurred in ascertaining the profits in that sense, in ascertaining them for a certainty, in finally determining what they amount to, comes within the first part of Lord Macmillan's statement; in other words, as Romer, L.J. said, expenses incurred for the purposes of ascertaining the profits may be said to be an expense for the purpose of earning profits. The profits were not ascertained when the Commissioners or the inspector of taxes made a charge of bad faith against the appellants and directed that the transaction in question should be disregarded. They were not ascertained until the appeal had been heard and a final decision given. None of the profits in any of the three senses to which I have referred was ascertainable until after that decision had been given. Then, and not until then, did the company know what the divisible profits were. Then and not until then, did they know what the expense in connection with excess profits tax was going to be; then, and not until then, could one determine what were the profits assessable to income tax.

In my judgment, the true principle, if I may repeat it once more, is that an expense properly and reasonably incurred in the final ascertainment of profits may properly be considered an outlay in order to earn profits. It is not an outlay of profits, certainly not of ascertained profits, as the profits were at all times subject to that outstanding expense.

Two further remarks may be made. It was a payment which reduced expenses not merely for the years in question but for future years and it was a payment which added a substantial sum to the profits subject to income tax.

I think that the income tax appeal must be allowed and the two appeals as to excess profits tax follow suit, because the same reasoning applies to those as to the income tax appeal. The appeals will be allowed with costs.

Appeals allowed with costs.

Solicitors: *Scott & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re HENRY HORNBY (*deceased*)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), March 27, 1946.]

Will—Execution—Place of testator's signature—"Foot or end" of will—Intention of testator—Wills Act, 1837 (*c.* 26), *s.* 9—*Wills Act Amendment Act*, 1852 (*c.* 24), *s.* 1.

A document, purporting to be a last will and testament, was written, in green ink, in the testator's handwriting, on one side of a sheet of paper. On the right hand side, about a third of the way down, lines had been drawn forming an oblong space, in which there appeared the word "Signed" in the testator's handwriting in the same green ink, and, in a different coloured ink, the testator's signature. The signatures of the attesting witnesses, also in this different coloured ink, appeared at the foot of the sheet. Beyond the document itself there was no evidence of the circumstances in which it had been prepared and signed. On a motion to admit the document to probate the question for determination was whether the document was properly executed having regard to the position of the testator's signature:—

HELD: the combined effect of the Wills Act, 1837, s. 9, as amended by the Wills Act Amendment Act, 1852, s. 1, was that it was for the court to decide in any particular case what was the end of a will and whether the document, with the signature where it was, made it apparent on the face of it that the testator intended to give effect by his signature to the writing signed as his will; there was no doubt, in this case, that the testator intended his signature sufficiently to authenticate the whole of the document written on that side of the sheet of paper; and consequently the document should be admitted to probate.

[**EDITORIAL NOTE.** The will in this case is held to be properly executed, since it is clear that the place prepared by the testator for his signature was where he expected the will to end, and he, therefore, signed it with the intention of giving testamentary effect to the writing. As WALLINGTON, J., points out, there are many varieties of signatures which are capable of being brought within the Wills Act Amendment Act, 1852, and each must be dependent on its own facts.

AS TO PLACE OF TESTATOR'S SIGNATURE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 58-60, paras. 71-74; and FOR CASES, see DIGEST, Vol. 44, pp. 251-258, Nos. 783-849.]

Cases referred to:

*(1) *In the Estate of Roberts*, [1934] P. 102; Digest Supp.; 103 L.J.P. 61; 151 L.T. 79.

(2) *Margary* v. *Robinson* (1886), 12 P.D. 8; 44 Digest 253, *800*; 56 L.J.P. 42; 57 L.T. 281.

(3) *Sweetland* v. *Sweetland* (1865), 4 Sw. & Tr. 6; 44 Digest 254, *809*; 34 L.J.P.M. & A. 42; 11 L.T. 749.

(4) *Re Stalman, Stalman* v. *Jones* (1931), 145 L.T. 339; Digest Supp.

*(5) *In the Goods of Coombs* (1866), L.R. 1 P. & D. 302; 44 Digest 256, *820*; 36 L.J.P. & M. 25; 15 L.T. 363.

Motion for the admission to probate of a testamentary document, the signature of the testator appearing in an oblong space about a third way down and at the side of the document. The facts are fully set out in the judgment.

Victor Williams for the applicants, the executors.

William Latey for the testator's brother.

Wallington, J.: This is a motion asking that a document signed by Henry Hornby on Sept. 16, 1919, be admitted to probate. The estate is a considerable one; it is said to amount to some £24,000. The attesting witnesses are dead, and there is no means of obtaining any evidence or assistance as to how this document came to be signed, as to why it was signed, where, and in the manner in which it was signed, nor as to any other circumstance that would assist the court in coming to a conclusion as to the facts of the case, beyond the document itself.

Before a document can be admitted to probate it has to be a testamentary document, complying with the requirements of the statutes relating to the bringing into existence of such documents. On behalf of deceased's brother, Francis Hornby (who, under the document submitted to the court, is interested to the extent of a £1,000 legacy and in part of the residue, and who would be interested to a much larger extent if there were an intestacy, which, of course, there would be if this document could not be admitted to probate) counsel submits that this document is not entitled to probate because it is not signed at the foot or end thereof, as is required by the Wills Act, 1837, amended as it is by the Wills Act Amendment Act, 1852, s. 1.

On the other hand, counsel for the executors submits that when the enlarging section of the Wills Act Amendment Act, 1852, and sect. 1 of that Act are studied, it becomes plain that this document is properly executed because it complies with the conditions of that section, and, therefore, he moves that it be admitted to probate, and he relies for some assistance, though not, perhaps complete assistance, on a judgment of Sir Boyd Merriman, P., in *Roberts*' case (1).

Counsel for the brother suggests, in effect, that I ought not to pay too much attention, though he does not go so far as to say that I ought to pay no attention, to any cases where there was no opposition, in other words, where there was a consent to the admission of the document to probate. I agree with him, but only to this extent: it is manifestly useful to have the assistance of counsel in dealing with both facts and law in any matter, particularly one that is so technical as the one before me. The assistance of counsel in such cases is not essential, by any means, nor is the court, owing to the absence of opposition, excused from the duty of going carefully into the whole of the circumstances as well as the law, and satisfying itself, before making an order admitting a document to probate or refusing probate, that the law has or has not been complied with.

In *Roberts*' case (1) it is plain that Sir Boyd Merriman, P., considered the matter as fully as if there had been a strenuous and reasoned opposition to the admission to probate of the document then submitted to him. Similarly, in this case, and with the assistance of counsel for the brother, as well as of counsel for the executors, I must satisfy myself, before admitting this document to probate, that it is one that is entitled to be admitted because it does, in fact and in law, comply with the requirements of the statutes.

I am absolved from any inquiry as to the omission of the full *testimonium*, because counsel for the brother has said that he does not raise any question on the form of the *testimonium* or the place where the witnesses' signatures appear. Their signatures appear at the foot of the sheet, nearer to the right-hand side of it, one under the other, and the first signatory as a witness has added "National Provincial Bank, Stafford." Having written down to about one-third the length of the sheet from the top of it, the signatory, Henry Hornby, at some time or other (there is no evidence to show when) drew a horizontal line, a perpendicular line and then lower down the sheet another horizontal line, and within the oblong space so formed he has written the word "Signed," and a little lower down, still in the oblong space, his own name "Henry Hornby." That is the signature, and the only signature that can be relied upon by counsel for the executors as complying with the statutes as to the place of the signature, and if that is not within the statutes then this is not a document that can be admitted to probate as a whole, though it might be (and counsel for the brother concedes this) that that part of it above the signature, that is to say, higher up the sheet of paper than the point at which the signature appears, might be admitted to probate, the remainder of the document being non-testamentary and not provable as a will.

The question, therefore, is, does this signature comply, in this position, with the provisions of the Wills Act, 1837, s. 9, and the Wills Act Amendment Act, 1852, s. 1? If it does it must be admitted to probate; otherwise, only part of it can be so admitted. The earlier statute enacts in sect. 9: A

> No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

It is the latter words of that section that actuated counsel for the brother in saying he was not pressing any invalidity in the attestation, but the material words for the purposes of this motion are "it shall be signed at the foot or end thereof by the testator." That section has been modified or explained or to some extent mitigated in its requirements by the provisions of sect. 1 of the amending Act of 1852. That is in these terms: B

> . . . every will shall, so far only as regards the position of the signature of the testator . . . be deemed to be valid within the said enactment [the Wills Act, 1837] as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will . . . C

First of all, what is the meaning of the words "if the signature shall be so placed beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will"? It seems to me that that does not mean that it does not matter in the least where the signature appears, but it does mean that the court has to decide two things: (1) what, in the particular case, is the end of the will, and (2) whether the document, with the signature where it is, makes it "apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." In one sense the end of the will might be said to be the word "nineteen" in the words "As witness my hand this sixteenth day of September nineteen-hundred and nineteen," but that raises the question what was the object of the testator—I call him testator by way of identification only—in apparently reserving the oblong space to which I have referred on the right-hand side of the sheet and higher up on the sheet than some of the words of the will itself, if it be a will? As has been said in argument, it is possible to enter into a bewildering variety of speculations as to how this came about, and I do not think it would serve any useful purpose to enter upon any of those speculations. The outstanding facts are that the testator has written the whole of the words of the will in his own handwriting, quite plainly, and in green ink, and inside the space to which I have referred he has written in the same ink and apparently at the same time the word "signed." It is plain that he must have had some serious motive in making the oblong space. The words of the document that are written on the left-hand side of it are not a series of sentences ending at the point of the space on that side; they are words running straight on, as if they were prepared at the same time, written at the same time and intended to be signed at the same time. It cannot have been, therefore, because the testator thought after writing out the whole document that that would be a convenient spot and a prominent place at which to append his signature; it looks to me as if it must have been thought of by him before he had finished the writing of the words that appear on the sheet from the top to the bottom, and that he intended to sign the document as his will in that space which he had prepared beforehand. D E F G H

The next facts of importance are: In a different ink, either at a different time or in a different room the testator has written his name as his signature in that space that I have alluded to, and the two witnesses, in the same ink at the foot of the sheet of paper, have written their names as witnesses, and one of them has added the branch of the bank in which, I suppose, he was engaged.

If intention to sign the will in that place has any significance within the meaning of the words from the amending Act that I have just read, I find that there is no doubt that Henry Hornby intended that signature sufficiently to authenticate the whole of the document written on that side of the sheet of paper.

Sect. 1 of the Act of 1852 continues as follows:

> . . . no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will . . .

It is quite possible to put a meaning on those words that might be inimical to some extent to the claim of the applicant here to probate of this document; but, giving to the words their plain meaning, it seems to me that this signature does not follow, nor is it immediately after the foot or end of the will. That sentence, in its literal meaning, would seem to me to indicate that the document is not invalidated because the signature is not at the foot or end; nor is it to be affected—going on with the section:

> . . . by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening . . . and the enumeration of the above circumstances shall not restrict the generality of the above enactment . . .

Some effect must be given to these words. The meaning of them quite plainly must be that although the section enters into some specification or particularisation of certain possible facts, that is not to alter this outstanding fact, that the court must look at the document and see whether the signature, wherever it is, is so placed that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

There is only one other part of the section to which I need refer. It goes on to enact:

> . . . no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it . . .

Those words are relevant only to the question whether, in case I should have to hold that this signature is ineffective as to what is written below it, it is effective as to what is written above it. Now the authorities on which counsel for the brother has relied are authorities which are, in my judgment, materially different from the facts in this case. They were *Margary* v. *Robinson* (2), *Sweetland* v. *Sweetland* (3), and *Re Stalman* (4). Each of those cases is interesting on its own facts, but, in my view, none assists the decision of this matter. *Roberts'* case (1) is one which is the nearest to the present case on the facts, though they are so fundamentally different, that it cannot be relied on as in any way decisive of the present question. SIR BOYD MERRIMAN, P., in his judgment ([1934] P. 102, at p. 106), does lay stress upon the first sentence of sect. 1 of the Wills Act Amendment Act, 1852, to which I have referred. The sheet of paper upon which the will there was written was full before any signature or attestation clause could be appended, and, either there was not room enough at the end of the sheet to provide for signature and attestation, or it was thought more convenient that the signature and attestation should be in the margin. The signature of the testator was placed in the same position in relation to the attesting witnesses' signatures as it would have been if it had been at the end of the will, that is to say, written on the left-hand margin of the sheet of paper, at right-angles to the text parallel with the edge and was on the right while the signatures of the witnesses were to the left, as there would have been if all the signatures had been at the end. The question there was, as it is in this case: Was the signature at the foot or end of the will? It is quite plain that in that case, if these words be interpreted without reference to sect. 1 of the amending Act no one could say that the signature was at the foot or end; it was not at the foot, because it was at the top of the sheet of paper, or nearer to the top than the bottom, and it was not at the end because it was at the beginning, or, at any rate, certainly much nearer to the beginning than to the end. But SIR BOYD MERRIMAN, P., found that that document complied with the provisions of these statutes, and, in dealing with *In the Goods of Coombs* (5) having set out sufficient of the facts, he says this ([1934] P. 102, at p. 106):

LORD PENZANCE gave effect to the signature, and I cannot see any difference in principle here. So far as the position of the attestation clause is concerned it could not have been at any point which was more nearly opposite or beside the end of the will, [and this is the part that is important] and having regard to the fact that the whole writing is at right angles to the operative part of the will I think that I am justified in holding that the signature was so placed beside or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will.

If I were to apply those words literally to the present case the executors' A
case would fail, because it cannot be said in strictness that this signature of the testator is so placed beside or opposite the end of the will, and so on. The category of cases to which sect. 1 of the Act of 1852 can be applied has certainly not been so far exhausted. There must always be varieties of signatures that will have to be, and will be capable of being, brought within the ambit of the statute because of the many varieties of testator and the many varieties B
of conduct in relation to their testamentary documents that will arise from time to time for consideration, as they have arisen in the past.

It is for these reasons that I must regard this signature as being, in the intention of the testator, at the end of the will, and he so signed it with the intention of making it apparent on the face of the will that he intended to give effect by that signature to the writing signed as his will. For these reasons I come to the conclusion that the whole of this document is a valid and properly C
executed testamentary document, and I admit it to probate.

Document admitted to probate. Costs of all parties out of the estate.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Pickering & Pickering*, Stafford (for the applicants, the executors); *Gibson & Weldon*, agents for *Lloyd & Leake*, Shifnal (for the testator's brother).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

D

COUNTESS OF BERKELEY *v.* R. G. W. BERKELEY AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Porter, Lord Simonds and Lord Uthwatt), April 2, 4, 8, 9, June 21, 1946.] E

Rentcharges and Annuities—Annuity given free of income tax—Statutory variation of tax burden—Will and codicils—Annuity given by codicil dated Dec. 3, 1938—*Will and earlier codicils confirmed by codicil made in* 1940—*Death of testator in Jan.,* 1942—*When provision made—Finance Act,* 1941 (*c.* 30), *s.* 25 (1).

F

The testator made his will on Nov. 10, 1936, and appointed thereby an annuity to his wife, Lady B. By the second codicil, made on Dec. 3, 1938, he gave Lady B. an annuity of such amount as might in any year be required to make up to the total sum of £5,000, clear of all duties and income tax, the annual net income to be received by her under his will and his marriage settlement. He further provided that this annuity should itself be free of income tax (including sur-tax). By the fourth (and last) codicil, made on G
Sept. 14, 1940, the testator gave absolute priority to Lady B.'s annuities and charged them on specified property. In all other respects he confirmed the will and earlier codicils. The testator died on Jan. 15, 1942. The Finance Act, 1941, s. 25 (1) provides that, in the case of "any provision, however worded, for the payment. . . of a stated amount free of income tax . . . being a provision which (*a*) is contained in . . . a will or codicil . . . and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that H
date," the beneficiary shall bear a certain proportion of the income tax. The question to be determined was whether sect. 25 (1) applied to the annuity given to Lady B. under the codicil of Dec. 3, 1938. It was contended on her behalf (*a*) that, since the testator died after Sept. 3, 1939, the section did not apply, because a "provision" contained in a will or codicil was not "made," within the meaning of sect. 25 (1), until the moment of the testator's death; (*b*) alternatively, that the last confirmation of the provision by the fourth codicil postponed the date at which

it was originally made until the date of such confirmation which was after Sept. 3, 1939 :—

Held : (i) [Lord Porter *dissenting*] upon the true construction of the Finance Act, 1941, s. 25 (1), the words " any provision, however worded " referred to the benefit conferred and not to the words conferring it, and therefore " provision " was not " made " by a will within the meaning of the subsection until the testator was dead. Since the testator survived Sept. 3, 1939, sect. 25 (1) did not apply to his will or to any codicils, whatever their date, because a will or codicil came into operation only on the testator's death and until then it was revocable so long as he had any testamentary capacity.

Re Waring (1) *overruled.*

(ii) [*per* Lord Porter] since the codicil of Dec. 3, 1938, had been confirmed by the codicil of Sept. 14, 1940, sect. 25 (1) of the 1941 Act did not apply to the provision for Lady B.'s annuity contained in the codicil of Dec. 3, 1938, because, on the true construction of the will, the general rule applied that a will or earlier codicil was made at the date when it was confirmed by a codicil of later date.

Decision of the Court of Appeal, sub nom. Re Berkeley, Borrer v. *Berkeley* ([1945] 1 All E.R. 83) *reversed.*

[**EDITORIAL NOTE.** The House of Lords reverse the Court of Appeal by a majority of four to one, deciding the case solely upon the construction of the words " any provision, however worded," in the Finance Act, 1941, s. 25. This expression may mean the words which define a benefit, or the benefit itself, and the House decides that the latter meaning is the one intended by the legislature. The testator did not die until after the passing of the Finance Act, 1941, and, therefore, the provisions of the Act have no application, since a will speaks from death. This has the further advantage, as pointed out by Lord Thankerton, of complying with the presumption that in the case of taxing Acts the legislature intends the incidence of taxation to be the same in Scotland and England.

As to Tax-Free Payments, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391 ; and for Cases, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

For the Finance Act, 1941, s. 25 (1), see HALSBURY'S STATUTES, Vol. 34, p. 119.]

Cases referred to :

*(1) *Re Waring, Westminster Bank, Ltd.* v. *Awdry,* [1942] 2 All E.R. 250 ; [1942] Ch. 426 ; 111 L.J.Ch. 284 ; 167 L.T. 145 ; *revsg.*, [1942] 1 All E.R. 556 ; [1942] Ch. 309.

*(2) *Re Tredgold, Midland Bank Executor and Trustee Co., Ltd.* v. *Tredgold and Royal Society of Musicians of Great Britain (Incorporated)*, [1943] 1 All E.R. 120 ; [1943] Ch. 69 ; 112 L.J.Ch. 68 ; 168 L.T. 135.

*(3) *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co., Ltd.*, [1944] 1 All E.R. 672 ; [1944] Ch. 331 ; 113 L.J.Ch. 280 ; 170 L.T. 395.

*(4) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 42 Digest 649, *563* ; 61 L.J.Q.B. 265 ; 65 L.T. 621.

(5) *Saltoun (Lord)* v. *Advocate General* (1860), 3 Macq. 659 ; 42 Digest 675, *868* ; 3 L.T. 40.

*(6) *Lord Advocate* v. *Moray (Countess)*, [1905] A.C. 531 ; 21 Digest 42, *266* ; 74 L.J.P.C. 122 ; 93 L.T. 569.

*(7) *Hyslop* v. *Maxwell's Trustees* (1834), 12 Sh. (Ct. of Sess.) 413 ; 44 Digest 519, *d* ; 9 Fac. Coll. 246.

*(8) *Nimmo* v. *Murray's Trustees* (1864), 2 Macph. (Ct. of Sess.) 1144.

*(9) *Holmpatrick* v. *Ainsworth*, [1943] S.C. 75.

(10) *Grealey* v. *Sampson*, [1917] 1 I.R. 286 ; 44 Digest 375, *2091i.*

(11) *Goonewardene (M.)* v. *Goonewardene (E. M.)*, [1931] A.C. 647 ; Digest Supp. ; 100 L.J.P.C. 145 ; 145 L.T. 7.

(12) *Re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726 ; 44 Digest 376, *2102* ; 73 L.J.Ch. 481 ; 91 L.T. 48.

Appeal and cross-appeal from a decision of the Court of Appeal, (Lord Greene, M.R., Finlay and Morton, L.JJ.), dated Dec. 13, 1944, and reported *sub nom. Re Berkeley, Borrer* v. *Berkeley* ([1945] 1 All E.R. 83). The facts are fully set in the opinions of Viscount Simon, Lord Thankerton and Lord Porter.

J. Neville Gray, K.C., and Wilfrid Hunt for the appellant, Countess of Berkeley.

David Jenkins, K.C., and *J. H. Stamp* for the respondents R. G. W. Berkeley and R. J. G. Berkeley (the appellants on the cross-appeal).

M. G. Hewins for the respondent Sybil Deane Jackson.

The House took time to consider its opinion.

VISCOUNT SIMON : My Lords, this is an appeal and cross-appeal from a unanimous decision of the Court of Appeal composed of LORD GREENE, M.R., FINLAY and MORTON, L.JJ. The question to be decided was raised by originating summons and concerns the applicability of the Finance Act, 1941, s. 25, to the first clause of the second codicil to the will of the late Earl of Berkeley.

The Finance Act, 1941, s. 25 (1), is as follows :

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing ; and (*b*) was made before Sept. 3, 1939 ; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

The effect of substituting twenty twenty-ninths for the whole of the stated amount is the same as if the stated amount were paid free of income tax at 5*s*. 6*d*. in the £ and no more, while the balance is left to be borne by the recipient.

The Earl of Berkeley died on Jan. 15, 1942. His last will was made on Nov. 10, 1936, and to this will four codicils were subsequently made dated respectively Sept. 14, 1938, Dec. 3, 1938, Mar. 9, 1940, and Sept. 14, 1940. The relevant portions of these testamentary dispositions are as follows. The will of Nov. 10, 1936, contained in cl. 2 an appointment to the testator's wife, if she should be living at his death, of an annual sum of £1,200 for the then residue of her life, and in cl. 24 a further annuity commencing at the expiration of 3 months from the testator's death, of £200 free of income tax if and so long as she accepted (as she did) the office of executor and trustee of the will. In cl. 23 the testator gave to his stepdaughter, Miss Jackson, an annuity of £1,500 free of income tax at the standard rate. The will also contained gifts of annuities to other persons. Cl. 1 of the second codicil, dated Dec. 3, 1938, is as follows :

> I give to my wife Mary Emlen Countess of Berkeley during her life an annuity of such amount as may in any or every year after my death be required to make up to the total sum of £5,000 clear of all death duties and income tax the annual net income to be received by her in that year under my said will (including the appointment made by cl. 2 thereof) and under my marriage settlement (which I hereby confirm) dated Nov. 6, 1924 . . .

Cl. 4 of the fourth codicil dated Sept. 14, 1940, was as follows :

> I declare that every annuity by my said will or any codicil thereto bequeathed to my wife . . . shall be payable in priority to all other annuities or pecuniary legacies by my said will or by any codicil thereto bequeathed and that the annuity by my said will bequeathed to my stepdaughter Sybil Deane Jackson shall be payable in priority to all such other annuities or pecuniary legacies as last aforesaid except the annuity or annuities bequeathed to my said wife (which shall have absolute priority). And I charge first the settled estates and secondly the heirlooms (and in that order) with the payments of the annuities hereby or by any codicil hereto bequeathed and the duty on such of them as are bequeathed free of duty so far as my residuary estate shall be insufficient for the purpose.

The third and fourth codicils confirmed in all other respects the will and former codicils thereto.

In support of the contention that sect. 25 has no application to this case, counsel on behalf of the appellant, the Countess of Berkeley, the testator's widow, advances four propositions. (*a*) He first contends that a " provision " contained in a will or codicil, within the meaning of sect. 25, is not " made " until the moment of the testator's death. (*b*) If this contention fails, he contends as an alternative that the " provision " made in the second codicil must be treated as made at the date of the fourth and last codicil because this last named codicil confirms the previous testamentary disposition including the second codicil. If either of these contentions prevails, the " provisions " for the payment to be made annually to the Countess free of income tax would be made after Sept. 3, 1939 and would therefore be untouched by sect. 25. (*c*) He contends that in any case the "provision" is not for the payment of a "stated amount" free of income tax. (*d*) Lastly, he contends that in any case the "provision" has been "varied" by the fourth codicil and therefore is excluded from the operation of sect. 25 by failing to fulfil para. (*c*) of sect. 25 (1).

The Court of Appeal reached a conclusion adverse to each of these four contentions. I should agree with that Court, for the reasons they state, as regards (*b*), (*c*) and (*d*), but while I am fully alive to the force of the argument which prevailed with the Court of Appeal, as regards (*a*), I have after much consideration come to the conclusion that the first proposition is correct. The crucial question is what is the meaning of the phrase "any provision, however worded." It may mean, as the Court of Appeal thought, the words which define a benefit and which are contained in the document or oral contract referred to in sect. 25 (1). Or it may mean the benefit conferred by such a document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral contract and is necessarily of the same date, being in effect equivalent to a clause. If it means the second, its date will be the date when the benefit is conferred.

Either meaning is possible in construing para. (*a*) and para. (*c*) of sect. 25 (1), but I am forced to the conclusion that only the second meaning is possible when construing para. (*b*); and if this is so in construing para. (*b*), the same meaning must be given to the words when applying para. (*a*) and para. (*c*). Thus, "any provision, however worded" must be understood in all cases to refer to a benefit conferred and not to the words conferring it.

My reasons for thinking that this is the correct construction are as follows. There is a clear distinction drawn in the section between a provision "contained" in a document irrespective of date and a provision "made" before Sept. 3, 1939. Language is very ineptly used if one speaks of "making" a clause. It is not the instrument, but the provision, for which a latest date is prescribed. Moreover, all the other documents mentioned, except a will or codicil, are such as would confer a vested right to the payment of the annuity free of tax—a benefit created at a time when income tax at 10*s.* in the £ was in no one's thoughts. It was the existence of this vested right which involved a hardship when income tax was greatly raised, for it used up far larger resources in meeting the tax-free annuity than anyone had contemplated. This hardship was one which only an Act of Parliament could relieve, in the absence of agreement between the beneficiary and the sufferer of the hardship. It is the making of such an agreement after the war broke out which is referred to, I think, in para. (*c*) of sect. 25 (1).

The will of a living testator, on the other hand, confers no right on anyone to any benefit therein mentioned. Even if it existed side by side with a covenant not to revoke, the covenantee has no rights under the will until the testator is dead. There is therefore no call for statutory intervention in this case. It is true enough that a testator, using popular language, may say "I have made provision by my will for so-and-so," but this consideration does not help in construing an Act of Parliament which, as I read it, authorises variation of vested rights only if they arose before the outbreak of the late war. I do not think that it would be a legitimate construction of sect. 25 (1) to run paras. (*a*) and (*b*) together and read them as though the crucial date was contained in para. (*a*).

I had at first been much impressed by the argument that, if on the true construction of the section the testator must be dead before the late war broke out, his will could not be varied after that date. But the answer is that which I have indicated above, *viz.*, that what is contemplated is not the variation of a will, but the variation of a provision made by the will which conferred upon the annuitant a vested right from the moment of the testator's death. There may well have been many cases between Sept. 3, 1939 and the announcement of the proposal which became sect. 25 of the Finance Act, 1941, when the parties concerned, feeling the inequity involved if strict effect was given to the provisions of the will, had by agreement varied the operation of the provision (in the sense of the benefit) which the testator had made. Where this had happened, as, *e.g.*, between a tax-free annuitant and the party entitled to the residue, there would be no call for statutory intervention and the agreement to vary would stand.

On the view which I have been led to form, and the reasons for which I have above stated, no other question arises for decision in this appeal and the appeal must be allowed. The result is that FARWELL, J., was right in *Re Waring* (1) and cases like that discussed in *Re Tredgold* (2), should be decided on the ground that the testator died after the outbreak of the war.

By the cross-appeal it was contended that "the stated amount" was £5,000 and not the sum needed to make up that total free of tax after taking into account what is received from the other sources named, and I agree with the Court of Appeal, for the reasons it gives, that the cross-appeal fails.

I move that the appeal be allowed and that the cross-appeal be dismissed.

LORD THANKERTON: My Lords, this appeal and the cross-appeal raise questions as to the proper construction of the Finance Act, 1941, s. 25. They arise out of the testamentary writings of the late Earl of Berkeley, who died on Jan. 15, 1942. He had no issue, but his second wife, the present appellant, survived him. The subject-matter of the appeal and cross-appeal are the annuities given to the appellant under the will and codicils of the testator.

In the view that I take of the matter, the only relevant portion of the Finance Act, 1941, s. 25, is subsect. (1), which is as follows:

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

Before referring to the testamentary writings, it should be explained that, under a settlement dated June 8, 1888, the testator had—in the events which happened—a power to appoint by will an annual sum not exceeding £1,200 to or for the benefit of any wife who should survive him, out of the income of the trust fund, of which the testator had a life interest. Further, under the settlement dated Nov. 6, 1924, made on the marriage of the testator and the appellant, the appellant, after the death of the testator, is entitled during her life to the income of the fund therein defined as the settled fund, and an annuity of £2,000 payable by the testator's personal representatives.

By his will, dated Nov. 10, 1936, the testator appointed the appellant as one of the executors and trustees of his will; by cl. 2, in exercise of the power conferred on him by the 1888 settlement, he appointed to the appellant an annuity of £1,200; by cl. 23 (B) he gave to his step-daughter, the respondent Sybil Deane Jackson, free of all duties during her life an annuity of £1,500 free of income tax at the standard rate; and by cl. 24 (A) he gave to each of his executors and trustees, while acting as such, an annuity of £200 free of all duties and income tax. The testator also left four codicils, the first of which, dated Sept. 14, 1938, is not material.

By his second codicil, dated Dec. 3, 1938, the testator gave to the appellant during her life:

> . . . an annuity of such amount as may in any or every year after my death be required to make up to the total sum of £5,000 clear of all death duties and income tax the annual net income to be received by her in that year under my said will (including the appointment made by cl. 2 thereof) and under my marriage settlement [dated Nov. 6, 1924] . . .

He provided that in calculating the said annuity the annual sum of £200 given by cl. 24 of his will should be taken into account, and that the said annuity should itself be free of all death duties and income tax, which he defined as including sur-tax or any other tax from time to time imposed on income.

The third and fourth codicils were made after Sept. 3, 1939, to which I will refer as the war date. The third codicil, dated Mar. 9, 1940, is not material. The fourth codicil was dated Sept. 14, 1940; the testator, *inter alia*, declared that every annuity bequeathed to the appellant by his will or any codicil should be payable in priority to all other annuities or pecuniary legacies, and that the annuity bequeathed to the respondent Sybil Deane Jackson should have similar priority, except over the appellant's annuities, which should have absolute priority, and he further charged first the settled estates and secondly the heirlooms (and in that order) with the payment of the annuities bequeathed by his will or any codicil thereto and the duty on such of them as were bequeathed free of duty so far as his residuary estate should be insufficient for the purpose. As in previous codicils, the testator added :

> . . . in all other respects I confirm my said will as altered by the said former codicils thereto.

A On behalf of the appellant four contentions were submitted : (*a*) that the provision for payment of the appellant's annuity, which is contained in the second codicil, was not " made " within the meaning of sect. 25 (1) until the death of the testator, which was after the war date, and therefore the Act did not apply ; (*b*) alternatively, that the last confirmation of the provision by the fourth codicil postponed the date at which it was originally made until the date of B such confirmation, which, again, was after the war date ; (*c*) the provisions of the fourth codicil in relation to the appellant's annuity constituted a variation after the war date, within the meaning of para. (*c*) of the subsection, and therefore, the statute did not apply ; and (*d*) that the provision made was not " of a stated amount " within the meaning of the subsection, and, accordingly, the statute did not apply.

A fifth question arose on the cross-appeal, namely, whether " the stated C amount " in this case is £5,000 or only the sum required, under the provisions of the second codicil, to make up the appellant's net income to £5,000. The Court of Appeal had taken the latter view.

The Court of Appeal was bound by its previous decisions, *Re Waring* (1), and *Re Sebag-Montefiore* (3). In *Re Waring* (1) it was held that the provision for two annuities by a will, signed and attested before the war date, was not made as at the death of the testator, which occurred after the war date, but was D made at the date of the will, and that a codicil made after the war date, which contained no reference to the annuities and no express confirmation of the will, did not cause the provision to be treated as made at the date of the codicil. In *Re Sebag-Montefiore* (3) the will bequeathing the annuities was made before the war date, and a codicil made after the war date which expressly confirmed the will was held not to have the effect of causing the provision to be treated as made at the date of the codicil.

E My Lords, it is clear that an acceptance of the appellant's first contention, that the provision is not made until the death of the testator, would involve that sect. 25 does not apply to the present case, and the remaining questions in the case disappear. The appellant's fourth contention might arise in another case, and so might the question raised by the cross-appeal.

In *Waring's* case (1) the Court of Appeal reversed the decision of FARWELL, J., F whose opinion I venture to quote ([1942] Ch. 309, at p. 310) :

> The question for my determination is whether or not the Finance Act, 1941, s. 25 applies to a will made before Sept. 3, 1939, by a testator who died after that date. It is not until the death of a testator that provisions contained in the will take effect, and, therefore, in my judgment, the provision with which I am concerned here was not " made " until after Sept. 3, 1939. Until the death of the testator the will was a document bearing date before Sept. 3, 1939, but it had no effect. The Finance Act, G 1941, s. 25, therefore does not apply.

LORD GREENE, M.R., found no distinction between the date of making a will and the date of making a provision contained in a will, and he sought confirmation of his view in para. (*c*) of sect. 25 (1) : " has not been varied on or after that date." He added ([1942] 2 All E.R. 250, at p. 254) :

> If the argument of counsel for the respondent is correct and the judgment of the judge is correct, that paragraph can have no application whatsoever to a provision H by will, because, if the provision can only be deemed to be made when the testator dies, it is quite obvious that it never can be varied after his death.

MACKINNON, L.J., who agreed with LORD GREENE, M.R., does not consider the important question whether there was any distinction intended between the date of making the will and the date of making the provision which is contained in the will. LUXMOORE, L.J., concurred.

My Lords, I regret that I am unable to agree with the reasoning or the conclusion of LORD GREENE, M.R. To me, the draftsman has been careful to draw a distinction between the date of the will and the date when the provision

was made, and the reason is that, as **Lord Greene**, M.R., said ([1942] 2 All E.R. 250, at p. 253), the legislature was intervening to adjust "the burden between the classes of persons benefiting under the wills." He might have added that at the same time it was adjusting the obligations as between payer and payee under the deeds, orders of court, local or personal Acts or contracts, and in each of these cases there must be an existing right or obligation, and any variation must be a variation of an existing right or obligation. I have difficulty in thinking that variation as regards a provision contained in a will was intended A
to be different in character, so as to cover an alteration by the testator, which created no immediate right, and when there was no payer, no payee and no payment to adjust. The word "provision" may ordinarily be used in either of two senses, *viz.*, (i) as the clause in the will directing the tax-free annuity—*i.e.*, the benefit—to be paid, or (ii) as the benefit provided for the annuitant. In my opinion, it is clearly used in the subsection in the latter sense. If the former meaning was intended, paras. (*a*) and (*b*) would naturally and easily be B
combined by substituting "made by" for "contained in," by deletion of the word "and" at the end of para. (*a*) and adding "made before Sept. 3, 1939." In short the legislature was dealing with rights known to the law, and was adjusting such rights. I come to that conclusion independently of, but in agreement with, the presumption to which I will now refer, and which I could wish had been under consideration by the Court of Appeal.

In the case of taxing statutes, which apply to both England and Scotland, C
and where, as here, there is no suggestion that any of the language used has a technical legal meaning in either country, it is to be presumed that the legislature intended that the incidence of taxation should be the same in both countries. In *Comrs. for Special Purposes of Income Tax* v. *Pemsel* (4), **Lord Watson** said ([1891] A.C. 531, at p. 557) :

> The only principle derivable from *Lord Saltoun* v. *Lord Advocate* (5) which can aid D
> in the decision of this case, appears to me to be this—That the Act of 1842 must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries.

In *Lord Advocate* v. *Countess of Moray* (6), **Lord Macnaghten** said ([1905] A.C. 531, at p. 538) :

> It must be borne in mind that the Act which your Lordships are now called upon E
> to construe in its application to Scotland applies equally to the whole of the United Kingdom. It is a taxing Act. It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and Ireland, and to extend the same measure of relief . . .
>
> I understand that some of your Lordships are of opinion that the section is reasonably capable of another construction. In that view, it would follow, in my opinion, that, if the section under consideration is thus reasonably capable F
> of two constructions, one is bound to adopt the construction which is in harmony with the presumption, even if, otherwise, one would prefer the other one. The construction which I prefer is in harmony with the presumption ; the other is not.

There can be no dubiety as to the law of Scotland in this matter. In **Bell's Principles of the Law of Scotland**, s. 3, 1864, it is stated :

> A will may be made (and is presumed in law to be made) in the last moment of life, and so it is at all times during life revocable. G

These are **Professor Bell's** own words ; he died in 1843. In *Hyslop* v. *Maxwell's Trustees* (7) **Lord Corehouse** said (12 Sh. (Ct. of Sess.) 413, at p. 416 (n)), in reference to Miss Hyslop's power of disposal under her uncle's will :

> A circumstance much founded on by the defenders, *viz.*, that her settlement was executed before she knew of her uncle's legacy, is quite immaterial. It is settled, H
> that testamentary and revocable deed is to be held as the *ultima voluntas testatoris*, that is, as approved of, and confirmed down to the last hour that he is of a disposing mind.

Lord Balgray said (*ibid.*, at p. 417) :

> It is clear that the settlement, though originally executed many years before Miss Hyslop's death, did, so long as it existed unrevoked, manifest a continuous act of the will on her part, giving it the same force as if executed in the last moment of her retaining a disposing mind. It must therefore carry everything which it would have carried, if originally executed the day before her death.

In *Nimmo* v. *Murray's Trustees* (8), the trust disposition and settlement, under which the residue was left to "my own nearest heirs and successors," was executed prior to the passing of the Intestate Moveable Succession Act, 1855, by which representation was introduced into intestate moveable succession. The testator died after the Act had come into operation. After quoting the words of LORD COREHOUSE, in *Hyslop's* case (7), LORD COWAN said (2 Macph. (Ct. of Sess.) 1144, at p. 1148):

> When, therefore, this testator, died, leaving to his "nearest heirs and successors" the residue of his estate, the same construction must be applied to the bequest as if the deed had been written out and executed by him at the last moment of his being of a disposing mind . . .

LORD JUSTICE-CLERK INGLIS expressed the same view as LORD COWAN. See also MCLAREN ON WILLS AND SUCCESSION, 3rd Edn., Vol. II, pp. 778 and 808.

In the present case, the testator remained of a sound disposing mind at least until after the execution of his last codicil, if not until his death, and, if this had been a Scottish succession, the result in Scotland of the construction adopted by the Court of Appeal in *Re Waring* (1) would be that the provision was made at a date at least subsequent to the date of the last codicil, and, therefore, after the war date. This would make a marked difference in the incidence of taxation in the two countries respectively.

I am accordingly of opinion that the decision of the Court of Appeal in *Re Waring* (1) was wrong, and that all these somewhat artificial questions as to republication or confirmation or variation need never have arisen to complicate the matter. As I have said, this supersedes consideration of any of the other contentions in the appeal and cross-appeal, but I desire to add that, while I have formed no definite view, I am inclined to agree with the opinion of LORD GREENE, M.R., as to the decision in the Scottish case of *Holmpatrick* v. *Ainsworth* (9).

I am, therefore, of opinion that the appeal should be allowed and that the cross-appeal should be dismissed.

LORD PORTER: My Lords, the facts in this case have already been stated, but in order to make my opinion plain, the more essential matters should be set out in proper sequence.

(i) By a settlement dated June 8, 1888, Lord Berkeley was given power to appoint by will that an annual sum not exceeding £1,200 should be paid to any wife who might survive him during the residue of her life out of the income of a certain trust fund. (ii) By a marriage settlement executed on Nov. 6, 1924, a fund thereby constituted was settled upon trust to pay the income thereof to Lord Berkeley during his life and after his death to pay the same income to Lady Berkeley during her life. By the same settlement Lord Berkeley covenanted that his legal personal representatives would from and after his death pay an additional annuity of £2,000 to the trustees of the marriage settlement during the remainder of Lady Berkeley's life. (iii) By his will, dated Nov. 10, 1936, Lord Berkeley appointed the annual sum of £1,200 mentioned above to Lady Berkeley, made her an executrix and trustee, and disposed of his free estate in the manner therein appearing. Certain additional annuities were provided for, including one of £1,500 a year free of tax to Miss S. D. Jackson. (iv) There were four codicils to this will, of which it is only necessary to mention two, *viz.*, the second and fourth. (*a*) By the former, Lord Berkeley gave to Lady Berkeley during her life an annuity of such amount as may in any or every year after his death be required to make up to the total sum of £5,000, clear of all death duties and income tax, the annual net income to be received by her under his will (including the appointment of the £1,200) and under his marriage settlement. In calculating the amounts an annual sum of £200 given by the will was to be taken into account. The annuity was itself to be free of all death duties and income tax and payable quarterly, and income tax was to include sur-tax. The codicil confirmed the will and a former codicil in all other respects. This codicil is dated Dec. 3, 1938, and is, therefore, executed before Sept. 3, 1939. (*b*) The fourth codicil is dated Sept. 14, 1940, and the chief material changes made by it are concerned with the priority of payment of the benefactions given by the will in previous codicils and the property upon which they are to be charged. By cl. 4 every annuity by the will or any codicil bequeathed to Lady Berkeley was to be payable in priority to all other annuities or pecuniary legacies and the annuity to Miss Jackson was to have priority next after the annuities to Lady Berkeley. Moreover, the settled estates and heirlooms mentioned in the will were charged with the payment of the annuities. Cl. 5 authorised the trustees of the will, *inter alia*, to provide for the annuities bequeathed by the will and codicil by purchasing an annuity.

The question for your Lordships' determination is the effect of the Finance Act, 1941, s. 25, upon this series of testamentary dispositions. Sects. 25 and 27 of that Act are as follows: A

Tax-free Payments, etc.

25 (1) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, B as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

(2) Where any such provision as is mentioned in subsect. (1) of this section is a provision for a payment free of income tax (and not merely a provision for a payment free of income tax other than surtax) the sum, if any, to be paid under that provision to make good the requirement that the payment shall be free of surtax shall, in the case C of surtax for the year preceding any such year of assessment as is mentioned in the said subsect. (1), be reduced to twenty twenty-ninths of the sum which would have been sufficient for that purpose if the rates of surtax in force for the year 1937-38 had applied to the year for which the surtax is payable.

(3) A person who is entitled under any such provision as is mentioned in subsect. (1) of this section to a payment free of income tax, or free of income tax other than surtax, shall be entitled to the following adjustment of his surtax for the year 1940-41, that is to say, his total income for that year, so far as it is ascribable to his rights under D that provision, shall be reduced to what it would have been if in his case (*a*) the rates of surtax in force for the year 1937-38 had applied also to the years 1938-39, 1939-40 and 1940-41; and (*b*) the 1938-39 rates of income tax, other than surtax, had applied also to the years 1939-40 and 1940-41; and (*c*) the rights and liabilities of the persons concerned had been modified accordingly.

(4) If, in the case of a payment to which subsect. (1) of this section applies, the relations of the payee and payor are such that the payee is accountable to the payor for E so much of any relief from income tax which he receives as is ascribable to the payment (*a*) the liability of the payee to account to the payor shall be limited to twenty twenty-ninths of the sum for which he would have been accountable if the 1938-39 rates of income tax, other than surtax, had applied to the year of assessment in which the payment falls to be made, and the foregoing provisions of this section had not passed; and (*b*) the relief to be given shall be calculated as if (i) the gross sum represented by the payment were what it would have been if the 1938-39 rates of income tax, other than surtax, had applied to the year of assessment in which the payment falls to be F made, and the foregoing provisions of this section had not passed; and (ii) that gross sum had borne income tax at 10*s*. in the £.

(5) This section shall not (*a*) affect any provision falling within r. 23 of the General Rules (which renders invalid agreements not to deduct tax); (*b*) affect any provision if, by virtue of any provision in the same or any other deed, instrument, will, codicil, order, local or personal Act or contract, which contemplates rises in the rates of income tax, the payments thereunder have ceased, or, in the event of further rises in the rates G of income tax, may cease, to be wholly free of income tax, or, as the case may be, wholly free of income tax other than surtax; (*c*) apply to any emoluments of any office, employment, annuity, pension or stipend taxed under Sched. E; or (*d*) apply to any dividends or shares of profits.

27 (1) For the purposes of the provisions of this Act relating to tax-free payments (*a*) a provision, however worded, for the payment of such sum as will after deduction of income tax be equal to a stated amount, shall be treated as a provision for the payment of the said stated amount free of income tax, other than surtax; and (*b*) the expression H "a stated amount" includes a stated fraction of the gross amount of any specified income (that is to say, of the amount of that income before income tax has been charged thereon, whether by deduction or otherwise), but does not include a stated fraction of the net amount of any specified income (that is to say, of the amount of that income after it has been charged to income tax, whether by deduction or otherwise); (*c*) the expression "if the 1938-39 rates of income tax, other than surtax, had applied" means, in relation to a year of assessment, if the standard rate of tax for the year had been 5*s*. 6*d*. in the £ and the provisions of the Income Tax Acts relating to relief from tax had not been amended in any respect by any Act passed since Sept. 3, 1939.

(2) The Treasury may by regulations provide for adjustments between parties where payments to which the said provisions of this Act apply have been made before the passing of this Act otherwise than in accordance with those provisions.

Having regard to the terms of these sections, your Lordships have to determine whether sect. 25 applies to the sum secured to Lady Berkeley by the fourth codicil so as to reduce it, or part of it, by nine twenty-ninths.

On the respondent's part it was said that the provision for payment free of income tax was of a "stated amount" (*viz.*, £5,000), was contained in the second codicil and was, therefore, made before Sept. 3, 1939, and had not been varied since that date. All these contentions were controverted by the appellants, who maintained: (i) that provision made by will or codicil is not made until the testator's death; (ii) that even if it be made at the date of execution of the document, the material date is that of the fourth codicil, which confirmed the will; (iii) that the fourth codicil is a variation of the provision; and (iv) that in any case there is no "stated amount."

My Lords, it is common ground that a will or codicil comes into operation on the death of a testator. Until then, so long at any rate as he has testamentary capacity, it is revocable, or to use the common phrase, ambulatory. Indeed as my noble and learned friend LORD THANKERTON has pointed out, by the law of Scotland it is correctly described as made at the last moment at which it is revocable. If I thought the wording of the section ambiguous, I should, in an Act applicable to both England and Scotland, give such an interpretation as would best accord with the meaning which it would plainly bear under one of the two systems of law, though it might be doubtful under the other. But, speaking for myself, I do not consider the meaning doubtful. It is true that the word "provision" has more than one meaning. It may be used to indicate the thing provided or the words by which provision is made, and it was urged that in this section it bore the first meaning. It was, it was said, "made" when it came into operation; until then it was but inchoate. No doubt it was "contained" in the second codicil, but it was not "made" until the testator's death. The argument is attractive, but takes, I think, too technical a view. "Provision" in the section appears to be used in the second sense mentioned above. The expressions "however worded," "stated amount," "contained in" all seem to point to the language rather than what the language brings about. The Court of Appeal so thought in *Re Waring* (1), and I agree with their view.

The second question is what is the codicil in which the provision is contained. Originally, no doubt, it is to be found in the second, but that codicil is confirmed by the fourth, and in the end it has to be determined which of the two ultimately "makes" it. The inquiry goes back behind the Wills Act, 1837, to the history of the publication and republication of wills, an expression now meaningless, but still unhappily in use. I do not, however, think it necessary to explore its origin; it is enough to say that there is a series of cases since the Wills Act, 1837, was passed insisting that, just as republication of the will substituted the date of the republication for that of the will before the Wills Act was passed, so afterwards the will spoke from the date of confirmation rather than from that of its original execution, and this result occurred even when there was no express confirmation contained in the codicil, provided the will was referred to and it appeared that the codicil intended to confirm it. To this result, it is true, there were some exceptions made with the object of preserving the intention of the testator where a strict fulfilment of the general rule would defeat it, *e.g.*, in cases where an exact compliance with the rules would result in the giving of double portions, or would defeat a gift to charity which the testator obviously intended to be effective. It may be enough to quote *Grealey* v. *Sampson* (10) and *Goonewardene* v. *Goonewardene* (11), as exemplifying the rule, and *Re Fraser* (12), as exemplifying the exception. In the present case, however, there are no facts rendering either of these two exceptions applicable and the general rule that a will or earlier codicil is made at the date when it is confirmed by a codicil of later date must, in my opinion, prevail.

If this view be the true one it disposes of the case, but as the further points were fully argued, I think I ought to express my present opinion on them.

I think the amount was a "stated amount." True, it may vary from year to year, but it is calculable once the net sum derived from the previous gifts is known and the tax and sur-tax for the relevant periods are ascertained. What, then, is the stated sum ? It is, in my opinion, and as the Court of Appeal thought, the amount which the estate has to pay in cash in order to make up the income to £5,000 net. I can, perhaps, best express my view by saying that where there is a direction in a will to make up £*x* to £*y* the stated amount, for payment of which provision is made, is not £*y* but £*y* – £*x*.

Finally, it was contended that the codicil was a variation of the provision in the will for payment of a stated amount free of income tax. The Court of Appeal thought not ; indeed they thought that an increase or decrease in the amount would not be a variation. In their view, it is the direction to pay free of tax which must be varied in whole or in part. I cannot take that view, but I find the giving of priority over other legacies and of a larger property from which the annuity may be received more difficult to pronounce upon, and until it is necessary to decide the matter I should prefer to withhold my decision.

LORD SIMONDS : My Lords, this appeal and cross-appeal raise a number of questions, of which many involve the consideration of facts and documents of some complexity. But the initial and fundamental question is one which can be simply stated and does not admit of much elaboration in answer. All that is involved is the construction of a few words in the Finance Act, 1941, s. 25.

That section has already been cited to your Lordships but I will venture for the sake of clarity to repeat it. The material words are :

> (1) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing ; and (*b*) was made before Sept. 3, 1939 ; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s.* in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

The initial question is whether this section has any relevance in the circumstances which I will now baldly state.

The late Earl of Berkeley, whom I will call the testator, made his will on Nov. 10, 1936, and thereby made certain dispositions in favour of his wife, the appellant, Countess of Berkeley, and bequeathed an annuity of £1,500 free of income tax at the standard rate to the respondent, Sybil Deane Jackson. He made a first codicil on Sept. 14, 1938, to which I need not refer and on Dec. 3, 1938, made a second codicil whereby he bequeathed to the appellant an annuity which I will assume for the purpose of this question to be of a " stated amount free of income tax " within the meaning of the section. After Sept. 3, 1939, which I refer to as the " war date," the testator made two further codicils. By a third codicil dated Mar. 9, 1940, he made certain bequests in favour of the appellant and in all other respects confirmed his will and the former codicils thereto and by a fourth codicil dated Sept. 14, 1940, he made a number of dispositions affecting (*inter alia*) the annuities given to the appellant and the respondent, Miss Jackson, and again in all other respects confirmed his will as altered by the codicils thereto.

The testator died on Jan. 15, 1942, without having revoked or further altered his will. In the meantime the Finance Act, 1941, was passed, receiving the Royal Assent on July 22, 1941.

Sect. 25 (1) of the Act operates to reduce the annuities bequeathed to the appellant and the respondent, Miss Jackson (assuming them to be of " a stated amount "), if these conditions are satisfied : (*a*) that the provision was contained (*inter alia*) in a will or codicil ; (*b*) that it was made before the war date ; and (*c*) that it was not varied on or after that date. The first condition was clearly satisfied : upon the third I will not at present dwell, though it may have an incidental importance : it is to the second condition that I direct myself, asking the simple question, " Was any provision made for the appellant before the war date ? " For the purpose of answering this question, I at this stage ignore the fact that the testator by codicils made after the war date confirmed his will and earlier codicils.

For COHEN, J., who first heard this case, and for the Court of Appeal this question was decided by *Re Waring* (1). In that case FARWELL, J., decided in a few words that provision is not, within the meaning of the section, made by a will until the testator is dead; but the Court of Appeal, reversing him, held that provision is made at the date of the testamentary instrument containing the bequest and that it is immaterial when the testator dies. And it is this decision which your Lordships are, in the first place, called upon to review.

A My Lords, I am of opinion that the decision of the Court of Appeal in *Re Waring* (1) was wrong and that this appeal should therefore be allowed. In that view the other questions, some of them, as it appears to me, not easy of solution, do not arise.

I was much impressed by the point taken by my noble and learned friend LORD THANKERTON in the course of the argument and further developed by him in his speech to the House. It is a rule not to be disregarded that a statute B applying both to England and Scotland should bear the same meaning in both countries if its language is fairly susceptible of that result. And since it appears to be clear how the law of Scotland would regard a bequest contained in a will dated before the war date by a testator who died after it, I should be disposed to give the same effect in English law to the section if such a result did no violence either to the language of the section or to any principle of law. But, my Lords, C I by no means think it necessary to call this rule in aid. For, if I had to interpret this section upon the footing that English and no other law had to be considered, I should, with no more doubt or hesitation than I must feel when I differ from the Court of Appeal or any of your Lordships, conclude that it can have no application to the case of a testator who survives the war date, whatever may be the date of any will or codicil that he leaves behind him.

Ultimately, no doubt, the question whether provision has, within the meaning D of sect. 25, been made before or after a certain date can only be answered by a consideration of the section. It is a matter of construction and nothing else. But I cannot wholly ignore the clear purpose of the section and the circumstances under which the Act was passed. A practice had long grown up by which an annual sum free of income tax, including or excluding sur-tax, was provided for an annuitant. Unless the provision was made by will, it could only be made somewhat tortuously as, *e.g.*, by the provision of such a sum as after deduction E of income tax would leave the required amount; and my own experience, though I would not be dogmatic about it, has been that by far the commonest source of tax-free provision is to be found in wills. The advantage of such a provision is that the recipient obtains a definite annual sum whatever the rate of tax may be: the disadvantage, that an indefinite burden is placed upon the payer or upon the fund out of which the payment must be made. F Some increase or reduction of the burden must before the war date have been in the contemplation of any man who bargained to pay, or by his will bequeathed, an annuity free of tax: for changes in the rate of tax were a matter of common experience. But the war brought such changes as it was fair to assume had not been contemplated, the rate of tax rising, immediately on the outbreak, to a height hitherto unprecedented and continuing to rise. It was under these circumstances that the legislature in 1941 thought fit to make an adjustment of the G burden between the payer and payee and did so in the manner provided by the Finance Act, 1941, s. 25. But, my Lords, nearly two years had elapsed between the war date and the passing of the Finance Act, 1941, and what had happened in the meantime? There must have been many testators who made their wills before the war date (and thereby gave annuities free of tax) who survived the war date and knew of the great increase in the rate of tax (for who is so insensible as to be unaware of it?) and yet left their wills unaltered H and so died. Why should their wishes be overridden? If a man's wish is that his widow should have a clear annual sum for her support whatever the burden of taxation may be, there is no reason for the legislature to intervene to defeat it. Intervention where a guess may be hazarded as to what a testator's intention might have been had he foreseen events is one thing, but intervention where those events were before his eyes and he has not changed his purpose in another, and I should not willingly attribute to sect. 25 a meaning that had such a result.

In the present case the testator survived the passing of the Finance Act, 1941, but, to put it at the lowest, did nothing to suggest that, recognising the burden of increased tax, he wanted some adjustment made. Indeed, everything he did pointed in a contrary direction, but that is another part of the case. It was urged by counsel for the respondents that in such a case a testator must be presumed to know the section (and I suppose any section of any Act that may supersede it) and to be content to leave his will unaltered in the faith that the statute would make the adjustment that he desired of his testamentary disposition. My Lords, is it not the more probable view that he leaves his will unaltered because he does not want to alter it and remains as ignorant of the Finance Act, 1941, s. 25, as I was until I read the report of *Re Waring* (1) or, likely enough, until *Re Tredgold* (2) came before me for decision ? If so, what ground again is there for Parliamentary intervention ? Here, surely, is a sphere of conduct in which a man may do what he will with his own.

But, my Lords, the question is, as I have said, a question of construction and I will not rely more than is proper upon the background that I have sketched. The question is whether, for the purpose of sect. 25, provision is made by will for an annual payment when the will is duly signed, or when, by the death of the testator, the will becomes operative. The question here is not when the will was made but when provision was made, a distinction which escaped the notice of MACKINNON, L.J., and, as I think, led him into error in *Re Waring* (1).

I have pointed out that there are three conditions of sect. 25 applying, and I think that is significant. The first condition refers to the document or other source of payment, in which the provision is contained : the second, to the date when the provision is made. It would have been easy for the draftsman to refer the date to the document and combine the first and second conditions. He did not do so and I think that one good reason for not doing so was that, if he had, the section might have had just the meaning for which the respondents contend. But there would have been this odd result that, whereas in every other case than a provision by will the section would have dealt with rights known to the law which had accrued at the war date, in the excepted case of a provision by will it would have purported to operate on an ambulatory document which had no force or validity whatever at the war date and could have none until the testator died. By introducing the date in a separate condition and providing that the provision in question must be made before a certain date he postulates of every provision, however made, a common content, *viz.*, that it has a legal effect before that date.

That the section is not very artistically drawn I would be prepared to agree. In particular, little skill is shown in the use of the word " provision." That is a word of diverse meanings which slide easily into each other. It has come sometimes to mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it. Sect. 25 (1) opens with the words " Subject to the provisions of this section," and in this phrase either or both of the meanings I have given may be intended. Then comes the phrase " provision however worded," where the first meaning would seem more apt, though the second is well enough. Thirdly, the word is used in the context of (*a*) " contained," (*b*) " made," and (*c*) " varied," and here, though either meaning is appropriate to (*a*) or (*c*), it is the second meaning only which is appropriate to (*b*). I have said enough to show that it is not safe to build upon the fine shades of meaning of the word " provision," but the balance is, I think, in favour of giving to the expression, " being a provision which was made before," the second meaning that I have indicated. For one does not speak of " making " a provision, if by provision one means a clause or section.

So, my Lords, I come back to the simple question, whether provision is made by a testator for his beneficiary until he is dead. I do not doubt that, if asked, he might say he had made provision by his will, *e.g.*, for his wife. It is possible that she, if she knew the contents of his will, might say that he had made provision for her. But this is surely a loose and somewhat elliptical way of saying that, if he died without altering his will, there would be found to be provision made for her. I fail to see how provision can be made, how something can be provided, until there is vested in somebody some right known to the law. Until a testator is dead, the beneficiaries under his will have no better provision than have the next of kin from their intestate ancestor. In my view, sect. 25 must be read as dealing not with a *spes successionis*, nor with an expectation which rests upon a document liable at any moment to be torn up and having no force in the law, but with rights known to the law and enforceable by one man against another.

My Lords, I have said that the third condition, *viz.*, that the provision should not have been varied after the war date, had some significance. The importance of it, I think, is this, that it points to some act by the parties liable to pay and entitled to be paid the annual sum: it assumes rights in existence at the war date and afterwards varied, as *e.g.*, where an annuitant under a will and the residuary legatees agree that in view of the increased rate of tax some adjustment shall be made. I can see no sense or reason in it, if it is applied to the unilateral act of a testator. He is at all times master of the situation: why should application of the section depend on whether he does or does not vary his disposition? I think that the Court of Appeal did not sufficiently notice this aspect of the case. LORD GREENE, M.R., was, logically enough, driven to the view that the section applies, even though the testator has after the war date confirmed his will, for, as he justly says, if he has confirmed it he has not varied it. With all respect, I think that so strange a result might have led him to the view that the section has no relevance except where the variation is of rights accrued by virtue of a provision already made.

Coming to the conclusion that *Re Waring* (1) was wrongly decided and that in this case sect. 25 does not apply because the testator survived the war date, I do not think it necessary to say much about the other questions. I would, however, take this opportunity of correcting what I conceive to be an error in my judgment in *Re Tredgold* (2). The Court of Appeal had in *Re Waring* (1) expressly left open the question whether their decision in that case would be applicable in a case in which the testator had by a codicil made after the war date expressly confirmed his will made before that date. In *Re Tredgold* (2) I decided that it did not. But I do not think that I was justified in so deciding; for in *Re Waring* (1) there had been a republication of the will by a codicil, though it contained no express confirmation of it, and upon further consideration I do not think that there is any valid distinction for this purpose between republication with and without confirmation. I ought therefore to have followed the decision in *Re Waring* (1), in which case *Re Tredgold* (2) might itself have reached your Lordships' House and the decision in *Re Waring* (1) have been corrected at an earlier date. I would, however, add that, if it were necessary for me in this House to reconsider the effect of a republication of the will after the war date, I should adopt the view taken upon this point by my noble and learned friend LORD PORTER, whose opinion I have had the privilege of reading.

I will not detain your Lordships by a consideration of the question whether the further dispositions made in regard to the appellant's annuity by the fourth codicil amounted to a variation, so that the operation of the section would in any event be excluded. For, as I have already indicated, the question is for me an unreal one.

Upon the final questions raised by the appeal and cross-appeal, whether the provision in the testator's will and codicils was for a "stated amount" and which was the "stated amount" I respectfully adopt the reasoning and conclusions of LORD GREENE, M.R., and cannot usefully add anything.

I would allow the appeal and dismiss the cross-appeal.

LORD UTHWATT: My Lords, by the Finance Act, 1941, passed on July 23, 1941, income tax for the year 1941-42 was directed to be charged at the standard rate of 10*s*. in the £ for the year 1941-42. By sect. 25 of the Act certain annuities expressed to be given tax free were dealt with. It is necessary to quote only sect. 25 (1) which runs as follows:

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

The arithmetical result is that the gross amount of the sum payable in any year where the standard rate is 10*s.* is computed as if the standard rate were 5*s.* 6*d.*—the rate which obtained in the year 1938-1939.

The testator in this case died on Jan. 15, 1942, having by his will dated Nov. 10, 1936, and a codicil dated Dec. 3, 1938, given certain tax-free annuities, and having by codicils dated Mar. 9, and Dec. 14, 1940, confirmed his will and former codicils.

The first question which arises for decision is whether sect. 25 (1) applies to a provision made by a testamentary disposition—assumed for this purpose to be made only by a will dated before Sept. 3, 1939—of a testator who died on or after Sept. 3, 1939. The provision is contained in a will. Was the provision so contained made before that date ?

Sect. 25 (1), to my mind, admits of more than one construction and with Lord Greene, M.R., in *Re Waring* (1) I think it permissible to consider the nature of the problem with which the legislature chose to deal. Lord Greene, M.R., made the following observations ([1942] 2 All E.R. 250, at p. 253) :

> . . . it is to be observed that when a testator executes his will he is putting down his intention—his language expresses his intention, just as the parties to a deed express their intention, and it is a document which he knows perfectly well will have the effect which he intends it to have if he dies the next moment, or if he dies in . . . 10 years' time . . . Testators making their wills before Sept. 3, 1939, would, *ex hypothesi*, have been making their wills in reference to a state of facts quite different from that for which sect. 25 was drafted. If the argument for the respondents were correct, it would mean that those testators who died in the interval between Sept. 3, 1939, and the date when the 10*s.* income tax was imposed, which was in the Finance Act, 1941, would, at their peril, have had to make new wills or codicils in contemplation of this exceptional rise in income tax. It seems to me that the legislature cannot have imputed it to testators' prevision of subsequent legislation at the time when they made their wills. What has happened is that testators having made their wills, the legislature intervened and adjusted the burden between the classes of persons benefiting under the wills. I see no reason whatever why the legislature should have dealt with the case in the way in which the respondents claim here ; but I can see many excellent reasons why they should not. That makes it easier for me to accept what, in my view, is the clear *prima facie* meaning of this language.

I find myself unable to agree with this method of approach in an effort to ascertain the general intention of the legislature, or with the conclusion at which Lord Greene, M.R., arrived. The position dealt with by sect. 25 was the existence of instruments providing for tax-free annuities. The standard rate of income tax might at the beginning of the war be expected to rise during its continuance. The section proceeds on the footing that prior to Sept. 3, 1939, parties would not envisage the possibility of the standard rate of income tax rising to 10*s.* in the £. Their assumed intentions on that basis were not to be disappointed. But on and after Sept. 3, 1939, so far as income tax was concerned, parties ordered their affairs at their own risk. The obligor is held to a bargain made on or after that date. What, consistently with the rule laid down as respects obligors, is the treatment one might expect to be accorded to persons living on Sept. 3, 1939, who have prior to that date made a will or codicil giving a tax-free annuity ? Under the Act the question whether those persons did or did not survive its passing is immaterial. On one view, the testamentary instruments of all such persons are to be affected by the Act : on the other view, these testamentary instruments are to be left to mean what they say. Which of those views might one naturally expect the legislature to intend and express ? The latter is, I think, the natural alternative to adopt. The testator who is alive at the war date has the right freely to alter his testamentary dispositions. The result of the Act in the cases to which it applies is to alter the operative effect of freely expressed intentions on a matter not contrary to the public interest. To my mind it would be wrong in these circumstances to impute to the legislature any intention to go beyond the necessities of the case. If the language of the section so admits, the section should, therefore, in my opinion, be construed as dealing only with an untoward situation which the interested parties could not be expected to consider and deal with. And the line was drawn at Sept. 3, 1939. Why, as regards a person living on that date, able freely to deal with the matter as he thought fit, and having the same prescience as to the future course of events as a contracting party, should it be imputed to the legislature that its intention was to disturb an arrangement he had chosen to maintain, and force upon him an artificial scheme ? He does not need help. Why thrust it upon him ? He, if so minded —a common form is ready to hand in the books of precedents—could completely cover the ground by providing for any and every change in the rate of tax.

Nor does a consideration of the subject-matter dealt with suggest any special need for intrusion by the legislature in the case of a testator living on the war date. The contrary, indeed, appears to be the case. The object of giving an annuity free of tax is to allow the annuitant so much spending money. Solicitude for the welfare of the annuitant and personal interest in him appear from the nature of the gift. Tax-free annuities given by a testamentary disposition may be fairly assumed to be at all times well to the forefront of the testator's mind.

I am unable, therefore, to see any good reason why the legislature should regard as needing alteration the testamentary arrangements of testators living at Sept. 3, 1939, in respect of tax-free annuities, if no transaction made on or after that date is regarded as demanding interference. It is for these reasons that I differ from Lord Greene, M.R., in the passage I have quoted. I venture the comment that, in reaching his conclusion, Lord Greene, M.R., took into account only testamentary dispositions, and that a conclusion embracing cases where the testator survives the date of the passing of the Act is reached by considering only the case of a testator who did not so survive. To this it might be added—not by way of comment—that if *Re Tredgold* (2) were rightly decided, the conclusion of Lord Greene, M.R., as to the intention of the legislature includes the case where a testator has at any time after Sept. 2, 1939, chosen in express terms to confirm his will. Whatever view the law may take of the operative effect of such a confirmation, that confirmation at least means to a testator, " I now mean what I then said."

One further general observation may be made. Testamentary instruments appear in sect. 25 (1) of the Act in the middle of a list of other instruments all of which were in effective operation on Sept. 3, 1939, and the section applies in the same way as respects the effect of the provision whatever be the character of the instrument in which the " provision " is contained. The general lay out of the section, as well as the substance of the matter, suggests that the legislature was dealing with a closed series of transactions involving, therefore, only the testamentary dispositions of testators who died before the war date. My Lords, in my view, the word " provision " is an ambiguous word. It may mean the clause in the instrument; the word " provision " in the phrase " subject to the provisions of this section " appearing in the forefront of the section may have that meaning. But the word may also mean the subject-matter resulting from the legal operation of a clause and, when it is used in that sense, the phrase commonly adopted in describing the act done is " provision has been made." The ambiguity in the word " provision " arises from the fact that, when it is sought to describe generally provisions in the latter sense, resort must be made to the source from which they spring, *viz.*, provisions in the former sense. In my opinion, the word " provision " in sect. 25 (1) is used in the latter sense. Read in that sense throughout the section, I find no difficulty in giving a sensible meaning to all parts of the section without putting any gloss on any other words appearing in it. One qualification only needs to be made to this statement, *viz.*, that the word " provision " where secondly used in subsect. (5) (*b*) is used in the former sense. But this, though relevant, is by no means decisive. Against this exceptional use there may be set the fact that the use of the phrase in subsect. (5) : " This section shall not . . . (*c*) apply to the emoluments of any office . . . or (*d*) . . . dividends or shares of profits "—the section, be it remembered, applies to a provision—goes on the footing that " provision " means the thing provided, not the source from which the thing is provided.

In support of my view some other matters may be referred to. There is first the outstanding fact that the critical date is attached to the provision made—not to the document in which it is contained. That I do not take to be a draftsman's slip. Secondly, I attach importance to para. (*c*) of sect. 25 (1)—the provision is to be one " which has not been varied on or after that date." Generally speaking, variations are made in the effect of a clause, not its terms, and, leaving aside the disputed case of testamentary instruments, it would be only the effect—not the language—of a clause that would excite the attention of interested parties. Again, para. (c) must receive the same construction, whatever be the instrument in which the provision is found. Among the instruments mentioned is an Act of Parliament. A provision in the former sense contained in an Act of Parliament can be varied only by another Act of Parliament (I leave out of consideration the exceptional case where the Act provides some other means of variation). An agreement between the parties interested would however be effective to vary a " provision " contained in an Act of Parliament in the latter sense. I do not conceive it to be possible that the section in such a case was intended to apply, whatever the parties interested agreed, unless there had been another Act of Parliament. Why should they not be free to make their own bargain ? Provision in the latter sense must, therefore, have been intended.

If this be the meaning of the word " provision," it follows that there is no provision made by a testator until he dies and his will becomes an instrument having an operative effect in law. The Act accordingly does not, in my opinion, apply to the testamentary dispositions made by Lord Berkeley. I would add that I am in complete agreement with the view expressed by my noble and learned friend LORD THANKERTON that the presumed intention of the legislature in a taxing Act is that the incidence of taxation should be the same in England and in Scotland, with the consequence that, if a taxing Act is reasonably capable of two constructions, one leading to equality of incidence in the two countries and the other to inequality, the former construction should be adopted.

My conclusion renders it unnecessary to express any opinion upon the other points which were argued. I content myself with saying that I agree with the views expressed by LORD GREENE, M.R., in reference to " stated amount " and that, if the view which I take as to the meaning of " provision " is correct, the observations made by LORD GREENE, M.R., on the question of " variation " need reconsideration.

I would allow the appeal and dismiss the cross-appeal.

Appeal allowed. Cross-appeal dismissed.

Solicitors : *Field, Roscoe & Co.* (for the appellant) ; *Garrard, Wolfe & Co.* (for the respondents R. G. W. Berkeley and R. J. G. Berkeley) ; *Culross & Co.* (for the respondent Sybil Deane Jackson).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CONGREVE AND CONGREVE *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Wrottesley, J.), April 30, May 1, 2, 3, 16, 1946.]

Income Tax—Sur-tax—Avoidance of tax—Transfer of assets to company abroad—Transfer of assets to company in United Kingdom subsequently moved abroad—By whom transfer must be made—" Associated operation "—What income deemed income of transferor—Finance Act, 1936 (c. 34), *s.* 18, *Sched.* II, *para.* 6.—*Finance Act,* 1938, (c. 46), *s.* 28.

The appellants, who were husband and wife, were both ordinarily resident in the United Kingdom, but domiciled abroad. A series of complicated transactions, the great bulk of which were undoubtedly entered into in order that the appellant wife might escape the incidence of income tax and sur-tax, resulted in the transfer of income to persons abroad. On an appeal against assessments made under the Finance Act, 1936, s. 18, and Sched. II. para. 6, as amended by the Finance Act, 1938, s. 28, the Commissioners for the Special Purposes of the Income Tax Acts found that the appellant wife was an individual who had, by means of a transfer in conjunction with associated operations, acquired rights by virtue of which she had, within the meaning of sect. 18, power to enjoy the income covered by the assessments, which was income payable to persons resident or domiciled out of the United Kingdom. The main questions for the decision of the court were: (i) Was it a condition precedent to the working of the section that the transfer must be made by the appellant wife? (ii) Whether the section applied to cases where the appellant wife transferred shares to a company in the United Kingdom, which, after the transfer, removed out of the United Kingdom? (iii) What income, found to be the income of a person out of the United Kingdom, which the appellant wife had power to enjoy, was to be deemed to be the income of the appellant wife or her husband?:—

HELD: (i) it was a condition precedent to the working of the section that the transfer must be made by the person striving to avoid liability to tax; the section had no application to any transfer of assets unless it was a transfer made by an individual ordinarily resident in the United Kingdom and by virtue or in consequence of the transfer (either alone or in conjunction with associated operations) income became payable to persons resident or domiciled out of the United Kingdom.

(ii) the only effect of the transfer of shares to a company in the United Kingdom, which, after the transfer, removed out of the United Kingdom, was to make income payable to the transferee company, which was still resident and domiciled in the United Kingdom and the income only became payable to a person out of the United Kingdom by reason of the company moving out of the United Kingdom, not by the transfer; the exhaustive definition of "associated operations," in subsect. 2, was confined to operations in relation to any of the assets transferred or assets representing the assets transferred or income therefrom, and the removal of the company, in whom the assets were vested, out of the United Kingdom, could not be so described; consequently the section did not apply.

(iii) on a true view of the section it was only the benefit which might at any time accrue to the individual as a result of the transfer and any associated operation that the individual could be said to enjoy; consequently it was only income referable to assets which the appellant wife transferred herself or caused to be transferred that was to be deemed to be her income for the purposes of the Income Tax Acts and not the whole income of the company concerned.

[**EDITORIAL NOTE.** It is clear from the preamble to sect. 18 of the Finance Act, 1936, that the target aimed at by the legislature is the individual who is endeavouring to avoid the incidence of tax by tranferring assets abroad. But when the transfer of assets is not carried out by the person ordinarily resident in the United Kingdom in consequence whereof income becomes payable to persons resident or domiciled out of the United Kingdom, it is held that the transaction is not affected by the section.

For the Finance Act, 1936, s. 18, see HALSBURY'S STATUTES, Vol. 29, p. 230.]

Cases referred to:

*(1) *MacDonald* v. *Inland Revenue Comrs.*, [1940] 1 K.B. 802; Digest Supp.; 109 L.J.K.B. 609; 23 Tax Cas. 449.

*(2) *Howard de Walden (Lord)* v. *Inland Revenue Comrs.*, [1942] 1 All E.R. 287; [1942] 1 K.B. 389; 111 L.J.K.B. 273; 25 Tax Cas. 121.

*(3) *Corbett's Executrices* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 218; 169 L.T. 166; 25 Tax Cas. 305.

CASE STATED under the Income Tax Act, 1918, s. 149 and the Finance Act, 1927, s. 42 (7), by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on Oct. 21, 1942, Nov. 2, 3, 4, 1942 and Sept. 27, 1944, Mrs. M. G. Glasgow Congreve and A. C. Congreve (hereinafter called "Mrs. Congreve" and "Mr. Congreve" respectively) appealed against the following assessments:—Mrs. Congreve against an assessment to sur-tax in the sum of £15,059 for the year ending Apr. 5, 1936; Mr. Congreve against assessments to sur-tax in the sums of £17,281, £26,314, £40,061, £70,066, £117,803 and £97,866 for the years ending Apr. 5, 1936 to Apr. 5, 1941 inclusive; and against assessments to income tax in the sums of £10,000 £20,000, £40,000, £60,000 and £60,000 for the years ending Apr. 5, 1937 to Apr. 5, 1941 inclusive.

2. All the above assessments are raised under the provisions of the Finance Act, 1936, s. 18, and Sched. II, para 6, and of the Finance Act, 1938, s. 28. The appeals raise the question whether the said assessments were correctly made by reason of the matters hereinafter set out.

The following table sets out the respective dates of registration, the full names and the short labels of the several English, Canadian and American companies hereinafter mentioned.:

June 17, 1912	Humphreys & Glasgow Ltd., an English Company	Hereinafter called	Humphreys & Glasgow (England)
Dec. 29, 1927	International Gas Processes Corporation, an American company	,,	International Gas.
Apr. 21, 1932	Humphreys & Glasgow (Canada) Ltd., a Canadian company	,,	Humphreys & Glasgow (Canada)
May 5, 1932	Rockbridge Ltd., A Canadian Company	,,	Rockbridge
Nov. 29, 1933	Humglas Ltd., a Canadian company	,,	Humglas
Nov. 18, 1936	Margreve Ltd., an English company	,,	Margreve
Oct. 15, 1937	73 Investment Trust Ltd., an English company.	,,	Seventy Three
Oct. 18, 1937	Marglas Ltd., an English company	,,	Marglas
Nov. 29, 1937	Glow Investment Trust Ltd., an English company.	,,	Glow

3. Mr. Glasgow, the father of Mrs. Congreve, was born about 79 years ago in the United States of America of American parents. He is and always has been an American citizen domiciled in one of the United States. In 1901 Mr. Glasgow married an American lady. She is still living. Mr. Glasgow came to England in 1892 and (except during the 1914-1918 war) resided in England from that time until September, 1939, when he gave up his residence in England and returned to America with Mrs. Glasgow. They have not been back since. Shortly after coming to England in 1892, Mr. Glasgow entered into a partnership with another American, Dr. Humphreys. They carried on business in England under the firm name of Humphreys & Glasgow. Their business was the designing and supplying of plant for the production of carburetted water gas. Mr. Glasgow became the sole owner of the business and in 1912 he sold it to Humphreys & Glasgow (England). Mr. Glasgow became the owner of the bulk of the shares, and until December, 1927 owned a little over 93,000 shares out of 100,000 issued, the remainder being held by several employee directors of the company. Transactions thereafter relating to the said 93,000 shares are referred to in the following paragraphs. . .

4. Mrs. Congreve was born in London, where she resided with her parents, accompanying them on their trips to the United States of America. From 1914 to 1919 she lived entirely in America. Upon reaching her majority Mrs. Congreve took active steps to confirm her American citizenship and domicil and exercised her vote in New York City, although she continued to reside in the United Kingdom. On July 30, 1935, Mrs. Congreve was married to Mr. Congreve. Mr. Congreve was ordinarily resident in the United Kingdom at all material times: as was later agreed (see para. 21 of this case) he was at all material times domiciled in Eire. From time to time Mrs. Congreve has received by way of gift from her father or her mother substantial American investments and she has also received substantial legacies from American relatives. Mrs. Congreve has been a director of Humphreys & Glasgow (England) since September, 1939. The said assessment to sur-tax made upon her for the year ending Apr. 5, 1936 is in respect of her income from Apr. 6, 1935 to July 30, 1935, the date of her marriage to Mr. Congreve.

5. Humphreys & Glasgow (England) was incorporated in England on June 17, 1912 with an authorised share capital of 100,000 shares of £1 each. It acquired from Mr. Glasgow the business then owned by him of Humphreys & Glasgow. The shareholdings in Humphreys & Glasgow (England) were, in consequence of the matter hereinafter set out, held on the respective material dates as follows:—

Name	January 1929	May, 1933	July 16, 1937
Mr. Glasgow	28,083	28,083	—
International Gas	60,000	—	—
Humphreys & Glasgow (Canada) ..	—	65,000	—
Mrs. Congreve	5,000	—	48,083
Mr. Congreve	—	—	3,000
Margreve	—	—	17,000
Consolidated Nominees	—	—	28,000
Other Shareholders	6,917	6,917	3,917
	100,000	100,000	100,000

The voting power of the shares was one vote per share. As appears from paras. 6 and 7 hereof Mrs. Congreve held from Apr. 16, 1932, the whole of the issued capital of

International Gas and in May, 1933 all the shares in Humphreys & Glasgow (Canada). As appears from para. 10 hereof Mrs. Congreve was on July 16, 1937, the owner of all the issued shares of Margreve save 50 ordinary which she purchased in October, 1937, the issued capital of Margreve being at that time £105,000 of which £100,000 was in preference shares and £5,000 in ordinary shares. The 28,000 shares held by consolidated nominees were so registered at that date. In fact they had been purchased by Margreve on Nov. 23, 1936, from Humphreys & Glasgow (Canada): see para. 10 hereof. It will be seen therefore that Mrs. Congreve held at all material times directly or indirectly the controlling majority of the shares in Humphreys & Glasgow (England). In 1933 Humphreys & Glasgow (England) sold its foreign investments to Humglas (referred to later in para. 9 hereof) receiving in exchange 995 out of 1,000 shares of no par value in Humglas Ltd., and its class " A " debentures of the nominal value of $1,290,000. Mr. Glasgow was the chairman and managing director of Humphreys & Glasgow (England) from the date of its incorporation until Sept. 30, 1939, when he resigned his managing directorship, as from that date. He continued as chairman without remuneration. Mr. and Mrs. Congreve have respectively been directors of Humphreys & Glasgow (England) from Dec. 2, 1936, and Sept. 11, 1939. On Dec. 1, 1937, Humphreys & Glasgow (England) sold the Humglas debentures to Glow (hereinafter referred to in para. 13) for £257,500 payable in cash.

On Dec. 1, 1937, Humphreys & Glasgow (England) acquired for £257,500, debentures issued by Glow of the nominal amount of £515,000. Humphreys & Glasgow (England) still holds these Glow debentures which are repayable at a premium of 20 per cent. At the date of the hearing before us Mrs. Congreve owned 93,455 of the 100,000 issued shares of Humphreys & Glasgow (England).

6. International Gas was incorporated in the State of Delaware on Dec. 29, 1927. By offer dated Dec. 9, 1927, made by Mr. Glasgow and accepted on Dec. 31, 1927, by the board of International Gas, the latter acquired 60,000 shares of Humphreys & Glasgow (England) from Mr. Glasgow in exchange for 11,116 shares of stock of International Gas of $100 each being the whole of its issued capital. On Apr. 16, 1932, Mr. Glasgow while in America made a gift to his daughter of these 11,116 shares. By offer dated Apr. 22, 1932, made by Humphreys & Glasgow (Canada) and accepted by letter dated Apr. 25, 1932, International Gas sold to Humphreys & Glasgow (Canada), Ltd., its 60,000 shares of Humphreys & Glasgow (England) together with cash of approximately $3,400 (U.S.A.) which it then owned. The purchase moneys were satisfied by the issue of 995 shares of no par value of Humphreys & Glasgow (Canada) together with 424 series " A " redeemable sterling demand debentures of £500 each (total par value £212,000) part of a total authorised issue of £230,000 par value. The said debentures were non-interest bearing payable on demand at the Dominion Bank, Ltd., King William Street, London, to which all the dividends of Humphreys & Glasgow (England) were directed to be paid. The said debentures bore interest at 6 per cent. per annum from and after demand for repayment. The said purchase was completed on Apr. 19, 1932. On or about Apr. 27, 1932, International Gas went into liquidation, so that when the assets of International Gas were sold to Humphreys & Glasgow (Canada), Miss Glasgow (now Mrs. Congreve) was the sole shareholder of International Gas, and by direction of that corporation the shares of Humphreys & Glasgow (Canada) were allotted direct to Miss Glasgow. The aforesaid debentures also became Miss Glasgow's property. International Gas had received dividends annually on its 60,000 shares of Humphreys & Glasgow (England).

7. Humphreys & Glasgow (Canada) was incorporated by Dominion of Canada charter on Apr. 21, 1932, with a share capital of 1,000 shares of no par value, and a Canadian directorate which received no directors' fees. The income of Humphreys & Glasgow (Canada) came solely from the shares of Humphreys & Glasgow (England) immediately hereinafter referred to. No dividends were paid by Humphreys & Glasgow (Canada) the whole of its income being accumulated at the aforementioned branch of the Dominion Bank in London. At this bank the debentures issued to Mrs. Congreve were repayable on demand. It acquired from International Gas the 60,000 shares in Humphreys & Glasgow (England) in consideration of the issue of the 995 shares and the £212,000 debentures referred to in para. 6 hereof. On May 1, 1932, Miss Glasgow sold to Humphreys & Glasgow (Canada) 5,000 shares in Humphreys & Glasgow (England) which she previously held in her own right. They had been given to her by her father. The consideration for this sale was the issue to Miss Glasgow of further debentures in Humphreys & Glasgow (Canada) of £18,000 which made up the total authorised issue of £230,000. On Mar. 23, 1936, Humphreys & Glasgow (Canada) agreed to buy from Mr. Glasgow 28,000 shares of Humphreys & Glasgow (England) at a price to be fixed by valuation. This was subsequently fixed at £3 5*s.* 0*d.* per share ex dividend. These 28,000 shares were sub-sold by Humphreys & Glasgow (Canada) to Margreve as mentioned in para. 10 hereof. On July 16, 1936, the Finance Act, 1936, s. 18 became law. In Nov., 1936, Humphreys & Glasgow (Canada) applied for a surrender of its charter and the 65,000 shares, including the said 5,000 shares, of Humphreys & Glasgow (England) held by it, were transferred to Mrs. Congreve on a

distribution in specie of the assets in the winding up. These 5,000 shares have remained in her possession ever since. The date of the actual dissolution of Humphreys & Glasgow (Canada) was Oct. 13, 1937.

8. Rockbridge was incorporated by Dominion of Canada charter on May 5, 1932, with a capital of 1,000 shares of no par value, 995 of which were issued (as hereinafter mentioned) to Miss Glasgow or her nominees. The remaining 5 shares went to Canadian directors who received no director's fees. On May 5, 1932, Miss Glasgow sold to this company a number of her investments in American and/or Canadian undertakings. The consideration was the issue of the said 995 shares and series " A " debentures of the nominal value of £99,000 consisting of 165 at £500 each and 165 at £100 each. All these debentures like the Humphreys & Glasgow (Canada) debentures were non-interest bearing payable on demand at the Dominion Bank, Ltd., King William Street, London, and bore interest at 6 per cent. per annum from the date of the demand for repayment. No dividends were paid by Rockbridge—the whole of its income being accumulated—but in December, 1935, Rockbridge redeemed £22,000 of its debentures and in order to do this without selling securities it borrowed $47,000 (U.S.A.) from Mrs. Congreve which was subsequently repaid to her on Jan. 15, 1936. On Jan. 15, 1936, Mrs. Congreve sold to Rockbridge further foreign securities the purchase money being satisfied by the issue to her of £27,000 series " B " debentures of Rockbridge, which were in exactly the same form as the aforementioned existing series " A " debentures. On or about June 20, 1936, Rockbridge agreed to transfer all its assets, namely the American and/or Canadian investments to Mrs. Congreve in satisfaction of the rights attaching to the debentures of Rockbridge held by her. Rockbridge also covenanted that on or after June 20, 1936, it would carry on no business save to wind-up and surrender its charter. On Nov. 27, 1936, Mrs. Congreve transferred the said investments to Margreve: see para. 10 hereof.

9. Humglas was incorporated in Canada on Nov. 29, 1933, with an authorised share capital of 1,000 shares of no par value. The whole of its share capital was taken up by Humphreys & Glasgow (England) except 5 qualification shares which were held by the directors in Canada. Humglas acquired from Humphreys & Glasgow (England) a number of foreign investments. The result of this transaction was that Humphreys & Glasgow (England) no longer remained liable to income tax on income arising from the said foreign investments nor did Humglas pay United Kingdom income tax on these investments as it was resident abroad. The purchase money was paid by the issue of $1,290,000 class " A " debentures. These debentures were non-interest bearing payable on demand but carried interest at 6 per cent. per annum from the date of demand for repayment. On Dec. 1, 1937, as appears in para. 13 hereof, these debentures were sold by Humphreys & Glasgow (England) to Glow in consideration of an issue of £515,000 debentures at 50 per cent. discount. Humglas is now and always has been controlled by its board in Canada. Its directors are all resident in Canada or U.S.A. No dividends were ever paid by Humglas. Both at the time of the incorporation of Humglas and at the time of the sale of its debentures to Glow, Mrs. Congreve held directly or indirectly a controlling interest in Humphreys & Glasgow (England): see shareholdings in para. 5 hereof.

10. Margreve was registered in England on Nov. 18, 1936. The original capital of £1,100 was divided into 1,000 3 per cent. cumulative preference shares and 100 ordinary shares of £1 each. The preference shares took the whole of the surplus assets on a winding up. Margreve made the following purchases: (1) From Mrs. Congreve on Nov. 23, 1936, for £56,666 13*s.* 4*d.* payable in cash, 17,000 shares of £1 each in Humphreys & Glasgow (England). These 17,000 shares were part of the 65,000 shares which passed to Mrs. Congreve on the winding up of Humphreys & Glasgow (Canada): (ii) From Humphreys & Glasgow (Canada) on Nov. 23, 1936, for £93,333 6*s.* 8*d.* (*i.e.*, at £3 6s. 8*d.* a share) payable in cash, 28,000 shares of £1 each in Humphreys & Glasgow (England). These 28,000 shares did not form part of the 65,000 shares acquired by Humphreys & Glasgow (Canada) as hereinbefore set out. They belonged to Mr. A. G. Glasgow who on Mar. 23, 1936, had agreed to sell them to Humphreys & Glasgow (Canada) at a price which was subsequently fixed at £3 5*s.* 0*d.* per share. Margreve took a transfer direct from Mr. Glasgow, but the payment was made to Humphreys & Glasgow (Canada): (iii) From Mrs. Congreve on Nov. 27, 1936, a number of securities (the American and/or Canadian investments derived from Rockbridge and some other foreign investments) the price to be market value. These securities were ultimately valued at £232,283 2*s.* 7*d.* which price was paid in cash to Mrs. Congreve by Margreve.

On Nov. 23, 1936, the capital of Margreve was increased by the creation of a further 99,000 3 per cent. cumulative preference shares. On Nov. 27, 1936, Margreve allotted to Mrs. Congreve 10,000 3 per cent. cumulative preference shares at the price of £5 per share payable in cash, payable 10*s.* per share down and £4 10*s.* 0*d.* per share before Dec. 31, 1936. On the same date it was arranged that Mrs. Congreve should take up a further 30,000 of the preference shares of Margreve at £5 per share payable as to £91,000 by U.S.A. dollars in New York at the current rate of exchange and as to the balance of £59,100 in sterling in London. On Dec. 3, 1936, Mrs. Congreve took up for cash at par 50 ordinary shares of Margreve, such shares being allotted to the trustees of a charitable trust entered into by Mrs. Congreve. On Dec. 8, 1936, the capital of Margreve was increased by the creation of 4,900 ordinary shares. This made the nominal capital of Margreve £105,000 of which £100,000 was in preference shares and £5,000 in ordinary shares. On Jan. 25, 1937, Mrs. Congreve took up a further 8,000 preference shares in Margreve at £5 per share payable in cash. On Mar. 16, 1937, Mrs. Congreve took up a further 40,000 3 per cent. preference shares of Margreve at £5 per share payable in cash. On Apr. 14, 1937, Mrs. Congreve took up a further 11,998 3 per cent. preference shares of Margreve at £5 per share payable in cash. This with the two signatory shares held for her made her the owner of all the 100,000 3 per cent. preference shares of Margreve. On July 30, 1937, the Finance Act, 1937, became law. By sect. 19 thereof a new tax called National Defence Contribution was levied on trades and businesses, including the holding of investments, carried on in the United Kingdom. In October, 1937, the 50 ordinary shares which had been allotted to the trustees of her charitable trust were purchased by Mrs. Congreve for £500. This made Mrs. Congreve the beneficial owner of all the issued preference and ordinary capital of Margreve. At an extraordinary general meeting of Margreve, held on Oct. 21, 1937, resolutions were passed giving effect to the following: (i) The directors were authorised to create a series of 70 debentures of £5,000 each, as per their recommendation: (ii) The special rights and privileges attached to the 100,000 3 per cent. cumulative preference shares (including any arrears of dividend accrued on those shares) were cancelled and extinguished and the said preference shares whether issued or not issued, were converted into and became ordinary shares ranking *pari passu* in all respects with the existing 5,000 ordinary shares of £1 each. At this meeting of Margreve it was also resolved to capitalise the sum of £350,000 being part of the sum standing to the credit of share premium reserve and that a bonus of £350,000 be declared and such bonus applied on behalf of the persons who, on Oct. 21, 1937, were the holders of the ordinary shares in the capital of Margreve, in paying up in full £350,000 debentures of Margreve carrying interest as from the date of issue, at the rate of 6 per cent. per annum, payable half yearly in advance. At a board meeting of Margreve held on Oct. 21, 1937, after the extraordinary general meeting, the directors capitalised the sum of £350,000 aforesaid and distributed the same, as a special capital bonus, amongst the holders of the ordinary shares and applied the said £350,000 in paying up in full the amount payable on 70 debentures of £5,000 each, mentioned above. As at this time Mrs. Congreve owned all the issued ordinary share capital of Margreve, the whole of the said capital bonus was payable to her and the whole of the said 70 debentures were issued to her, payment for the latter being satisfied by the said bonus monies. Up to this time Mrs. Congreve had been a director of Margreve but on Oct. 25, 1937, she resigned her directorship. At the board meeting of Margreve held on Oct. 25, 1937, there was produced an allotment letter in respect of £215,000 out of the £350,000 debentures duly renounced in favour of Seventy Three (hereinafter referred to in para. 11) which renunciation was accepted, and, in accordance therewith, the name of Seventy Three was entered on the register as the holder of such £215,000 nominal value debentures. The remaining £135,000 nominal value debentures were duly registered in the name of Mrs. Congreve. At this board meeting it was also reported that Margreve had sold its 45,000 ordinary shares of £1 each in Humphreys & Glasgow (England) on which it had received the July 1937 dividend, to Marglas (hereinafter referred to in para. 12); and Margreve was thus left holding assets solely in the form of foreign shares and securities. At this meeting of the board of Margreve on Oct. 25, 1937, it was resolved that the payment of the first half year's interest in advance on the £135,000 debentures, registered in the name of Mrs. Congreve, be fixed for this date, *viz.*, Oct. 25, 1937, and the appropriate cheque for such interest, less tax, was drawn. The aforesaid interest of some £10,000 exhausted the income of Margreve received between April and Oct. 1937. It was further resolved that the fixing of the date for the payment of the first half-year's interest on the £215,000 debentures, registered in the name of Seventy Three be left over for the time being. At an extraordinary general meeting of Margreve held on Oct. 25, 1937, a special resolution was passed whereby new articles of association were approved and adopted in substitution for and to the exclusion of existing articles and regulations. These new articles provided, *inter alia*: (i) That the number of directors should not be less than two nor more than five (the maximum number was subsequently increased to six on Apr. 5, 1938, by ordinary resolution) and that not more than two of the directors, for the time being, should be resident in the United Kingdom. (ii) That no meeting of the directors be held in the United Kingdom: (iii) That general meetings held only outside the United Kingdom should be competent to pass any resolution binding upon or affecting the directors or any of them or the business or affairs of the company conducted by the directors, and that all general meetings should be held at such time and place outside the United Kingdom as might be determined by the directors. A meeting of the directors of Margreve, who at this time were Mr. Mengel, Mr. Crawley (both of London) and Mr. Scarborough, of Jersey, was held in the Channel Islands on Oct. 26, 1937. At that meeting Mr. Richardson and Mr. Gaudion (both resident in the Channel Islands) were appointed additional directors. At the same meeting of the board of Margreve it was resolved that the date for the payment of the first half year's interest in advance on the £215,000 debentures, registered in the name of Seventy Three, be fixed for that day and an appropriate cheque for such interest in favour of Seventy Three was signed and paid; and it was also resolved to repay at par £135,000 debentures of this company held by Mrs. Congreve, of which she had given notice of demand for payment. Subsequent to Oct 26, 1937, all directors' meetings and general meetings were held in and the company's business transacted wholly from the Channel Islands to the date upon which they were occupied by the enemy in June, 1940. This happening for the moment brought the company's activities to a standstill inasmuch as the provisions of the articles prevented any meetings of the directors being held in Great Britain. On Aug. 1, 1940, a board meeting was held in Douglas, Isle of Man, at which three persons resident in the Isle of Man were appointed directors in the place of the three previous persons who were resident, at the time of their appointment, in the Channel Islands. Office accommodation was secured at 50, Athol Street, Douglas, Isle of Man, at which address all the subsequent meetings of the board and the general meetings of the shareholders have been held and the whole of the company's business conducted therefrom. The banking account of Margreve was transferred by the Westminster Bank, Ltd., from their Channel Islands Branch to their branch in Douglas, Isle of Man, at which Branch the account has been held since Aug. 1, 1940. Margreve has never paid a dividend. A B

11. Seventy Three was incorporated in England on Oct. 15, 1937, with a nominal capital of £1,000 divided into 1,000 shares of £1 each. Only 19 shares of Seventy Three have at any time been issued, one each of which is held by nineteen persons, employees of Humphreys & Glasgow (England), in their own right, each of whom paid for his own share out of his own moneys. At the first meeting of the directors of Seventy Three held in London, on Oct. 21, 1937, it was resolved to create £430,000 worth of debentures namely a series of 86 of £5,000 each, repayable at a premium of 20 per cent. The debenture holders had options to require repayment on demand in various currencies at fixed rates. These debentures were applied for on that day at 50 per cent. discount by Mrs. Congreve, who paid a cheque for £215,000 being payment in full therefor. At that meeting of the board of Seventy Three there was purchased from Mrs. Congreve £215,000 nominal 6 per cent. debentures of Margreve, the same being paid for in cash at par. An extraordinary general meeting was held in London on Oct. 25, 1937, at which all the shareholders were present, and new articles of association were approved and adopted. These new articles provided, *inter alia*: (i) that the number of directors should not be less than two nor more than five (the maximum number was subsequently increased to six on Apr. 5, 1938, by ordinary resolution) and that not more than two of the directors, for the time being, should be resident in the United Kingdom: (ii) That no meeting of the directors be held in the United Kingdom: (iii) That general meetings held only outside the United Kingdom should be competent to pass any resolution binding upon or affecting the directors or any of them, or the business or affairs of the company conducted by the directors, and that all general meetings should be held at such time and place outside the United Kingdom as might be determined by the directors. At a board meeting held on Oct. 26, 1937, in the Channel Islands, three directors resident in the Channel Islands, were appointed to the board which then consisted of Messrs. Richardson and Cheetham, both of London, as additional directors, namely, Mr. Scarborough, Mr. Richardson and Mr. Gaudion, all resident in the Channel Islands. Subsequent to Oct. 26, 1937, all directors' meetings and general meetings were held in and the business transacted wholly from the Channel Islands to the date upon which they were occupied by the enemy in June, 1940. This happening for the moment brought the activities to a standstill inasmuch as the provisions of the articles prevented any meetings of the directors being held in Great Britain. On Aug. 1, 1940, a board meeting was held in Douglas, Isle of Man, at which three persons resident in the Isle of Man were appointed directors in the place of the three previous persons who were resident, at the time of their appointment, in the Channel Islands. Office accommodation was secured at 50, Athol Street, Douglas, Isle of Man, at which address all the subsequent meetings of the board and the general meetings of the shareholders have been held and the whole of the company's business conducted therefrom. The banking account of Seventy Three was transferred by the Westminster Bank, Ltd., from their Channel Islands Branch to their branch in Douglas, Isle of Man, at which Branch the account has been held since Aug. 1, 1940. Seventy Three has paid regular dividends which were substantial in percentage but did not involve much money, owing to the small share capital. They were as follows:—April, 1939, £1 7*s.* 6*d.*, April, 1940, £1 10*s.*, April, 1941, £2 0*s.* 0*d.*, July, 1942, £2 0*s.* 0*d.*, gross per share. Save for these dividends no distribution of the income of Seventy Three was ever made. The income has been accumulated in banking accounts in the name of Mrs. Congreve as custodian. C D E F G H

12. On Oct. 18, 1937, Marglas was formed in England with a nominal share capital of £400 divided into 400 shares of £1 each of which 50 were 5 per cent. non-cumulative preference shares of £1 each and 350 ordinary shares of £1 each. The company did not issue a prospectus but a statement in lieu of prospectus was duly filed. Margreve applied for and took up 350 ordinary shares of Marglas at the price of £386 per share payable in full in cash on acceptance, *i.e.*, £135,100. Seven only of the preference shares were issued and these to employees of Humphreys & Glasgow (England). On Oct. 21, 1937, Marglas agreed to purchase from Margreve the 45,000 fully paid shares in Humphreys & Glasgow (England) for £135,000 payable in cash (see para. 10 hereof). The entire share capital of Marglas was afterwards acquired by Mrs. Congreve. She paid Margreve £135,000 for the ordinary shares and bought the 7 issued preference shares for par or thereabouts. Marglas went into voluntary liquidation on or about Aug. 22, 1940. The company has not yet been finally dissolved.

13. Glow was incorporated in England on Nov. 29, 1937, with an authorised capital of £1,000 all in ordinary shares of £1 each. On Dec. 1, 1937, Glow agreed to allot 19 of its shares to 19 persons, some of whom were employees of Humphreys & Glasgow (England). On Dec. 1, 1937, Glow agreed to acquire for £257,500 the Humglas debentures owned by Humphreys & Glasgow (England) which had subscribed in cash for the debenture issued by Glow. On Dec. 1, 1937, it was agreed to create and issue to Humphreys & Glasgow (England) at a discount of 50 per cent. debentures of a nominal amount of £515,000. The company was not entitled to repay the principal moneys secured by the debentures prior to Oct. 21, 1957, but the holders could at any time by not less than 10 days' notice require the company to pay off the whole of the principal moneys thereby secured with a premium of 20 per cent. After failure to pay such principal the company was required to pay interest at 6 per cent. on the principal moneys until the date of actual payment. The debentures contained options to the registered holders to require payment of the principal moneys and interest in certain foreign currencies at fixed rates of exchange. No interest on the Humglas debentures has ever been paid but, from and after the transfer of the Humglas debentures to Glow, compensation was paid for not demanding repayment of the debentures. Glow had no other source of income. On Dec. 3, 1937, the company, as in the cases of Margreve and Seventy Three, adopted new articles vesting its control abroad, the control being moved first to the Channel Islands and then in Aug., 1940, to the Isle of Man. Glow has paid dividends as follows: Apl., 1939, £1 7*s.* 6*d.*, Apr., 1940, £1 10*s.*, 0*d.* Apr., 1941, £2 0*s.* 0*d.*, July, 1942, £2 0*s.* 0*d.*, gross per share. Save for these dividends no distribution of the income of Glow was ever made, the income has been accumulated in banking accounts abroad in the name of Humphreys & Glasgow (England) as custodian . . .

15. Mrs. Congreve gave evidence at the hearing which we accepted as follows: She knew nothing about any of the said transactions, everything was done by her father, she merely signed documents when asked to do so.

16. Mr. Richardson gave evidence at the hearing which we accepted as follows: He was a certified public accountant in the employment of Spain Bros. & Co. He dealt with private accounts and taxation matters of Mr. and Mrs. Congreve. He had been a director of Margreve for two years and of Seventy Three and Glow shortly after their incorporation. His firm audited the accounts of Humphreys & Glasgow (England), Margreve, Seventy Three and Glow. All his firm's correspondence with the Revenue concerning the taxation matters of the appellants and the aforesaid companies bore his initials. All dividends payable on the 65,000 shares of Humphreys & Glasgow (England) were paid direct to the credit of International Gas at the Dominion Bank, King William Street, London, and all debentures of Humphreys & Glasgow (Canada) were payable on demand at the same bank. For the purposes of the Finance Act, 1922, s. 21, Spain Bros. & Co., had contended on behalf of Margreve that as from the date on which it became controlled from abroad the "total income" of Margreve consisted in its dividends from United Kingdom shares, and such part of its income from foreign shares as was remitted to the United Kingdom. This contention was accepted by the Special Commissioners. It had also been contended that Margreve was not liable to the National Defence Contribution from the time when it became controlled from abroad and with regard to its income from Apr. 6, 1937, to Oct. 25, 1937, it was claimed to off-set the payment of £10,000 debenture interest. An appeal was taken to the General Commissioners, the Crown contending that Margreve was only entitled to the rateable proportion for the six days from Oct. 21, 1937, to Oct. 25, 1937. Oct. 21 was the date when the debentures were created and Oct. 25, the date when control was transferred abroad. The decision was given in favour of the Crown. As director of Glow and Seventy Three he was aware that some of the 19 shareholders were employees of Humphreys & Glasgow (England), but could not say as to the rest. The £430,000 debentures created by Seventy Three were repayable at a premium of 20 per cent. on demand. Mrs. Congreve applied for the whole of this issue at 50 per cent. discount and with the money Seventy Three purchased £215,000 debentures of Margreve from Mrs. Congreve. Practically the only income of Seventy

Three was the interest on the Margreve 6 per cent. debentures, which was payable in advance.

17. It was admitted on behalf of the appellants that they did not claim the benefit of the proviso to subsect. (1) of sect. 18 of the Finance Act, 1936, either in its original or amended form in respect of any of the aforementioned transfers of shares or debentures made by or to any of the aforementioned companies in 1936 and 1937. It was further conceded on behalf of the appellants that if the whole of the transactions hereinbefore set out, going back to the transactions in 1932, were to be treated as one interconnected series, the said proviso could not be invoked in respect of the transfers to Humphreys & Glasgow (Canada) and Rockbridge. It was admitted on behalf of the appellants that the benefit of the proviso could not be invoked in respect of Humglas.

18. At the aforesaid meetings in October and November, 1942, (see paragraph 1 above) it was contended on behalf of the appellants :—(1) that the avoidance of liability to taxation was neither the purpose nor one of the purposes for which Mrs. Congreve (then Miss Glasgow) effected either of the following transfers, that is to say, (i) the transfer on May 1, 1932, of 5,000 shares in Humphreys & Glasgow (England) to Humphreys & Glasgow (Canada), and (ii) the transfer on May 5, 1932, of various American and Canadian investments to Rockbridge ; (2) that none of the transactions or operations subsequent to the said transfer of May 1932 were so related to the said transfers as to constitute such subsequent transactions or operations "associated operations" related to the said transfers of May, 1932, within the meaning of the Finance Act, 1932, s. 18, or the Finance Act, 1938, s. 28 ; (3) that the said transfers of May 1932 were not "associated operations" in relation to any subsequent transfers ; (4) that as, at the time when Mrs. Congreve made transfers of assets to Margreve and Seventy Three, neither of those companies was a person resident or domiciled out of the United Kingdom, such transfers of assets were not transfers to which the provisions of either the Finance Act, 1936, s. 18, or the Finance Act, 1938, s. 28, applied ; (5) that the changes of residence of Margreve and Seventy Three resulting from the removal of the seat of control of these companies from the United Kingdom were not "associated operations" related to any transfers of assets ; and (6) that in any event the liabilities of the appellants under the said sections were measurable by reference not to the whole of the respective incomes of the various companies to which transfers had been made, directly or indirectly, but only to such parts of the income of those companies as arose from the assets so transferred to them or from assets acquired by the companies as a result of associated operations related to such transferred assets.

19. It was contended on behalf of the respondents :—(1) that by reason of transfers and/or associated operations, Mrs. Congreve had power to enjoy the income of the following Companies :—(a) Humphreys & Glasgow, (Canada) ; (b) Rockbridge ; (c) Humglas ; (d) Margreve ; (e) Seventy Three ; (f) Marglas and (g) Glow ; (2) that all the transactions, whether transfers or associated operations, were so linked up as to form one series ; it was admitted that, with regard to the companies (c) to (g) above, no claim was put forward to the benefit of the proviso, either under the Finance Act, 1936, or in its amended form in the Finance Act, 1938 ; accordingly the benefit of the proviso could not be claimed in respect of any of the transactions ; (3) that with regard to the transfers to Humphreys & Glasgow, (Canada) and Rockbridge, there was no satisfactory evidence that the transfer and/or any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation and, with regard to the years covered by the Finance Act, 1938, there was no satisfactory evidence that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected ; (4) that the change of the place of residence of Margreve, Seventy Three and Glow by the removal of control abroad was an associated operation within the meaning of the Finance Act, 1936, s. 18 ; (5) that accordingly the whole of the income of the companies mentioned in para. 19 (1) above ought to be deemed to be Mrs. Congreve's income up to the time of her marriage and the income of her husband after they were married ; (6) that the assessments were correct in principle and should be confirmed.

20. We, the Commissioners who heard the appeal, gave our decision as follows :—The first point we have to consider is whether the proviso to subsect. (1), sect. 18 of the Finance Act, 1936 can be invoked in favour of Mrs. Congreve in respect of the transfers made by her in 1932 to Humphreys & Glasgow (Canada) and Rockbridge. We were asked to treat these transfers as separable and independent from later transfers in respect of which it was conceded that the proviso could not be prayed in aid ; it was also conceded that, if the whole of the transfers and associated operations fell to be treated as one inter-connected series, the said proviso could not be invoked in favour of Mrs. Congreve in respect of the transfers to Humphreys & Glasgow (Canada) and Rockbridge, irrespective of the purpose for which those transfers were effected. On the evidence as a whole and having regard to the language of sect. 18 we are quite unable to divorce the transfers to Humphreys & Glasgow (Canada) and Rockbridge from the subsequent transactions. We hold that one interconnected series of transactions took place and it has not been shewn to our satisfaction that any of the transfers and

associated operations, referred to in this case, were effected mainly for some purpose other than the purpose of avoiding liability to taxation or, as regards assessments for later years, that such purpose was not the purpose or one of the purposes. If this part of our decision be correct it covers all points raised in respect of the said proviso. As, however, we were strongly pressed, at the hearing of the appeal, to grant an adjournment to enable Mr. Glasgow to give evidence before us, we consider it desirable to consider what would be the position on the assumption that the transfers to the two said companies could be segregated from the rest. In normal cases of this kind the attendance of the person primarily responsible for the various transactions is desirable if not essential to give evidence where any question arises under the said proviso. We have no doubt that Mr. Glasgow was such a person. In this case we are in the fortunate position of being in possession of the expressed purposes for which the various transactions were effected. These are contained in the letter dated Aug. 9, 1938, written by Messrs. Spain Bros. to the clerk to the Special Commissioners of Income Tax on the instructions of Mr. Glasgow. We consider it unlikely that Mr. Glasgow would, at the present stage, advance new and other purposes. We take these as the purposes put forward and it becomes our duty to test them, as it would be our duty to test any expressed purposes, in the light of all the circumstances of the case. It is clear to our minds that a most careful regard was paid throughout to the incidence of taxation and any changes brought about therein by the legislature. It is also clear that Mrs. Congreve could obtain, in certain cases, the whole of the capital assets of some of the companies concerned by presenting debentures she held for repayment at a London bank without the consent or approval of anyone. We do not reject the expressed objects as having no place in the transactions, but this power of Mrs. Congreve's alone would appear to defeat them. We were informed that Mr. Glasgow was 79 years of age. It is improbable that he would be able to journey from America, where he is residing at the present, in order to give evidence before us during the war. At the conclusion of hostilities transport facilities may well be difficult and Mr. Glasgow might feel disinclined to make the journey. Any adjournment granted would, in all likelihood be for a considerable time. In our opinion the facts of the present case speak for themselves as to the main purpose and on these facts as a whole we came to the conclusion that no injustice would be done in refusing the application for an adjournment. The next point we have to deal with relates to Margreve and Seventy Three. Both these companies were resident in the United Kingdom when the transfers were made to them, and it was subsequently that they became resident abroad. It was argued, under these circumstances, that sect. 18 did not apply. We were unable to accept this contention. We hold that the language of the sect. is wide enough to cover the case and that the change of residence by removal of control of two companies abroad is an associated operation within the meaning of subsect. (2). In our opinion Mrs. Congreve, who must be taken to have been a willing party to the transactions, was the only person entitled to benefit as the result of the whole of the transfers and associated operations, this being so, we do not consider it necessary that the transactions should all have been effected by her personally in order to fall within the mischief of the section. We hold that every transaction dating from the transfers made to Humphreys & Glasgow (Canada) and Rockbridge in 1932 was either a transfer or associated operation within the meaning of the section. The last point we have to consider relates to the question of the income of the foreign companies. It was argued that, if liability was held to exist under the section, such liability did not extend to the whole of such income, but only to that part which was referable to the assets which had been transferred either alone or in conjunction with associated operations. In our opinion Mrs. Congreve had power to enjoy the income of all the foreign companies concerned within the meaning of the section, she alone could benefit as the result of the transactions. We hold that the whole of the income of these companies should be brought into assessment, and that the appeals fail on all the grounds before us.

21. A further hearing took place—as appears in para. 1 of this case—on Sept. 27, 1944. In the interim Mr. Congreve (who had made his return of income for the years 1935/36 to 1940/41 on the basis of being domiciled in the United Kingdom) had been advised that he had at all material times been domiciled in Eire, and Mrs. Congreve (who had throughout been regarded as not domiciled in the United Kingdom up to the date of her marriage) had been advised that from the date of her marriage her domicil was in Eire. Representations were accordingly made to the Commissioners of Inland Revenue on Mar. 25, 1943, who, after consideration of the facts, signified their assent to the view that neither Mr. nor Mrs. Congreve was at any material time domiciled in the United Kingdom. The question for our determination on the further hearing, therefore, was the basis on which, in the light of the facts relating to the domicil of Mr. and Mrs. Congreve, the liability to income tax and sur-tax for the several years under the provisions of the Finance Act, 1936, s. 18, and Sched. II should be computed.

22. It was contended on behalf of the appellants :—(a) that, the Finance Act, 1936, s. 18 (1), although it defines the income to which the provisions of the section apply,

does not prescribe the manner in which the amount of such income is to be computed for the purposes of assessment ; (b) that the computation of the amount of an assessment upon income to which the provisions of the said sect. 18 apply is governed by the Finance Act, 1936, Sched. II, para. 4 ; (c) that the effect of the conjoint operation of the said para. 4, r. 2 of Case IV of Sched. D, and rr. 2 and 3 of Case V of Sched. D of the Income Tax Act, 1918, is that in the case of an individual not domiciled in the United Kingdom income arising abroad, although within the scope of the said sect. 18, is to be computed by reference to the sums received in the United Kingdom ; (d) that, in the case of an individual, the "tax chargeable" which under the Finance Act, 1936, Sched. II, para. 1 is to be charged under Case VI of Sched. D, is the tax computed as aforesaid ; (e) that in the light of the preamble to sect. 18 of the Finance Act, 1936, and in the absence of express provisions to the contrary, the section must be construed to impose a charge of tax only to the extent to which tax would otherwise be avoided by means of transfers of assets, and not to impose a charge in excess of that which would have been made, had no such transfers taken place ; (f) that the contentions under heads (a) to (d) above are consistent with such a construction of the section.

23. It was contended on behalf of the respondents :—(a) that the Finance Act, 1936, s. 18, relates in terms to individuals ordinarily resident in the United Kingdom, without any distinction of domicil, and the absence of any such distinction in the case of such individuals concerned in the transfers of assets is enforced, and shown to be deliberate by the express reference to domicil in the case of the transferees ; (b) that, as regards subsect. (1) of the section, the criterion of liability is "power to enjoy income" as defined in subsect. (3) of the section, irrespective of the actual receipt in the United Kingdom of any such income ; (c) that the section is not limited to the charge of tax which would have been incurred under other provisions of the Income Tax Acts but for the transfers of assets, and that this is shown by, *inter alia*, the words in subsect. (1) "whether it would or would not have been chargeable to income tax apart from the provisions of this section," and also by the provisions of subsect. (1a) which relate to the receipt, or title to receipt, of a capital sum, and clearly bring into charge amounts which would not have been chargeable, had no transfer of assets taken place ; (d) that the provisions of the Finance Act, 1936, Sched II, para. 1, are charging provisions, and direct that income of whatever nature falling within sect. 18 of the Act is to be charged under Sched. D, and not any other schedule, and under the rules as to computation in Case VI of Sched. D, and not under the rules in any other case ; (e) that paras. 2 and 3 of Sched. II are only consonant with para. 1, if it be so read, and that para. 4 merely applied general provisions of the Income Tax Acts, so far as applicable and subject to any necessary modifications.

24. We, the Commissioners, gave our decisions a follows :—The individuals with whose liability to tax the Finance Act, 1936, s. 18, is concerned are "individuals ordinarily resident in the United Kingdom," and, as to such individuals, no distinction is made by reference to domicil. We are unable to regard anything in the section as implying that the liability thereunder is to be limited, either generally to the amount of tax which would otherwise be avoided, or in the case of a person not domiciled in the United Kingdom, to tax on amounts received in the United Kingdom. The Finance Act, 1936, Sched. II, para. 1, which has effect under subsect. (6) of sect. 18, provides that "tax chargeable at the standard rate by virtue of that section shall be charged under Case VI of Sched. D." In our opinion this is a specific direction requiring the liability to be computed under Case VI : the measure of liability is found here, and not in para. 4, which applies the general provisions of the Income Tax Acts relating to charge, assessment, collection and recovery, etc., "so far as they are applicable and subject to any necessary modifications." The appeal fails on this point, and we determine the several income tax and sur-tax assessments in the following figures which have been agreed on the basis of our decision :—

		Sur-tax	*Income Tax*
Mrs. Glasgow Congreve	1935/36	£11,220	—
Mr. Congreve	1935/36	£13,265	—
,, ,,	1936/37	£24,406	£11,861
,, ,,	1937/38	£38,813	£22,084
,, ,,	1938/39	£36,977	£16,792
,, ,,	1939/40	£70,289	£27,901
,, ,,	1940/41	£48,058	£23,204

The above figures of assessment are without prejudice to any such Dominion income tax relief as may be admissible.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the appellants.

D. L. Jenkins, K.C., J. H. Stamp and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

WROTTESLEY, J. : This case contains firstly the narrative of one Mr. Glasgow's life in this country. He was an American citizen, domiciled in the United States, who carried on a successful business in this country which he finally sold to Humphreys & Glasgow (England), an English limited company. I use throughout the same short labels as the Commissioners use in the case to describe the various companies concerned. Mr. Glasgow had one child, now Mrs. Congreve. She was born in London, spent a good deal of her childhood in America, and confirmed her American citizenship and domicil when she came of age. In 1935 she married Mr. Congreve, who is domiciled in Southern Ireland or Eire.

The rest of the case sets out a large number of transactions of a complicated nature, the great bulk of which were without doubt transactions entered into in order that Mrs. Congreve might escape the incidence of income tax and sur-tax, and the questions which arise are whether three assessments, namely, (1) against Mrs. Congreve, before her marriage, for sur-tax in the sum of £15,059 for the year ending Apr. 5, 1936; (2) against Mr. Congreve for sur-tax in the sum of £17,281, £26,314, £40,061, £70,066, £117,803 and £97,866 for the years ending Apr. 5, 1936 to Apr. 5, 1941 inclusive; (3) against Mr. Congreve for income tax in the sums of £10,000, £20,000, £40,000, £60,000 and £60,000 for the years ending Apr. 5, 1937 to Apr. 5, 1941, inclusive, are properly made. All these assessments are made under the provisions of the Finance Act, 1936, s. 18, and Sched. II, para. 6, as amended by the Finance Act, 1938, s. 28. All the transactions are set out sufficiently clearly in the case, and I shall not endeavour to paraphrase the account of them given by the Commissioners. In the result, the Commissioners found that Mrs. Congreve was an individual who had, by means of a transfer in conjunction with associated operations, acquired rights by virtue of which she had, within the meaning of sect. 18, power to enjoy the income covered by the assessments, which was income payable to persons resident or domiciled out of the United Kingdom.

The first point I will deal with is whether the Commissioners were right in not granting an adjournment to enable Mr. Glasgow to give evidence before them. He was 79 years of age, and it was at the time of the hearing improbable that he would be able to make the journey to this country from America. Bearing in mind that counsel was not in a position, even at the hearing of the appeal, to undertake that Mr. Glasgow would make the journey, and also that no application was made to take his evidence in America, and looking at the material which the Commissioners had before them, I find it quite impossible to say that the Commissioners wrongly exercised what was undoubtedly their discretion.

I pass now to the more important points in the case, namely, whether the complicated transactions or some of them fall within the Finance Act, 1936, s. 18. Given the nature of the transactions, this must depend on the correct interpretation of the language of the section. As it happens, this section contains something in the nature of a preamble, for it opens with a statement as to the purpose of the section, and the court is therefore not left to ascertain the purpose of the section by a consideration of the language of the operative part merely. The court knows in advance what the purpose is. If, therefore, any question should arise as to whether the language of the section applies to any particular transaction, and if this question is not clearly answered in the operative part of the section, the court may properly resort to the express intention to see if this affords any help. It is, therefore, desirable to see how far the language of the preamble itself is clear; there is no preamble to the preamble, and the language of this introductory part of the section must, therefore, be construed according to its plain, ordinary meaning, if it has one. The words are:

> For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows . . .

We have, therefore, to look for an individual who is ordinarily resident in the United Kingdom and avoiding liability to income tax. There cannot be two opinions as to what "avoiding" means. Where what is to be avoided is a liability, it must mean to evade or to keep out of the way of, whether it be as in *Richard III*, "The censures of the carping world," or anything else unpleasant that might befall a man, such as a tax. At this stage, therefore, the legislature has clearly in mind an individual who is evading liability to income tax, and not a person who is, through no effort of his own, not in the road and so not likely to be affected by a tax. Nor is it all and every such evasion that is aimed at by the section. The individual must be evading it by a certain means, and that means is a transfer of assets of a particular kind; it must be a transfer by virtue or in consequence whereof income, either alone or in conjunction with associated operations, becomes payable to persons outside the United Kingdom. At any rate, there must be a transfer, and the first point which I have to decide is whether the target of the section includes a person who makes no transfer at all whether personally or through an agent. It seems to me that the language in which the purpose of the section is described is clear and unmistakable; it contemplates an individual bent on evading tax and doing so by transferring assets so as to bring it about that the income from them becomes payable to persons out of the United Kingdom. It may do this simply or it may do it only by being conjoined with associated operations, that is to say, operations of any kind effected by any person in relation to any of the assets transferred or representing the assets transferred or the income from them. The respondents, the Commissioners, contend that even the preamble of the section is not so limited and includes the case of a transfer which is made neither by nor on behalf of the individual; and it certainly is true that it is not stated in so many words that the individual avoiding the tax must make the transfer. But, looking at the words and reading them as a whole and in their ordinary and common-sense meaning, they appear to deal with the plain and straightforward case of an individual bent on avoiding tax and doing so by means of a transfer. The section does not deal with the case of an individual who escapes tax because of a transfer which some other person makes. The use of the words, "by means of," fits this interpretation. These words mean, it was agreed in argument, a means to an end, and so import purpose: and that must mean purpose on the part of the person who is avoiding liability to income tax. This phrase is to be contrasted with such phrases as "by virtue of" and "in consequence whereof" both of which tend to negative or make unnecessary intention or purpose, and both of which are used in that sense in the very passage.

So much for the preamble, but it is truly said by the respondents that these introductory words are not to be used to restrict the plain wording of the operative or charging words to be found in subsect. (1). The opening words of this subsection are:

> Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights . . .

Pausing there, it is seen that what I have called a preamble is more than a preamble; it is drawn in to the operative part of the section, so as to explain and so to limit or expand the kind of transaction which is to be dealt with. For instance, the individual must be ordinarily resident in the United Kingdom, and the transfer must also be such as has been referred to in the preamble. The respondents say that that only imports that it must be a transfer of assets by virtue or in consequence of which he has power to enjoy income of a person residing outside the United Kingdom, by whomsoever such a transfer is made. I do not think that this narrow meaning can be given to the use of the word "such," but that the section is intended to deal with such transfers as are dealt with in the preamble. For the reasons that I have given, two characteristics attach to that kind of transfer. It must be made by a person avoiding liability to tax, and it must also bring it about that income becomes payable to persons outside the United Kingdom. This interpretation of the section is that which commended itself to MACNAGHTEN, J., firstly in *MacDonald* v. *Inland Revenue Comrs.* (1) (23 Tax Cas. 449, at p. 456), and secondly in *Howard de Walden* v. *Inland Revenue Comrs.* (2) (25 Tax Cas. 121, at p. 128). It is true that in neither case was the contrary argued, and the judge therefore did not have to decide this point; nevertheless it shows the impact of these words on the mind of a judge who is not unfamiliar with the language of taxing statutes. In point of fact I find a similar assumption as to the meaning and by the same judge in *Corbett's Executrices* v. *Inland Revenue Comrs.* (3) (25 Tax Cas. 305, at p. 312), where he states the burden on the Crown as being:

> . . . to establish that the individual, being a person ordinarily resident in the United

Kingdom, has made a transfer of assets . . .

So far then the section deals with transfers made by the individual by means of which he or she has acquired any rights. I may say that I do not accept the argument of the appellants that the use of the word "acquired" strengthens the interpretation which I think is the right one, nor that it indicates that the individual has done something to put himself in possession of the rights. As used by lawyers the word "acquired" has long covered transactions of a purely A passive nature and means little more than receiving.

To pass on, the rights in question are rights by virtue of which an individual has, within the meaning of the section, power to enjoy any income of a person outside the United Kingdom. It is urged on behalf of the Crown that this is the test as to whether the section applies. In other words, all you have to do is to find a person ordinarily resident in the United Kingdom with power to enjoy income of a person outside the United Kingdom, then look and see if B he got that power by a transfer. If he did, that is enough. The answer to this argument is that the section might well have been drawn in this way and so as to effect this. If so it would have been both simpler and more effective. But in that event the introductory words would have been unnecessary; and the courts are not here to make the efforts of the legislature to circumvent tax evasion more efficient than is provided by the language, particularly when C that involves disregarding the ordinary plain language of the preamble, and the fact that that preamble is deliberately drawn into the fabric of the operative section. Here the legislature has been careful to hedge about the operative section with words which indicate that the target is an individual who is trying to avoid tax by means of a particular course of conduct. It is not for the courts to widen that target so as to include persons who have not evaded liability, at any rate by the means referred to.

D That does not, however, conclude the matter. It is conceded by counsel for the appellants that a person who by an agent transfers his assets would not on that account escape the operation of the section. I think that a person who by owning all or practically all of the capital of an investment company is able to bring about such a transfer as is referred to in the section, is, for the purposes of such a section, a person who has avoided tax by means of a transfer. At this point, then, I can adopt precisely the language used by MACNAGHTEN, E J., in *Macdonald* v. *Inland Revenue Comrs.* (1) (23 Tax Cas. 449, at p. 456), to which I have referred above. The words are:

> It is to be observed that the section has no application to any transfer of assets unless (1) it is a transfer made by an individual ordinarily resident in the United Kingdom, and (2) by virtue or in consequence of the transfer (either alone or in conjunction with associated operations) income becomes payable to persons resident or domiciled out of the United Kingdom.

F Once this has been established, it becomes necessary to see whether it is a transfer by which Mrs. Congreve has acquired any rights by virtue of which she has power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of Mrs. Congreve, received by her in the United Kingdom, would be chargeable to income tax by deduction or otherwise. The meaning of the words "power to G enjoy" is dealt with in great detail in subsect. (3), setting out five cases each of which amounts to "power to enjoy." It is unnecessary at this moment to consider what they are.

So far I have not dealt with the case of transactions consisting of transfers which operate in conjunction with associated operations to bring it about that income is payable to persons resident or domiciled out of the United Kingdom. In that connection there arises another question, namely, whether the H section applies to cases where Mrs. Congreve transferred shares to a company in the United Kingdom which, after the transfer, removed out of the United Kingdom. There is no doubt that the result of the transfer coupled with the removal was that income became payable in the manner described by the section, but the appellants say that in these cases it cannot be said that the income became payable to the person out of the United Kingdom by virtue or in consequence of the transfer.

The contention of the Crown is that in such a case the income becomes payable to the company out of the United Kingdom by virtue or in consequence of the transfer, and that therefore the section applies. I confess I am quite unable to follow this argument. If language is to have any value at all, it seems to me clear that in such a case, whether the removal of the company took place eight months after the transfer or eight days, it is quite impossible to hold that by virtue of the transfer or in consequence of it, income became payable to the company which moved abroad. The only effect of the transfer was to make income payable to the transferee company which was still resident and domiciled in the United Kingdom; and the income only became payable to a person out of the United Kingdom when the company moved out of the United Kingdom. Indeed it was, I suppose, to deal with manoeuvres of this kind that the words "in conjunction with associated operations" were introduced into the section. Unfortunately, the definition of associated operations, which is exhaustive, is so drawn as not to include this particular manoeuvre. Wide though that definition is, it is confined to operations in relation to any of the assets transferred or assets representing the assets transferred or income therefrom; and I cannot see how the removal of the company, in whom the assets are vested, out of the United Kingdom can be so described.

That leaves another question, namely, the question of the income which is, when found to be the income of a person out of the United Kingdom which Mrs. Congreve has power to enjoy, to be deemed to be the income of Mrs. Congreve or her husband.

Now, in various instances related in the case before the court, Mrs. Congreve either herself transferred or caused an investment company, in which she owned all or practically all the shares, to transfer shares so that she obtained, in respect of a company abroad, power to enjoy its income in the sense in which that phrase is used in the section.

It appears, for instance, in para. 6 of the case that in April, 1932, Mr. Glasgow gave his daughter all the capital in International Gas, an American company. As this company owned 60,000 shares in Humphreys & Glasgow (England), the trading company, in this way Mrs. Congreve became indirectly the owner of the 60,000 shares. International Gas sold these 60,000 shares to Humphreys & Glasgow (Canada), a Canadian company, for 995 shares and £212,000 worth of demand debentures which found their way into Mrs. Congreve's name, International Gas being wound up and disappearing. These debentures carried no interest until after demand for repayment. As a result Mrs. Congreve could allow dividends on the 60,000 shares to accumulate tax free in the hands of Humphreys & Glasgow (Canada) and recoup herself in this country by calling in these debentures. This is, therefore, an instance of a transfer by a company wholly owned and controlled by Mrs. Congreve, namely, International Gas, to a company resident abroad, by virtue of which income, namely, from the 60,000 shares, became payable to the Canadian company. It is also an instance of a transfer by means of which Mrs. Congreve acquired rights in virtue whereof she had power to enjoy the income from those 60,000 shares. The case therefore falls within paras. (*a*), (*b*), (*c*) and (*e*) of subsect. (3), which are as follows:

> (*a*) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual; or (*b*) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or (*c*) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or . . . (*e*) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income.

Within (*a*) because the income was accumulated so as to inure for her benefit; within (*b*) because if she allowed the income to accumulate, her debentures and her shares became more valuable; within (*c*) because she could demand repayment of the debentures; and within (*e*) because of her power to control Humphreys & Glasgow (Canada).

In addition, Mrs. Congreve, then Miss Glasgow, sold 5,000 shares, which her father had given to her, to Humphreys & Glasgow (Canada) for further debentures of the same kind of the face value of £18,000; here then was another transfer by Mrs. Congreve, and the section applies.

Different considerations apply to a transaction in 1936, when Mr. Glasgow sold for value 28,000 shares in Humphreys & Glasgow (England) to Humphreys & Glasgow (Canada). These were sold on to Margreve, an English company.

I refer to the above facts only by way of illustration of the effect of the answers which I have given to the questions raised in argument. But the Crown lay claim to the right to tax the income, if any arose, from the 28,000 shares which Mrs. Congreve's father sold to Humphreys & Glasgow (Canada), and say that that income is within the section. To test this we must look at the section again. A It was clearly income of a company resident or domiciled out of the United Kingdom, Humphreys & Glasgow (Canada). To take the simplest case, in the transfer by Mrs. Congreve of 5,000 shares to Humphreys and Glasgow (Canada) above referred to, the Crown claim that this transfer brings Mrs. Congreve within the section. It clearly does, for she has by means of it acquired rights by virtue of which she has, within the meaning of the section, power to enjoy "any" income of a company resident out of the United Kingdom. I take the B word "any" here to mean "any part," but the Crown goes on to claim that all the income of the company therefore falls within the section, including that which arose from the 28,000 shares sold by her father to the company.

The point arose and was argued in the case of *Lord Howard de Walden* (2), where it was contended, for the taxpayer appellant, that the court should regard subsect. (3) as merely expanding the meaning of the phrase "power to enjoy" C so as to insure that individuals, who used circuitous complicated devices, should be no better off than the individual who contented himself with a transfer of assets to a person abroad coupled with an order to accumulate the dividends for him indefinitely; and that it was not intended to measure the *quantum* of the income to be treated as the individual's income and so liable to tax. It was pointed out, anyhow, in the argument addressed to the Court of Appeal, that the wider interpretation contended for by the Crown would lead to results D which were capricious and even fantastic. If the income dealt with by the section includes all the income which the person abroad has power to enjoy, the section certainly appears to work capriciously and to produce very different results according to whether the case falls under one or other of the paragraphs; thus para. (*a*) deals with cases where "the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual" and would only result E in the individual being taxed on the income arising from the assets transferred. That is a case within the express object of the section and would prevent the avoidance referred to in the preamble. Case (*b*) would have the same effect if the company held only the transferred assets. But if the company were, for instance, an insurance company to which the individual had transferred his assets in return for promissory notes or non-interest-bearing debentures, a remarkable result would F follow. The income of the company which operates, to use the words of the paragraph, "to increase the value to the individual of his assets," is not confined to that part of it which flows from the transferred assets but is the whole of the company's income. Case (*c*) is equally far-reaching, and goes far beyond the preamble to the section, because the whole income of the person abroad is to be attributed to the individual instead of the part which she is entitled to receive as a benefit. Case (*d*), on the other hand, only applies where the individual G has power to obtain for himself the beneficial enjoyment of the income and would apply, therefore, only to the income of the transferred assets. Case (*e*) is probably also so confined, for it is only as much of the income of the person abroad as the individual can control that is attributed to him.

It will be seen, therefore, that the use of subsect. (3) to measure the *quantum* of the income to be attributed and so the tax to be paid by an individual, who comes within the section, may produce results which are capricious in the sense H that sometimes it affects only the income referable to the transferred assets, and sometimes it affects an income which bears no sort of relation to these assets, and might indeed be somebody else's income from which the individual could never benefit. Some of these results may fairly be called fantastic. It is true that arguments of this kind were dealt with in the case of *Lord Howard de Walden* (2), to which I have referred, when LORD GREENE, M.R., ([1942] 1 All E.R. 287, at p. 289), expressed the view that the courts would not shrink from such a result if necessary, as the whole section must be regarded as an attempt by Parliament to end, once for all, the battle of manoeuvre between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that case the Court of Appeal had to deal with an English subject and a peer of Parliament who must have derived his wealth largely, if not entirely, from property in this country. Somewhat different considerations may be thought to apply to an American subject who remained such until she married a South Irishman domiciled in Eire, and who, for ought I know, in respect of a part of her income, pays tax in the United States. In such a case retroactive action of a penal kind may seem to go some way beyond the preamble to the section. In any event the decision of the Court of Appeal in that case left open, as it had to do, the question under debate, for the only income in question there was income from the transferred assets. It had not to deal with assets transferred by some other person.

Some guidance may be found in a matter of some difficulty in subsect. (4). This subsection seems to return to the declared object of the section, and directs the Commissioners or the court to look at the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to the individual as a result of the transfer and any operations are to be taken into account. Is this subsection only to be applied so as to make more tax exigible or is it also to be used so as to confine the section to the mischief aimed at in the preamble, namely, the prevention of the avoidance of tax by means of transfers ? If subsect. (4) is, as its language clearly suggests, to be regarded as an overriding subsection, it may be thought to afford the real clue which will prevent the extravagant results which would flow from a literal reading of subsect. (3), and its introduction into subsect. (2). In order to ascertain *quantum* the court is to look behind the literal interpretation and find the substantial result and effect of the transfer. On the other hand this subsection would also provide that an individual who, after making a transfer, employs colourable transactions to evade the operation of the section, would nevertheless be caught.

I have come to the conclusion that subsect. (4) deliberately authorises the Commissioners, and so the court, to do this, whether the result is to prevent extravagant results in one direction or the other. On this view of the section it is only the benefit which may at any time accrue to the individual as a result of the transfer and any associated operations that the individual can be said to have power to enjoy. Consequently it is only income referable to assets which Mrs. Congreve transferred herself or caused to be transferred, in the sense that I have referred to above, that is to be deemed to be her income for the purpose of the Income Tax Acts.

One more point raised by the appellant can be dealt with shortly. It was argued faintly that the whole object of sect. 18 was to be curtailed owing to the provisions in Sched. II, para. 4, and that only income reaching this country was to be liable to tax. This would nullify the whole object of the section. I cannot accede to this argument.

Those are the answers that I have given to the questions, and I think I have answered all the questions which were argued before me. Obviously, the case will have to go back. There are three questions, as it appears to me. Firstly, is it a condition precedent to the working of the section that the transfer must be made by the lady ? I have said "Yes," that it must be made by the lady or by one of the companies which appear here. I except from that, of course, as I indicated, the trading company, because she did not own the whole of that. The second question was this : Is the particular manoeuvre of a transfer to the company and its subsequently moving abroad covered by the section ? I think not, and I have said so. The third matter was : What are the assets ? and for the reasons I have given, the assets are not the whole income of the foreign company, but that part which is referable to the transferred assets. Those are the three points. The two other points I have also answered against the appellants.

Appeal allowed with costs, and the case remitted to the Commissioners to adjust in accordance with the judgment.

Solicitors : *Slaughter & May* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

CUTLER *v.* WANDSWORTH STADIUM LTD.

[KING'S BENCH DIVISION (Oliver, J.), May 21, 22, 1946.]

Gaming and Wagering—Bookmakers—Provision of space for bookmaking—Dog-race track—Totalisator maintained—Whether action for damages lies against occupier—Betting and Lotteries Act, 1934 (c. 58), *ss.* 11.30.

Action—Ubi jus, ibi remedium—Infringement of private right—Statutory remedy available—Whether action lies by private person—Bookmaker—Breach by occupier of dog-race track of obligation to provide space for bookmaking—Betting and Lotteries Act, 1934 (c. 58), *ss.* 11, 30.

Although the Betting and Lotteries Act, 1934, s. 30, provides severe penalties for breaches of the provisions of the Act, an action lies, at the suit of a bookmaker injured thereby, against the occupier of a dog-race track on which a totalisator is maintained, for breach of the occupier's obligation, under sect. 11 (2) (b) of the Act, to secure that space is available, on the track, where bookmakers can conveniently carry on bookmaking in connection with the dog races run on that track on any particular day.

[**EDITORIAL NOTE.** It is held in this case that bookmakers are a " specified class of the public " within the principle that where the legislature has provided protection for a specified class of the public, a member of the class, unless it is otherwise provided, has a right of action for breach of the protection provided, notwithstanding the provision of penalties.

AS TO ACTION FOR DAMAGES BY PRIVATE PERSON IRRESPECTIVE OF BREACH OF STATUTORY PROVISION WHERE PENALTIES ARE PROVIDED, see HALSBURY, Hailsham Edn., Vol. 1, pp. 11, 12, paras. 11, 12 ; and FOR CASES, see DIGEST, Vol. 42, pp. 758-760, Nos. 1849-1858.]

PRELIMINARY ISSUE OF LAW in an action by a bookmaker against the occupier of a dog-race track on which a totalisator was maintained, for breach of the occupier's duty, under the Betting and Lotteries Act, 1934, s. 11 (2) (b), to secure that there was available, on that track, space where the bookmaker could conveniently carry on bookmaking.

E. G. Hemmerde, K.C., J. Platts Mills and *Patrick O'Connor* for the plaintiff.

Eric Neve, K.C., and *R. T. Paget* for the defendants.

OLIVER, J. : I have come to the conclusion on this rather difficult matter that this action does lie.

The section to be interpreted is the Betting and Lotteries Act, 1934, s. 11, which provides as follows :

> (1) Notwithstanding any enactment or rule of law to the contrary, it shall be lawful on any licensed track being a dog racecourse for the occupier of the track or any person authorised by him in writing—(a) to set up and keep a totalisator, whether in a building or not ; and (b) on any appointed day, while the public are admitted to the track for the purpose of attending dog races and no other sporting events are taking place on the track, to operate a totalisator so set up, but only for effecting with persons resorting to the track betting transactions on dog races run on that track on that day ; and for any person to effect betting transactions by means of a totalisator lawfully operated.

That part of the section authorises, under certain conditions, the use of a totalisator on a dog racecourse.

Subsect. (2) reads as follows :

> The occupier of a licensed track—(a) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track . . .

That seems to me to give a charter to bookmakers on dog-race tracks having a totalisator to go on to such tracks, provided, of course, that they are respectable people and that they behave themselves ; that seems to me to be what is contemplated by the words of subsect. (2) (*a*)—that he shall not be excluded from a track by reason only of the fact that he wants to make a book.

Subsect. (2) (*b*) reads as follows :

> The occupier of a licensed track (b) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day. . . .

That seems to me to be putting upon the owner of the track the duty of seeing that bookmakers are given a fair chance of competing on level terms with the totalisator; I think that is what it means.

Subsect. (2) of sect. 11 of the Act continues as follows:

> . . . and every person who contravenes, or fails to comply with, any of the provisions of this subsection shall be guilty of an offence.

and the offence is punishable under sect. 30 of the same Act, which reads as follows: A

> (1) A person guilty of an offence under section . . . eleven [among others] or under any section contained in Part II, of this Act shall be liable—(a) on summary conviction, to a fine not exceeding one hundred pounds, and in the case of a second or any subsequent conviction for an offence under the same section, to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred pounds or to both such imprisonment and such fine; or (b) on conviction on indictment, to [a much heavier fine and a heavier term of imprisonment.] B

It is quite true that those are very heavy penalties, even including a possibility of indictment, and the argument put forward for the defendants is that, looking at those penalties and the general scope of the Act, the legislature clearly intends that penal section to be the only remedy in respect of a breach of a provision of sect. 11.

The question whether a breach of a statutory provision which entails penalties C may also give rise to an action for damages at the suit of an injured party has been the subject of much judicial discussion. Some of the authorities are not easy to reconcile. But it seems to me that this principle does emerge: Where the legislature has provided for the protection of a specified class of the public, even though it has also provided penalties in respect of a breach of the enactment, members of that specified class who suffer injury from a breach of the provision, have a right of action. That seems to be a principle consonant with all the D authorities.

The converse proposition is not, of course, true. It is not true to say, where there is no specified class, and only the public as a whole are intended to be protected, that injured members of the public can never have redress; in some cases it is held that they can. But I know of no authority—counsel on neither side has been able to give me one—which has decided that where a specified class is intended to be protected by the legislature and an enactment is broken, E members of that specified class have no right of action.

I need not go through all the cases—they are too well known—but if that proposition is right, then I have only to look at this section and decide whether it was intended to protect a specified class of the community. Just as factory hands—an enormous class, running into millions—receive protection under the Factories Acts, and can sue in respect of certain breaches of the provisions of those Acts, so it is, it seems to me, with the bookmakers; they ply their trade F on the dog-tracks and are a specified class of the public.

Looking at the preliminary section, it seems to me that this section was intended to protect their rights. They were members of a trade before the statute was passed; the statute in effect legalised a new form of betting by machine, and it was quite plain that what the legislature meant to say was this: We are, in permitting the use of this machine, obviously doing a considerable G amount of damage to the bookmaking trade; we are authorising a new competitor, and a very formidable one; let us at any rate see that the members of that trade are given a fair chance to compete with the machine, and in order to do that we will say, not that every dog-track is to have a machine, but that if a track does have a machine, the owners of that track are to treat the bookmakers fairly. That, I think, is the object of the section.

I am not assuming that in this case the owners have treated the bookmakers H unfairly at all—I have not heard the case yet—but for the purposes only of this preliminary point I have to assume that the bookmakers have been treated unfairly; if they have, they have a right of action, and this action will now proceed.

Preliminary objection overruled.

Solicitors: *S. Seifert & Co.* (for the plaintiff); *Wilkinson, Howlett & Moorhouse* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH, *Ex parte* WATERLOW & SONS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Singleton, JJ.), June 3, 1946.]

Public Health—Housing—Compulsory purchase order—" Park, garden or pleasure ground "—" Required for the amenity or convenience of any house "—Land must be appurtenant to house—Housing Act, 1936 (c. 51), *ss.* 74, 75—*Housing (Temporary Accommodation) Act*, 1944 (c. 36), *s.* 6.

Public Health—Housing—Authorisation by Minister of Health—Equivalent to compulsory purchase order—Housing Act, 1936 (c. 51), *s.* 74—*Housing (Temporary Accommodation) Act*, 1944 (c. 36), *s.* 6.

Crown Practice—Certiorari—Prohibition—Substituted procedure under principal Act—Different machinery under subsequent Act—Whether writs lie -Housing Act, 1936 (c. 51), *s.* 74—*Housing (Temporary Accommodation) Act*, 1944 (c. 36), *s.* 6.

The applicants owned certain land used as a sports ground and kept by them for the benefit of their employees. The Minister of Health, purporting to act under the Housing (Temporary Accommodation) Act, 1944, s. 6, gave an authorisation to the local authority to enter and take possession of the land for the purposes of the Housing Act, 1936, Pt. V. The applicants moved for an order of *certiorari* and an order of prohibition :—

HELD : (i) the authorisation which was granted under the Housing (Temporary Accommodation) Act, 1944, s. 6, was equivalent to a compulsory purchase order under the Housing Act, 1936, s. 74.

(ii) the machinery under the 1936 and the 1944 Acts being different, the procedure prescribed, in Sched. II, para. 2, of the 1936 Act, for testing the validity of an order by an application to the High Court as distinct from *certiorari* was not applicable in this case ; consequently an objection that *certiorari* and prohibition had been taken away and another procedure substituted was not well founded.

(iii) on a true construction of sect. 75 of the 1936 Act, the " park, garden or pleasure ground " must form part of land which was appurtenant to a house, the amenities of which the sections intended to preserve ; the sports ground in question was not land which a local authority was forbidden to acquire in part ; therefore, the authorisation was good and the motions must be refused.

[**EDITORIAL NOTE.** The object of the Housing (Temporary Accommodation) Act, 1944 was to facilitate the provision of temporary houses of a bungalow type. Sect. 6 simplified the procedure for the compulsory acquisition of sites, and it is decided in this case that the authorisation to be given by the Minister under that section is equivalent to a compulsory purchase order.

In *Re Newhill Compulsory Purchase Order* [1938] 2 All E.R. 163, DU PARCQ, J., said " I do not think that I need decide whether it would be enough to say that the land formed part of a park or a pleasure ground, without going on to say that, as such, it was required for the amenity or convenience of a house." The Divisional Court in this case holds that " required for the amenity or convenience of a house " applies to the foregoing " park, garden or pleasure ground," and that a sports ground is therefore not a pleasure ground so as to be protected by the section from compulsory acquisition.

AS TO ACQUISITION OF LAND FOR PROVISION OF HOUSING ACCOMMODATION, see HALSBURY, Hailsham Edn., Vol. 26, p. 562, para, 1185 ; and FOR CASES, see DIGEST, Supp., Public Health.]

MOTIONS for an order of *certiorari* and an order of prohibition in respect of an authorisation given by the Minister of Health purporting to act under the Housing (Temporary Accommodation) Act, 1944, s. 6. The relevant facts are set out in the judgment of LORD GODDARD, L.C.J.

Gilbert Paull, K.C., and *T. J. Sophian* for Waterlow & Sons, Ltd. (the appellants).

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *Hon. H. L. Parker* for the Minister of Health.

Erskine Simes, K.C., and *C. E. Scholefield* for the Corporation of Walthamstow.

LORD GODDARD, L.C.J. : Counsel for the applicants in this case has moved for an order of *certiorari* to bring up and quash an authorisation dated Dec.

31, 1945, given by the Minister of Health purporting to act under the provisions of the Housing (Temporary Accommodation) Act, 1944, s. 6, authorising the Walthamstow Corporation "to enter and take possession for the purpose of Part V of the Housing Act, 1936," of certain land which is a sports ground owned by Waterlow & Sons, Ltd., and kept by them for the benefit of their employees.

The matter arises in this way: Under the Housing (Temporary Accommodation) Act, 1944, which is to be read as one with the Housing Act, 1936, a local authority in the present circumstances have power to apply to the Minister for his authorisation to acquire certain land compulsorily and, for the purposes of expediting the proceedings in the present housing emergency, much of the machinery of the Housing Act, 1936, is altered. No public inquiry has to be held, and although the Minister must consider any representations made to him by the owners of the land if he gives an authorisation, the local authority can enter straight away, and have power thereby to acquire land in the same way as they are authorised by an order under the Housing Act, 1936, s. 74, and thereupon they must buy the land and pay compensation.

It is said in this case that they have no power to acquire this land because the ground they are taking forms part of a pleasure ground, and that the acquisition of a pleasure ground or part of a pleasure ground is forbidden by the Housing Act, 1936, s. 75.

On this motion three points have been argued. The first point which counsel for the Minister of Health has taken, and which I think conveniently may be dealt with first, is that *certiorari* does not lie, and that the only provision which gives a right of appeal to the Court is that of the Housing Act, 1936, Sched. II, which provides for an application to the High Court; though perhaps it would be more logical in the first place to consider whether there is a compulsory order in this case, because Sched. II deals with compulsory orders and provides for a hearing before the High Court, and also under sect. 75 the words of the Act are "which at the date of the compulsory purchase order forms part of any park, garden or pleasure ground."

In the opinion of the court, the authorisation which is granted under the Housing (Temporary Accommodation) Act, 1944, s. 6, is the equivalent of a compulsory purchase order because under subsect. (4) of sect. 6 it is provided that:

> Where a local authority have taken possession of land pursuant to an authorisation under this section, they shall by virtue of this section have power to acquire the land compulsorily as if they had been authorised so to do by an order under section seventy-four of the principal Act, made, submitted and confirmed in accordance with the provisions of the First Schedule thereto, incorporating the enactments required to be incorporated in such an order with the modifications and adaptations appropriate to such an order, and the authority shall as soon as may be after taking possession of the land serve notice under section eighteen of the Lands Clauses Consolidation Act, 1845, of their intention to take the land and shall in all respects be liable as if such notice had been given on the day of their entering on the land, except that the power conferred by subsection (2) of section five of the Acquisition of Land (Assessment of Compensation) Act, 1919, to withdraw such a notice shall not be exercisable.

So it appears to me that the position is that as soon as the Minister has given his authorisation, the position is to be exactly the same as though a compulsory purchase order had been made, submitted and confirmed, and I think, therefore, that any provisions one finds in the Act dealing with a compulsory purchase order apply to the authorisation which has to be given under the Housing (Temporary Accommodation) Act, 1944. I think the Court must deal with it as if there had been a compulsory purchase order and regard the authorisation as a compulsory order.

Then comes the question in those circumstances whether or not *certiorari* lies. Under the Housing Act, 1936, Sched. II para. 1, it is provided:

> So soon as may be after a compulsory purchase order or a clearance order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection.

That provision of the schedule cannot apply to this case because it is not applicable under the Act of 1944. It is then provided :

> 2. If any person aggrieved by such an order as aforesaid, or by the Minister's approval of a re-development plan or of a new plan, desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation of the order, or of the approval of the plan, make an
> A application for the purpose to the High Court . . .

and then it sets out what the High Court may do on such an application.

Then para. 3 of Sched. II provides :

> Subject to the provisions of the last preceding paragraph, the order, or the approval of the plan, shall not be questioned by prohibition or *certiorari* or in any legal proceedings whatsoever, either before or after the order is confirmed or the approval is given, as the case may be, and shall become operative at the expiration of six weeks
> B from the date on which notice of confirmation of the order, or of the approval of the plan, is published in accordance with the provisions of this Act.

It will be observed that under that paragraph the order does not become operative at once. It only becomes operative at the expiration of six weeks from the date on which the notice of confirmation is published. It also lays down a time limit within which the application is to be made to the court,
C that is, six weeks after the publication of notice of confirmation. Counsel for the applicant, in answer to the submission of counsel for the Minister of Health, takes the point that that procedure cannot be followed in this case because the machinery under the Housing (Temporary Accommodation) Act, 1944, is different from the machinery under the Housing Act, 1936, and as there is no publication in the newspaper provided for in the Housing (Temporary Accommodation) Act, as there is under the Housing Act, the procedure prescribed by para. 2
D of Sched. II does not apply. In my opinion, that is a good answer to the case. I think one cannot say *certiorari* is taken away here because the substituted procedure which Sched. II gives is not applicable to this case, and the court therefore is of opinion that it is no sound objection to say that *certiorari* has been taken away and another procedure substituted.

Counsel for the Minister of Health also wished to keep open, though he has not taken the point in this case, an objection that *certiorari* will not lie because
E this is a mere administrative order. We are not called upon to pronounce on that in this case, and I can, therefore now proceed to what I may call the real merits of the application. They depend on the true construction of sect. 75 of the Act of 1936. That Act, as I have already said, is to be read together with the Act of 1944, and in the Act of 1944 is described as "the principal Act." Sect. 75 says this :

> Nothing in this Act shall authorise the compulsory acquisition for the purposes of
> F this Part of this Act of any land which . . . [leaving out immaterial words]—at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house.

Counsel for the Minister of Health admits that this land may be described as a pleasure ground because it is a sports ground, but he contends that the true construction of the section is that it must form part of land which is appur-
G tenant to a house, and that it is intended to preserve the amenities of a person's house. It is admittedly, of course, a section against severance because it only deals with acquisition of part of a park, garden or pleasure ground, and in my opinion counsel for the Minister of Health is right in this respect. I think the matter would be clearer if put in this way : The whole thing turns on the word "otherwise," and if one reads it in this way, "forms part of a park, garden or pleasure ground or for any other reason is required for the convenience or
H amenity of a house," one sees that those words "required for the convenience or amenity of a house" apply to the words "park, garden or pleasure ground." Not only that, but I think one must read the words "pleasure ground," in this case applying the doctrine of *ejusdem generis*, as it is often called, which is a very sound rule of construction to apply to a section of this sort. It shows, I think, that the pleasure ground is something in the nature of a park or garden and is a matter which refers to the amenities or convenience of the house.

In my opinion, therefore, the main point that is taken and is of real importance in the case is that the sports ground in this case is not land which the local authority are forbidden to acquire in part, and, therefore, the order of authorisation is good and this motion and the motion for an order of prohibition must be refused with costs.

Humphreys, J.: That, so far as I am concerned, is the judgment of the court.

Singleton, J.: I agree.

Motions refused with costs.

Solicitors: *Coward, Chance & Co.* (for the applicants); *Solicitor, Ministry of Health* (for the Minister of Health); *Sharpe, Pritchard & Co.*, agents for *C. A. Blakeley*, Town Clerk, Walthamstow (for the Walthamstow Corporation).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ALAN MABERLEY *v.* HENRY W. PEABODY & CO. OF LONDON, LTD., ROWLAND SMITH MOTORS, LTD. AND ROWLAND SMITH.

[King's Bench Division (Stable, J.), May 3, 6, 7, 8, 1946.]

Nuisance—Adjoining premises—Damage to adjoining wall by large mound of earth piled against it—Damage to adjoining wall and land by percolation of injurious chemicals deposited on mound—Remedy—No substantial damage sustained up to date—Injunction appropriate remedy.

The defendants, who were the occupiers and owners of premises adjoining a garden belonging to M., had caused (or allowed) a substantial quantity of debris and earth to be piled up against M.'s wall with the result that injury had been caused to it. Moreover, a chemical substance had been deposited on this mound and had percolated through the wall and was damaging the wall and the soil in the vicinity. It was contended by the defendants that a cause of action only arose when damage first appeared, and that M.'s remedy was merely to bring an action for damages, or a series of actions, as and when the wall actually showed damage:—

Held: (i) the cause of action arose immediately the undue burden was placed on M.'s wall, and from that moment the wall sustained damage which was harmful to it and which would ultimately result in its destruction.

Darley Main Colliery Co. v. *Mitchell* (1) *distinguished.*

(ii) the injury to M.'s right was not a small one; nor could it be adequately compensated by a money payment because, up to the present, he had not sustained any very substantial damage, but he would probably do so, in the course of time, if nothing were done to abate the damage. The assessment of damages should, therefore, stand over, and the appropriate remedy was an injunction.

Shelfer v. *City of London Electric Lighting Co.* (3) *applied.*

[**EDITORIAL NOTE.** In view of the present excavation and rebuilding of bombed sites this is an interesting decision on the rights of owners where damage, actual or potential, is caused to walls of adjoining property by deposit of debris. The principle laid down in *Shelfer's* case (3) are held to be applicable, namely, that a person by committing a wrongful act is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf: the rule is to grant an injunction.

As to Principles upon which an Injunction is Granted in Respect of Nuisance, see HALSBURY, Hailsham Edn., Vol. 24, pp. 91-93, paras. 161-167; and for Cases, see DIGEST, Vol. 36, pp. 223-228, Nos. 648-690.]

Cases referred to:

*(1) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; 1 Digest 15, *118*; 55 L.J.Q.B. 529; 54 L.T. 882.

(2) *Hurdman* v. *North Eastern Ry. Co.* (1878), 3 C.P.D. 168; 36 Digest 191, *325*; 47 L.J.Q.B. 368; 38 L.T. 339.

*(3) *Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 28 Digest 415, *408*; 64 L.J.Ch. 216; 72 L.T. 34.

Action for damages and an injunction in respect of a nuisance. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *J. R. Ogilvie Jones* for the plaintiff.
J. A. Wolfe for the first defendants.
D. A. Scott Cairns for the second and third defendants.

STABLE, J.: This case, although it involves certain complications, is, in my view, both as regards the facts and the law, a reasonably simple one. The plaintiff, Dr. Maberley, is, and was at all material times, the owner and the occupier of a garden situated in the Vale of Health in Hampstead. On the northern boundary of this garden is a wall which divides his garden from an open space at the back of a building, called the Athenaeum. The plaintiff complains of two separate and wholly distinct matters. First, he says that on the Athenaeum land a very substantial quantity of debris and earth has been piled up against the wall, and this has brought to bear on his side of the wall a condition of permanent stress or pressure which it is common ground the wall was never intended to sustain. The other matter is that on to this mound from time to time a chemical substance has been deposited, which has percolated through the wall and has set up a process of disintegration of the bricks and the lime mortar of which the wall is composed, and has adversely affected the fertility of the soil in the immediate vicinity of the wall on Dr. Maberley's side.

In this action, for those two independent wrongs, Dr. Maberley is seeking redress from one or other or all three of the defendants concerned. Their position in the matter is this. Rowland Smith is the owner of the Athenaeum freehold, and, at all material times up to Feb., 1941, a limited company, Rowland Smith Motors, Ltd., were the occupiers of the Athenaeum premises under an agreement with Rowland Smith. From Feb., 1941, the premises have been occupied by Peabody & Co., of London, Ltd., under a lease from Rowland Smith.

To recapitulate very shortly the history of the matter, as far back as 1937 Dr. Maberley had occasion to complain to Rowland Smith Motors, Ltd., of the injury that they were doing to this dividing wall. It is agreed by everybody that the wall belongs to Dr. Maberley on his side of the wall, up to the middle line, and that on the other side of the middle line the wall is part of the Athenaeum property. In 1937, Rowland Smith Motors, Ltd., erected a sort of concrete platform on the part of this land at the back of the Athenaeum, and in the course of that operation they undoubtedly applied stress to the wall, which pushed it over, as to a part of it. Dr. Maberley complained, as he was entitled to do, and that matter was rectified; and as far as that part of the story is concerned, it is over.

Then, in 1939, Dr. Maberley again complained and said that since the outbreak of the war a large quantity of soil and, apparently, household refuse, had been dumped on the eastern side of this concrete platform. There is no doubt that in 1939 Rowland Smith Motors, Ltd., who were excavating for some air raid shelters in some other part of Hampstead, took the soil that they excavated, brought it to this piece of land, and piled it up at the eastern extremity of this concrete platform, against this dividing wall. The reply to Dr. Maberley's complaint was that as soon as the thaw had set in steps would be taken to remove any danger to the wall; but it appears that nothing in fact was done. Dr. Maberley ceased to take a very active interest in the matter, for the obvious reason that war service took him away from the neighbourhood. In 1942 Dr. Maberley returned to Hampstead, and in 1944 (by which time the occupation of the Athenaeum had passed from Rowland Smith Motors, Ltd., to Henry Peabody & Co., of London, Ltd.), he returned to the attack.

It was strenuously contended before me that this matter is really governed by a decision of the House of Lords in *Darley Main Colliery Co.* v. *Mitchell* (1). It was contended that the mere imposition of this burden on Dr. Maberley's wall was not in itself an infringement of his rights, but that the cause of action arose, and only arose, if and when some actual damage to the wall, resulting from the imposition of this burden, could be established. In my view that contention is wrong, and I further hold that it does not really matter whether it is right or wrong, for this reason: I had the advantage of the testimony of two very eminent architects, and each of them agreed that this wall was never designed or intended to sustain the sort of burden that has been imposed upon it. Mr. Lovett, the plaintiff's architect, detected certain cracks, fissures and bulges in the wall, which he attributed to the burden of the mound. Mr. Biggs on the other hand, while he agreed the wall was not intended for the part allotted to it, attributed the cracks and displacement of the wall to what I may call natural causes. There was, in fact, very little difference between the views of the two architects, I have no doubt that the wall has suffered by the effluxion of time and that some but not all of the defects apparent on the wall today can be attributed to the mound. I am satisfied that nobody can dogmatically assert that this or that is attributable to the one cause or to the other. A

I am satisfied, however, that demonstrable or apparent injury has been caused to the wall by the imposition of this mound. I do not accede to the submission of counsel for the defendants that under these circumstances the cause of action only arose when the first crack appeared, and that the plaintiff's remedy is simply to bring an action for damages, or a whole series of actions for damages as and when the wall disintegrates brick by brick. It may well be that a fresh cause of action arises as each brick topples down, and that there is a continuing B cause of action until the root of the trouble is eradicated; but, however that may be, I am satisfied that a cause of action arose immediately this undue burden was imposed on Dr. Maberley's wall, and that from that very moment the wall sustained damage, that is to say, it was subjected to a pressure or to a strain, an actual measurable physical impact, which was harmful to the wall and which must, in the course of time, ultimately result in its destruction.

C I think that *Darley Main Colliery Co.* v. *Mitchell* (1) is distinguishable, and I think the distinction was very clearly pointed out by Cotton, L.J., in *Hurdman* v. *North Eastern Ry. Co.* (2), where he said (3 C.P.D. 168, at p. 174):

> But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an inter- D ference with this enjoyment by something in the nature of nuisance [then these are the important words] (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land.

Cotton, L.J., was drawing a distinction between the action in nuisance and the action based on an interruption or disturbance, of an easement such as a right of E support, or something of that kind.

As regards this mound, in my view there is no doubt that it was a nuisance in the legal sense of the term. It was a nuisance deliberately created by Rowland Smith Motors, Ltd., and for that the company is responsible to Dr. Maberley. As regards the position of Rowland Smith in that matter, he was the owner of the freehold at the time when the nuisance was created. I am told that he substantially owns the company which created the nuisance, but, however F that may be, Rowland Smith is a wholly distinct entity from the company, and as such I treat him. I think that he is responsible for the abatement of this nuisance, for two reasons: First, when the nuisance was created the land was occupied by Rowland Smith Motors, Ltd.; their agreement or their occupation came to an end, and the land was then leased to Peabody, with the result that for (it may be) a very short period of time, Rowland Smith was G himself the owner and the occupier of the land on which the nuisance had been created. Whether he actually knew of his own knowledge of the existence of this nuisance, I do not know. There is no evidence that he did know, and I will assume that he did not know; but the secretary of Rowland Smith Motors, Ltd., who was entrusted by Rowland Smith with the task of re-letting the property to Peabody, knew of the mound, because he was constantly on the property and saw it, and in my view this knowledge must be attributed to Rowland Smith. H I think that there is another ground on which Rowland Smith is responsible, and that is this: If ever there was a nuisance that was apparent, it was this one, and although the owner of property who is not in occupation of it may be placed in a position of some difficulty if his tenant introduces a nuisance on the property which is latent and which will not readily be discernible even by the most careful property owner, anybody who took any interest in this property at all must have noticed that there was this vast amount of stuff which had been brought on to the land and piled up against the wall.

The position of Peabody in relation to this nuisance is somewhat peculiar. I am satisfied that they did not create it or add to it in any shape or form, but the fact of its existence had been brought very pointedly to their notice. They are in occupation of the property; they have had ample time, if they were minded to put the matter right, so to do, and they have done nothing; and I think in law they are equally responsible with the owner of the freehold and with the actual tortfeasor for the adverse consequences that Dr. Maberley has sustained.

As regards the other matter, what I may refer to as the chemical position, the facts are wholly different. Rowland Smith Motors, Ltd., have nothing to do with that at all. That nuisance never existed until a substantial time after they had ceased to have any interest in this property. As regards Rowland Smith, I am satisfied that he did not know of the nuisance, and I do not think that with any degree of care, however microscopically he had kept his property under inspection, he could be expected to have noticed it. The nuisance is latent, and it is brought about by the percolation of water charged with this deleterious chemical into and through the wall and on to the adjoining soil in Dr. Maberley's garden. For that matter it seems to me that the legal responsibility rests, and rests solely, on the shoulders of Peabody, the party who caused it.

I need not go into the facts at any length, and indeed there is little or no dispute about them. There is no doubt that Peabody deposited (in what may have been from the weight point of view, comparatively small quantities), a certain amount of this chemical on the land. The rain has washed it through the wall, and I have no doubt that it has disintegrated, and is disintegrating, the bricks and mortar of the wall, and that for a short distance on Dr. Maberley's side the wall is adversely affected.

The real problem, which is a practical problem rather than a legal problem, is this: Here we have two entirely separate and distinct wrongs, which have caused injury to the structure of Dr. Maberley's wall. The harm is derived from two separate and distinct sources, in one case the mound, and the other the chemicals; and the damage that these two causes have brought about, and are in process of bringing about, is complementary. The solution of the problem from the practical side is a composite operation, which will free the wall from the burden of the stress of the mound and protect it from any further percolation of this deleterious chemical.

The question is what is the appropriate form of relief. My attention was called to the judgment of A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (3), where he said ([1895] 1 Ch. 287, at pp. 322, 323):

> Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section . . . In my opinion, it may be stated as a good working rule that (i) If the injury to the plaintiff's legal rights is small, (ii) And is one which is capable of being estimated in money, (iii) And is one which can be adequately compensated by a small money payment, (iv) And the case is one in which it would be oppressive to the defendant to grant an injunction: Then damages in substitution for an injunction may be given.

That short, clear and authoritative statement of the law I very respectfully adopt.

In my view none of the four conditions stated by A. L. SMITH, L.J., in which it is proper for the court to award damages in substitution for the injunction is satisfied in the present case. I do not think the injury to the plaintiff's legal rights is a small one. At this stage of the proceedings, in my view, it is quite incompetent for the court to estimate the quantum of that damage in money. If the source, or sources, of the trouble are removed, it may well be that, up to date, Dr. Maberley has sustained very little damage. If, on the other hand, nothing is done about the matter, it may be that in course of time the damage which he will sustain as a result of the combination of these two wrongful acts, or one or the other of them, will be very substantial. As to the third condition it follows that, if this view of the matter is right, Dr. Maberley cannot be adequately compensated at this stage of the proceedings by a small money payment. As to the fourth condition, that the case is one in which it would be oppressive to grant an injunction, it seems to me that that does not arise. Dr. Maberley has been vigilant in defence of his rights; he has called the attention of the motor company to the mound at the earliest possible time, and, notwithstanding his protests, they piled up this great mound of earth, and have done nothing to prevent or reduce the harmful consequences which were foreseen and which, I venture to think, were perfectly apparent throughout.

As regards the introduction of the chemical, it seems to me to be an intolerable proposition that you can bring poisonous chemicals on to your land and allow them to percolate through your neighbour's wall and kill his flowers on the other side, and then shrug your shoulders and say: "Oh, well, flowers do not much matter, and anyhow, it is a miserable old wall, and a modest sum of damages will put that matter right." I think Dr. Maberley is entitled to be protected from this invasion of his private rights.

I do not propose to assess the damages now, because it seems to me that the whole thing is so conjectural. Up to date, in the loss of amenities and otherwise, I do not think Dr. Maberley has sustained any very substantial damage. At all events, the wall has not yet fallen down, and, if the cause of the trouble is removed, it may be that it never will fall down. I think the assessment of the damages is a matter that ought to stand over.

As regards the injunction, in my view, as I have already said, in relation to both the matters of claim this is essentially a case in which an injunction is the appropriate remedy, and I so decide. I do not think this is the moment to determine the exact form which the injunction should take, for various reasons. I think the most cogent reason is this, that we are faced with a somewhat intricate problem by reason of the fact that the source of the trouble is twofold, but as regards the chemical aspect of the matter the responsibility for that rests solely on Peabody, whereas, with regard to the other matter, the responsibility rests on all three of the defendants. The actual operation of putting these matters right is a matter which the defendants will probably be in a position to adjust as between themselves. Also, one cannot shut one's eyes to the fact that at the present moment there are certain restrictions on every form of human activity in this island, and it may be that an order of the court, if made to-day, would be unenforceable by reason of those restrictions; but that the case is one in which the appropriate remedy is by way of injunction I entertain no doubt, and I so decide.

In my view, this matter should be rectified by the persons who are responsible for the prevailing state of affairs. In the circumstances, I think that, as against Peabody and Rowland Smith, there should be a declaration that they are not entitled to continue to maintain the deposits on these premises; I think the wording should be "any harmful substance which percolates into the plaintiff's garden." Nor are they entitled to maintain the accumulation of soil at or near the partition wall so as to damage it, or so as to be likely to damage it. As against all three defendants, the assessment of damages will stand over, and as regards the precise form of injunction there will be liberty to apply.

Judgment for the plaintiff with costs.

Solicitors: *Cliftons* (for the plaintiff); *Norton, Rose, Greenwell & Co.* (for the first defendants); *Fowler, Legg & Co.* (for the second and third defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

Re WELSH BRICK INDUSTRIES, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Tucker, L.JJ.), May 28, 29, 1946.]

Companies—Winding up—Petition by creditor—Writ already issued by creditor in King's Bench Division for recovery of debt—Company granted unconditional leave to defend under R.S.C., Ord. 14*—Winding-up court not precluded from considering evidence as to whether dispute bona fide—Discretion of judge to make winding-up order—Companies Act,* 1929 (c. 23), *ss.* 168, 169*—R.S.C., Ord.* 14.

On Feb. 18, 1946, the petitioner issued a writ in the King's Bench Division for the recovery of certain sums advanced by him to the company, and on Apr. 9, 1946, he presented, in the county court, a petition, based on that debt, for the compulsory winding up of the company on the ground that it was unable to pay its debts. On a summons for judgment under R.S.C., Ord. 14, in the King's Bench action, the registrar made an order on Apr. 26, 1946, giving the company unconditional leave to defend. When the petition came on for hearing, the county court judge found on the evidence before him that the debt was owing and that the company could not pay its debts, and he made a winding-up order. The company appealed from the order. It was contended that the judge should have dismissed the petition because the order of the registrar giving the company unconditional leave to defend the action for repayment of the debt was in itself conclusive of the fact that there was a *bona fide* dispute, and winding-up proceedings were not the appropriate procedure for dealing with disputed debts :—

HELD : in spite of the fact that unconditional leave to defend had been granted in the King's Bench action, it was competent for the judge in the winding-up court to go into the evidence which was before him to consider whether or not there was a *bona fide* dispute. The registrar's order was a matter which the winding-up court would take into consideration, but it did not preclude the judge from finding, as a fact, that there was no *bona fide* dispute as to the debt. The judge had, therefore, discretion to make a winding-up order under the Companies Act, 1929, s. 168.

[**EDITORIAL NOTE.** This case decides that the mere fact that unconditional leave to defend an action relating to a debt has been given, is not sufficient to make a winding-up petition one based upon a " disputed debt." It is for the judge exercising the jurisdiction in winding up to consider all the facts and exercise his own discretion upon whether the debt is or is not disputed, the grant of leave to defend being merely one matter to be taken into consideration.

AS TO WINDING UP BY THE COURT ON CREDITOR'S PETITION, see HALSBURY, Hailsham Edn., Vol. 5, pp. 549-552, paras. 887-890 ; and FOR CASES, see DIGEST, Vol. 10, pp. 832-834, Nos. 5425-5454.]

APPEAL by the company from an order of His Honour JUDGE THOMAS, made at Cardiff County Court, and dated May 7, 1946, directing that the company be wound up compulsorily. The facts are fully set out in the judgment of LORD GREENE, M.R.

Gerald Upjohn, K.C., and *R. Gwyn Rees* for the appellant company.

J. B. Lindon, K.C., and *Carey Evans* for the respondents.

LORD GREENE, M.R., : This is an appeal from an order of his Honour JUDGE L. C. THOMAS, sitting in the Cardiff County Court, directing the appellant company, Welsh Brick Industries, Ltd., to be wound up compulsorily. The company appeals against that order and the appeal is put on two grounds. First, it was said that the petitioning creditor had no *locus standi* to present a petition because his alleged debt was the subject of a *bona fide* dispute and that in those circumstances the county court judge ought to have dismissed the petition on the ground that winding-up proceedings are not the appropriate procedure for dealing with disputed debts. The debt, I may say, was not one in respect of which a statutory demand had been made, and therefore the petitioner in order to succeed on his petition had to prove further to the satisfaction of the court that the company was unable to pay its debts [see Companies Act, 1929, s. 169]. This is, of course, an appeal from a county court and our jurisdiction is confined to dealing with matters of law—and included in matters of law are questions as to whether or not, with regard to some particular issue of fact, there was evidence on which the county court judge could hold as he did. In the present case the debt on which the petition is based consisted of advances made to the company for something over £800 by the petitioner. On the evidence it is perfectly clear that he made those advances, but what is disputed is the liability of the company to repay them at the present time. It appears that the petitioner had issued a writ in the King's Bench Division on Feb. 18, 1946, for the purpose of recovering the amount of those advances and the petition was presented on Apr. 9, 1946, some two months later. In the meanwhile, on a summons for judgment, an order was made (it was in fact made on Apr. 26, 1946) by the registrar of the Cardiff District Registry giving the company unconditional leave to defend. In those circumstances the petition came on for hearing and affidavits were filed dealing with a number of matters, including the history of the relationship of the parties. So far as the debt in question is concerned, the case that was made before the county court judge was to the effect that, as the registrar in the King's Bench action had granted unconditional leave to defend, that by itself was sufficient to establish the proposition that the debt was *bona fide* disputed and that therefore the judge ought not to make a winding-up order. Before us that point was taken too, but, in addition, a further point was taken, namely, that, quite apart from the order of the registrar giving unconditional leave to defend, on the evidence which was in fact before the county court judge he could not in law find that the debt was not a disputed debt. The law and practice on those matters is for present purposes stated with sufficient accuracy in BUCKLEY ON THE COMPANIES ACTS, 11th Edn., pp. 356, 357, as follows :

> A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the court. Some years ago petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

I do not think that there is any difference between the words "*bona fide* disputed" and the words "disputed on some substantial ground." I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a *bona fide* dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-up court will take into consideration and to which the winding-up court will in due course pay respect, but I cannot regard it as in any way precluding a winding-up judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a *bona fide* dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action. An order, of course, can be made under R.S.C., Ord. 14, giving unconditional leave to defend on grounds which fall far short of the establishment of a substantial ground of defence to the satisfaction of the registrar or the master, as the case may be. He may find that there is a keen dispute between the parties and he may find that, on the facts before him, it would not be proper or just to treat that issue as one which he is capable of deciding—whether it is *bona fide* or not—and he may accordingly say : "The facts alleged are quite consistent with it being a *bona fide* dispute ; I need not go so far as to find that it is a *bona fide* dispute, but I think that there ought to be leave to defend." Accordingly, in the winding-up court it seems to me that it must be competent for the judge, in spite of the fact that unconditional leave to defend has been granted, to go into the evidence which is in fact before him. Of course, in an appeal from the winding-up court to this court, this court has a very much freer hand than it has in appeals from a county court, because it is not tied by the decisions of fact of the judge. But, looking at the evidence which was before him, I am bound to say that in the present case, so far from differing from the view which he quite clearly took that this debt was owing, I find it difficult to see on what ground he could have found the contrary ; in other words, not merely am I unable to say that there was no evidence before him on which he could find as he did, but I find it difficult to see what evidence there was before him which would have justified him in finding the contrary. The affidavit, upon which unconditional leave to defend was obtained, was not put before him. The ground upon which the company defended the petition on this point was, as I have said, that the order of the registrar giving unconditional leave to defend was conclusive on that matter, so that the county court judge did not have before him any of the facts alleged in the affidavit on which the registrar made the order. We have, as a matter of fact, looked at that document, and I can find nothing in it which carries the matter any further. The question is: Was the petitioner entitled to claim repayment at this time or was the company entitled to refuse repayment until some future date? When the evidence filed on behalf of the company in support of that claim is looked at, it is found to be of the most flimsy and most vague character and it is all of this type. In his affidavit (sworn on Apr. 29, 1946) Marshall, the secretary and a director of Welsh Brick Industries, Ltd., after referring to the promotion of the company, said:

> The petitioner was one of such promoters, and it was arranged that he should finance the company until it took over the said property and became self-supporting.

What that means I am quite unable to tell. With whom was it arranged; when was it arranged; up to what amount was he to advance money and on what terms? And does it mean that, if he did finance the company by way of an advance, the company's obligation to repay was to be deferred to some future—and, if so, what future—time? The same matter is dealt with in other affidavits filed on behalf of the company. (In passing, I should say that the petitioner Mr. Frederick Stanley Bates, denies in his affidavit that he arranged to finance the company—so that there is a complete denial of the company's story. In the same affidavit, he again denies the allegation that he should provide the company with the sum of £5,000, the figure mentioned in the affidavit which was put before the registrar). Then, in a later affidavit (filed on May 6, 1946), Marshall says:

> I insist that there is evidence in the documents in the Chancery action . . . to show that the petitioner was under an obligation to finance and to give effect to the said trusts in favour of the company.

The Chancery action is an action in which the company is asserting against the petitioner that, in some way and to some extent, he is a trustee for the company of the brickworks in question. Therefore, what Marshall is saying *here* is this: "Proof of my statement that the petitioner undertook the financing of the company is to be found in documents in the Chancery action." But he does not condescend to examine those documents and produce the proof. No extract from, or letter contained in, those documents, whatever they may be, has been put before the court. He had plenty of time to do it and if there was any substance in the argument that the company was entitled to some time or indulgence before it was to be called upon to pay, and there were documents to that effect, it would have been the easiest thing for him to produce them—but he chooses to deal with the matter in this way. Then, again, Marshall in his affidavit refers to what he calls "the documents in the Chancery action." That is the company's evidence—that these undoubted advances by the petitioner were not to be repaid for some substantial time; but it seems that that evidence is quite worthless; it establishes nothing of the kind, and I should have been very much surprised if the county court judge had taken the view that that evidence afforded a shadow of ground for thinking that there was a substantial defence to the action or a *bona fide* defence to the action. It was, in my opinion, competent to him to consider that issue and to examine the question of whether or not a debt was owing. He did examine the question whether a debt was owing, and in doing so he must have considered the question as to whether, on the evidence before him, there was any kind of substance in the defence put forward. He must have held that there was no substance in it—and I am not surprised that he did so.

In the result, therefore, the appeal on that ground fails. That, by itself, is sufficient to deal with the whole of this appeal. It was argued at one time by counsel for the company that the petitioner had failed to establish that the company was unable to pay its debts. The inability or ability to pay debts is a question of fact for the judge and there was ample evidence, in my opinion, on which he could find that the company was unable to pay its debts. Counsel for the company was impressed by the difficulties in which he found himself on that matter and he very properly conceded that the judge had found that the company was insolvent and that he (counsel) could not contend that there was no evidence upon which he could so find. That matter, therefore, disappears from the case.

In the result the appeal must fail and must be dismissed .

Morton, L.J.: There were two issues of fact before the county court judge in this case. The first was : Is there a *bona fide* dispute as to the existence of the debt upon which the petitioner founded his petition ? Secondly : Is the company unable to pay its debts ? If both of these facts were found against the company, the county court judge would have discretion to make a winding-up order under the Companies Act, 1929, s. 168.

In my view it is right for us to proceed on the footing that the county court judge did arrive at a conclusion upon both of those issues of fact. As to the question whether the company was unable to pay its debts, he clearly did, as appears from the note of his judgment, and I do not desire to add anything to what has been said by the Master of the Rolls on this point.

As regards the other point, whether there was a *bona fide* dispute, it is quite true that, when the petitioner issued a writ in the King's Bench Division claiming repayment of this debt, the company was given leave to defend. That is no doubt a matter for the county court judge to take into consideration, but it is not a matter which concludes the issue before him. I quote now from a note [to R.S.C., Ord. 14] in The Annual Practice, 1945, p. 201 :

> The power to give summary judgment under Ord. 14 is " intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay " . . . As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend.

Therefore, the decision of the registrar in giving leave to defend does not amount to more than this—that he thought, on the evidence before him, that there was at least a fair probability that the company had a *bona fide* defence. To my mind it is quite impossible to regard such a finding by the registrar as a bar in itself to a finding of fact by the county court judge that there was no *bona fide* dispute as to this debt at all.

I do not desire to go through again the evidence which has been referred to by the Master of the Rolls, but I would like to make one or two observations in deference to the admirable argument of counsel for the company. The debt is alleged in the petition as being : " the amount of money advanced by your petitioner to the company in Nov. and Dec., 1945." Then there is a claim for interest with which I need not deal. That is verified by affidavit in the usual way. The affidavit in reply says this, after referring to the promotion of the company :

> The petitioner was one of such promoters and it was arranged that he should finance the company until it took over the said property and became self-supporting.

Criticisms of that statement have already been made. I entirely agree with them and I do not desire to repeat them. Counsel for the company suggested that it was inconceivable that this company should have embarked upon operations of brick-making unless it had had a firm agreement with the petitioner that he would not only advance moneys but leave those moneys on loan for a particular time and advance further sums as and when they were needed up to the alleged limit of £5,000. I agree it seems not unlikely that the company would require such a provision before it started business, but the difficulty is that the company's own evidence does not state it. There is no statement to be found in the company's evidence of an agreement not to call in the money before a particular date, or anything of that kind. If there was such an agreement it was for the company to set it up and prove it.

We were referred to the evidence which was filed in the King's Bench action and on which leave to defend was given, but, assuming in favour of the company that we should refer to that evidence at all, as it was not before the county court judge, I think it carries the matter no further. All that Marshall says in his affidavit (sworn on Apr. 26, 1946) in this regard is this :

> The plaintiff was also to find a sum of £5,000 for financing the operations of the defendant company. [Para. 7].

Again there is no description of the terms upon which the money was to be found or the dates upon which it was to be repaid. Then Marshall deals again with the matter in para. 11 of that same affidavit :

> The defendants admit that the plaintiff paid to the credit of the defendants' said account the two sums of £159 10s. and £653 mentioned in the particulars of claim. Such amounts it is alleged [he is evidently not prepared to swear it] were provided by the plaintiff as part of the arrangement under which he was to finance the company to the extent of £5,000, and neither of them was a loan to the company, or not a loan at interest, or a loan repayable until and unless the plaintiff first satisfied his full obligation to finance the company's operations to the extent of £5,000. Such is the defendants' contention [he does not state it as a fact] and your deponent submits it is amply borne out by the facts set out above and the voluminous correspondence in the case.

But he did not exhibit any document recording any such arrangement.

In my view there was ample evidence upon which the county court judge could come to the conclusion that there was no *bona fide* dispute as to the petitioner's debt. I think he must have come to that conclusion as a matter of fact and, in my view, the appellant's case fails under that head.

I agree that this appeal should be dismissed.

TUCKER, L.J. : I agree.

Appeal dismissed. Costs of the respondents to be paid out of the assets of the Company.

Solicitors : *Fortescue, Adshead & Guest,* agents for *Richards & Guest,* Cardiff (for the appellant company) ; *Ince & Co.,* agents for *Allen Pratt & Geldard,* Cardiff (for the respondents.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SIMMS MOTOR UNITS, LTD. *v.* MINISTER OF LABOUR AND NATIONAL SERVICE.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Lynskey, JJ.), May 15, 1946.]

Emergency Legislation—Essential work—Reinstatement—Dismissal of employee for alleged serious misconduct—Direction to reinstate—Instruction from Ministry ordering national service officer always to direct reinstatement in certain cases—No exercise of discretion by national service officer—Direction to reinstate invalid—Rules Publication Act, 1893 (c. 66)—*Emergency Powers (Defence) Act,* 1939 (c. 62), *s.* 1—*Defence (General) Regulations,* 1939, *reg.* 58A—*Essential Work (General Provisions) (No.* 2) *Order,* 1942 (*S.R. & O.,* 1942, *No.* 1594, *as amended by S. R. & O.,* 1943, *No.* 1075, *and S.R. & O.,* 1944, *No.* 815).

On Feb. 23, 1945, S.M.U., Ltd., a scheduled undertaking within the Essential Work (General Provisions) (No. 2) Order, 1942, dismissed one of its workmen alleging serious misconduct. The workman complained to the national service officer and his complaint and appeal were referred to the local appeal board, who held that the dismissal was not justified on the ground of serious misconduct. The national service officer had received instructions from the Ministry that in all cases of dismissal for alleged serious misconduct he was always to direct re-instatement if (*a*) the recommendation of the appeal board that the dismissed workman's appeal be allowed, was unanimous and (*b*) the dismissed workman desired to be reinstated. Acting on these instructions, the national service officer directed S.M.U., Ltd., to reinstate the workman. It was contended on behalf of S.M.U., Ltd., that the direction to reinstate was invalid because the national service officer had not exercised his discretion under the powers conferred on him by the Essential Work (General Provisions) (No. 2) Order, 1942 (as amended) :—

HELD : (i) the Minister could only confer power upon himself or his representatives under the Defence (General) Regulations, 1939, reg. 58A, by

Statutory Rules and Orders. He could not, by giving instructions which were not Orders, limit the duties or discretion conferred on the national service officer by the Essential Work (General Provisions) (No. 2) Order, 1942.

(ii) the direction to reinstate was invalid because the national service officer had not exercised his discretion in the matter as required by the Order.

[**EDITORIAL NOTE.** Where a Minister is given power to make Orders he is not A
entitled to give further instructions affecting the working of the Orders except, it may be presumed, in matters of mere departmental routine. In the circumstances here reported a national service officer was given a discretion by Order, which was limited by subsequent instruction, and a notice of reinstatement given by such officer pursuant to and in accordance with those subsequent instructiins is, therefore, held invalid.

As to Statutory Rules and Orders, see HALSBURY, Hailsham Edn., Vo.. 31, pp. 467-470, paras. 573-580; and for Cases, see DIGEST, Vol. 42, pp. 782, 783, B
Nos. 2114-2129.

For the Essential Work (General Provisions) (No.2) Order, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION, [14] 128].

Appeal by way of case stated from a decision of the Appeals Committee of the Court of General Quarter Sessions for the county of Middlesex, given on Oct. 16, 1945, allowing the appeal of Simms Motor Units, Ltd., from a decision of a court of summary jurisdiction for the petty sessional division of Highgate. C
An information was preferred against the company by a national service officer alleging failure to comply with a direction to reinstate in its employment a specified person within the meaning of the Essential Work (General Provisions) (No. 2) Order, 1942. The workman had been dismissed by the company for alleged serious misconduct. It was found by the appeal committee that the national service officer had received instructions from the Ministry that in all cases of dismissal for alleged serious misconduct he was always to direct re- D
instatement if (*a*) the recommendation of the local appeal board, that the dismissed workman's appeal be allowed, was unanimous and (*b*) the dismissed workman desired to be reinstated. The committee further found that the national service officer always acted on this instruction. The facts are fully set out in the judgment of the court delivered by Lynskey, J.

W. Arthian Davies and *Douglas Lowe* for the appellant.

Gilbert Beyfus, K.C., and *H. V. Lloyd-Jones* for the respondents. E

Lord Goddard, L.C.J.: Lynskey, J., will deliver the judgment of the court.

Lynskey, J. [delivering the judgment of the court]: This is a case stated by the appeals committee of the court of general quarter sessions for the county of Middlesex. The proceedings commenced originally by an information which was laid before the petty sessional division of the court of Highgate by one F
Walter George Winter, who was an officer of the Ministry of Labour and National Service, against Simms Motor Units, Ltd., who were persons carrying on an undertaking scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942.

The complaint against Simms Motor Units was that they had failed to comply on Apr. 21, 1945, with a direction given by the national service officer, Winter, G
that they should reinstate in the employment from which he was dismissed one Donald Hartley McGregor, who was a specified person within the meaning of the said Essential Work (General Provisions) (No. 2) Order, 1942, made under the Defence (General) Regulations, 1939, reg. 58A. This summons was heard on July 25 by the court of summary jurisdiction, and Simms Motor Units, Ltd., who are the respondents in this appeal by way of case stated, were ordered to pay a fine of £5 and the sum of 50 guineas costs. Thereupon the respondents H
appealed to the general quarter sessions, and the appeal committee of that quarter sessions heard this appeal and, subject to a case stated, they allowed the appeal with 50 guineas costs. The present appellant was the national service officer for that district.

According to the facts as found in the case stated, it appears that the respondents were within the terms of the Essential Work (General Provisions) (No. 2) Order, 1942, and that they had employed McGregor from 1940 as a capstan operator. He had first been employed on what they called aeronautical work, which apparently meant work which was not subject to inspection by the Aeronautical Inspection Department, and later he was employed upon work which was subject to such inspection and was called A.I.D. work. By Feb. 23, 1945, McGregor was capable of doing general machine work on a capstan lathe, and during the five months immediately prior to the said date he had been engaged in the aero-machine shop in A.I.D. work on a No. 4 Herbert capstan lathe. On Feb. 23, 1945, whilst he was engaged on that work, the respondents purported to dismiss him for alleged serious misconduct. He complained about that matter to the national service officer, the present appellant, with the result that his complaint and appeal were referred to the local appeal board. The local appeal board heard the case, and on Mar. 20, 1945, they decided that there had been no serious misconduct or, to put it in the words of their decision, they held and certified that the local appeal board was of opinion that the dismissal was not justified on the ground of serious misconduct. Thereupon the national service officer, the appellant, notified the respondents, and he required them to reinstate McGregor in the employment from which he was dismissed, namely, that of a machinist. When the matter came to be dealt with by the appeal committee, two points were taken on behalf of the respondents: (i) that in fact they had no work available for McGregor at the date when they were required to reinstate him; (ii) that the requirement which required his reinstatement was invalid, because the national service officer had not exercised his discretion under the powers conferred upon him by the Defence (General) Regulations, 1939, and the Essential Work (General Provisions) (No. 2) Order, 1942 (as amended), because of a special instruction given by the Minister, and, therefore, his notice was bad.

Both points have been taken on behalf of the respondents before this court, and I can deal with the first point quite shortly. There is a finding on the facts by the appeal committee that there was work available for the said McGregor at the respondents' factory, and he could have been re-employed by the respondents on a capstan lathe. They further go on to say that McGregor's own machine was employed on commercial work; that there was another machine employed upon a type of work upon which McGregor had been engaged, but to employ McGregor on that machine would mean that the person engaged on that particular work would have to be removed and either be given other employment or possibly not be employed at all. The view of this court is that on those findings of fact the respondents had work which was available for McGregor. His own lathe was available for him. The work which he had been doing up to five months before the actual date of dismissal could have been provided for him, and in our view it is not right to say that, because a particular type of work which was being carried out on a particular lathe ceased because the contract was up and some different type of work (although of a similar type to that which is generally done on lathes) was available, no work was available. In our view, so far as that point is concerned, we are of opinion that there was work available upon which McGregor could have been engaged if the respondents had cared to comply with the direction.

Coming now to the second point taken by the respondents and resisted by the appellant, the position is this. The Defence (General) Regulations, 1939, reg. 58A, deals with control of employment. Para. (1) gives the Minister general powers:

> (1) The Minister of Labour and National Service (hereinafter in this Regulation referred to as "the Minister") or any national service officer may direct any person in Great Britain to perform such services in the United Kingdom or in any British ship not being a Dominion ship as may be specified by or described in the direction, being services which that person is, in the opinion of the Minister or officer, capable of performing. (1A) Any such direction shall, except so far as the contrary intention appears therefrom, continue in force until the direction is varied by a subsequent direction or withdrawn by the Minister or a national service officer. (2) Any services required by a direction given under this Regulation to be performed shall be performed upon such terms as to remuneration and conditions of service as the Minister or a national service officer may, in accordance with the provisions of this Regulation, direct.

Then by para. (4A):

> The Minister may by order make provision for securing that enough workers are available in undertakings engaged in essential work and may in particular provide by any such order (*a*) for securing that, except in circumstances and to the extent

> provided by the order, persons employed in any such undertaking shall continue to be employed in that undertaking, and shall not be caused to give their services in any other undertaking.

There are similar provisions in relation to the control, work, movements and dismissal of persons engaged in essential work. Then para. (4B) is :

> An order made under this regulation may provide that where a person employed in an undertaking engaged in essential work (*a*) has been dismissed on the ground of serious misconduct ; or (*b*) has, in accordance with the conditions of his service, been suspended without pay for reasons of a disciplinary character, and, as a result of proceedings under an order so made, the dismissal or suspension is treated as ineffective or unjustified, he shall not, by reason of his attendance at any hearing in the course of the proceedings or, in the case of a person who has been dismissed, by reason of his having taken other employment, be treated as not having been capable of and available for work and willing to perform services which he could reasonably have been asked to perform.

What should be noted about the Defence (General) Regulations is this. They are made under the Emergency Powers (Defence) Act, 1939, for a particular purpose and they give the Minister very wide powers, but, so far as regs. 58 (4A) and 58 (4B) are concerned, it is quite clear, in our view, that they only give the Minister power to be exercised in a particular way : he can confer these powers upon himself and his representatives, but he can only do it in one way, and that is by Order. Having regard to the provisions of the Rules Publication Act, 1893, dealing with Orders, in our view that means by a Statutory Rule and Order which must be published in the proper way for the information of the public and those who are bound to comply with the Regulations. The result is that these Regulations give the Minister power to take power to himself by Order.

In the Defence (General) Regulations, 1939, reg. 100, the interpretation section, there is the definition of " national service officer " :

> " National service officer " means, in relation to persons in Great Britain, any officer authorised in writing by the Minister of Labour and National Service to give directions under reg. 58A of these Regulations on his behalf and in accordance with his instructions, and in relation to persons in Northern Ireland, any officer authorised in writing by the Ministry of Labour for Northern Ireland to give directions under the said reg. 58A on their behalf and in accordance with their instructions.

It is said on behalf of the appellant that reg. 100 means that a national service officer is an officer appointed for the purpose of giving directions under reg. 58A, and when he is employed in giving such directions he must act in accordance with his instructions. The argument, as I understand it, on behalf of the appellant, is that instructions so given would enable the Minister in certain circumstances to override the provisions of his own Orders. Under the powers given by reg. 58A the Minister made the Essential Work (General Provisions) (No. 2) Order, 1942, and the amendments thereto. At the relevant time art. 5 of that Order was to the following effect :

> Local Appeal Boards. (1) If (*a*) the person carrying on an undertaking or any specified person by or in respect of whom an application to a national service officer has been made, is aggrieved by reason of the fact that a national service officer has given or refused the permission asked for ; or (*b*) a specified person has been dismissed from his employment on the ground that he has been guilty of serious misconduct ; he may within 7 days of the giving or refusal of such permission or of such dismissal (as the case may be) or within such further period as a national service officer may for good cause in any particular case allow, request in writing a national service officer to submit the matter to a local appeal board to be constituted by the Minister.

In this case, McGregor exercised his powers under art. 5 (1). Art 5 (2) provides :

> A national service officer shall, on being so requested, forthwith submit the matter to the board and the board shall make such recommendation to a national service officer as it thinks fit, so far as is practicable within 7 days of the matter being submitted to it.

Then by art. 5 (3) (as amended) :

> A national service officer, after considering any such recommendation as aforesaid may cancel any permission already given, or grant or refuse to grant any permission, or direct any specified person who has left his employment to return to it, or direct the reinstatement of a specified person whose employment has been terminated under any permission so cancelled as aforesaid, or direct the reinstatement of a specified person

> who has been dismissed on the ground of serious misconduct if the board is of opinion that the dismissal was not justified on that ground, or, in the last-named case, without giving a direction to reinstate give notice to the person carrying on the undertaking and to the specified person that the board is of the above opinion.

I have read art. 5 of the Order first, because one has to do so to understand the provisions of art. 4. Art. 4 (9), as amended, provides :

> The dismissal of a specified person for serious misconduct shall, in the first instance, be provisional only, and if (*a*) within the period allowed by para. (1) of the next succeeding article he requires a national service officer to submit the matter to a local appeal board ; and (*b*) a national service officer, under para. (3) of that article, directs the reinstatement of the specified person . . . the dismissal shall . . . be treated as having been ineffective . . . but if the specified person fails to require the matter to be submitted as aforesaid within the time so allowed, or a national service officer informs the specified person and the person carrying on the undertaking that he does not intend to direct the reinstatement of the specified person . . . the dismissal shall be treated as having been always operative.

Now, the effect of these articles of the Essential Work (General Provisions) (No. 2) Order, 1942 (as amended), read together seems to us to be this. The Minister, having exercised his power by Order, has taken to himself the power, if a man is dismissed for serious misconduct, of allowing him to appeal to a local appeal board, and if the board find that there has been no serious misconduct, or no misconduct which could justify dismissal, then the national service officer has to consider any recommendation they may make. Having considered the local appeal board's recommendation, the national service officer is then in this position : He can either give a direction requiring reinstatement of the person alleged to have been dismissed, or he can give notice to both parties of the opinion of the board without giving a reinstatement direction, in which case the man will get his wages up to the date of that notice, or he can, if he thinks proper, give no notice at all, in the true sense, but notify the employer and the man that he does not propose to give a direction or notice under art. 5 (3) of the Order, in which event the original dismissal remains effective.

It is obvious from that that these articles of the Order, if read alone, give to the national service officer a discretion, and they require him to exercise his discretion. If these articles stood alone, in our view the case would be unarguable that the national service officer could decide the matter when exercising his discretion in coming to a conclusion. But it is said on behalf of the appellant that these articles must be read in the light of the definition of " national service officer." It is further contended that, in view of the wording of the Defence (General) Regulations, 1939, reg. 100, that the national service officer is " to give directions under reg. 58A of these Regulations " on behalf of the Minister " and in accordance with his instructions," if the Minister should (as, in fact, in this case he did) give a direction to the national service officer that he shall not exercise his discretion in certain circumstances, the effect of that interpretation clause is to alter the construction of those articles of the Order in question. But the view taken by the court is that the Minister can only confer power upon himself or his representatives under the Defence (General) Regulations, 1939, reg. 58A, by Order ; unless he exercises his power by Order, he is not able to confer upon himself or his representatives any of the powers which are open to him to confer by taking a proper course under the Defence (General) Regulations.

The view of this court is, that, having exercised his powers and having conferred these duties upon his own officer, he cannot, by giving instructions which are not Orders, limit the interpretation of the Essential Work (General Provisions) (No. 2) Order, 1942. The result is that, in our view, the national service officer has not exercised his discretion. There is a finding of fact to that effect. In our view, the Minister cannot by instructions limit the duties or limit the discretion of his national service officer, but he must carry out his orders, as distinct from his instructions, and, under these circumstances, in our view, the notice requiring reinstatement in this case was invalid, and the appeal will be dismissed.

Appeal dismissed with costs.

Solicitors : *Solicitor to the Ministry of Labour and National Service* (for the appellant) ; *Last, Riches & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re WARD, WARD *v.* WARWICK

[Chancery Division (Roxburgh, J.), May, 31, 1946.]

Gifts—Donatio mortis causa—Delivery of Post Office Savings Bank book—Words of gift together with instruction to pay donor's funeral expenses out of the money in the account.

The day before his death the deceased (who died intestate) handed over to W. his Post Office Savings Bank book with the words : "I leave everything I have to you. Pay all the expenses out of the money in the Post Office account. The rest is yours." The question to be determined was whether there was a valid *donatio mortis causa* to W. of the money standing to the credit of the deceased in the Post Office Savings Bank :—

Held : the words used by the deceased were words of immediate gift notwithstanding that something was charged upon the money in the Post Office Savings Bank which might not have been capable of precise ascertainment at the moment of the gift. There was, therefore, a valid *donatio mortis causa* of the money standing to the credit of the deceased in the Post Office Savings Bank.

[**EDITORIAL NOTE.** It is essential to the validity of a *donatio mortis causa* that there should be a present intention to give, the gift being conditioned to take effect on the contemplated death. It is argued that words indicating a desire that the sum represented by the Post Office book delivered shall be used to pay funeral expenses makes this a future gift and so invalid as a *donatio mortis causa*, but this argument is rejected.

As to Gifts *Mortis Causa*, see HALSBURY, Hailsham Edn., Vol. 15, pp. 742-748, paras. 1283-1290 ; and for Cases, see DIGEST, Vol. 25, pp. 541-544, Nos. 286-303, and pp. 549-556, Nos. 343-408.]

Case referred to :

*(1) *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680 ; 25 Digest 544, *302* ; 71 L.J.Ch. 343 ; 86 L.T. 551.

Adjourned Summons to determine whether the deceased who died intestate had made a valid *donatio mortis causa* of the money standing to his credit in the Post Office Savings Bank at the date of his death. The facts are fully set out in the judgment.

G. E. Timins for the plaintiff.

L. J. Solley for the defendant Arthur Henry Warwick.

G. W. Knowles for the next of kin.

Roxburgh, J. : The question which I have to decide is whether the intestate has made a *donatio mortis causa* of the money standing to his credit in the Post Office Savings Bank at the date of his death on Mar. 29, 1943, and amounting to £484.

The evidence on the matter, which is uncontested, is as follows. The day before the intestate died Arthur Henry Warwick, who is the person who claims to be the donee of the gift, brought the intestate an envelope and handed the same to him. Another man was present and saw all that occurred. The intestate handed the envelope back to the donee and said :

> If anything happens to me, there is plenty of money in the Post Office Bank.

Then the donee said to him :

> If you die, who is going to pay your funeral expenses ?

The intestate replied :

> I am not a poor man. In this envelope there is a Post Office Savings Bank book and a building society book. There is plenty of money there and I leave everything I have to you. Here are the keys to my room. Pay all expenses out of the money in the Post Office account. The rest is yours.

The witness gives the following account of what took place :

> I heard the intestate say to the donee : "Here are all my possessions, the keys of my room and of the street door." The intestate then opened the envelope and took from it some books which appeared to be a Post Office Savings Bank book and another book and said to the donee : "I am not a poor man. Here is my Post Office Savings Bank book and my building society book and the keys of my room. They are all yours. I leave everything to you as I have nobody else."

It has been decided in *Re Weston* (1) that the delivery of a Post Office Savings Bank book coupled with words of gift is capable of constituting a valid *donatio* *mortis causa* of money standing to the credit of the deceased in the Post Office Savings Bank. In this case there is no doubt that the book was in fact handed to the donee and the only question is as to the nature of the words of the gift. There is no doubt that the words of the gift must be words of present intention to give and not words of future gift. The point is a fine one, but in my judgment the words here are words of immediate gift and they are words of immediate gift notwithstanding that something is to be charged upon the money in the Post Office Savings Bank which might not have been capable of precise ascertainment at the moment of the gift.

Accordingly, in my judgment there was a valid *donatio mortis causa* of the money standing to the credit of the deceased in the Post Office Savings Bank.

Declaration accordingly.

Solicitors: *Geo. & Wm. Webb* (for the plaintiff and the next of kin); *Frank E. Fine & Co.* (for the defendant Arthur Henry Warwick).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

COUTTS & CO. *v.* BROWNE-LECKY AND OTHERS.

[KING'S BENCH DIVISION (Oliver, J.), May 16, 24, 1946.]

Guarantee—Void contract of principal debtor—Infant's overdraft at bank—Liability of surety.

The guarantors of an infant's overdraft at a bank, where all the parties know the facts, cannot be made liable to the bank.

Swan v. *Bank of Scotland* (1) *applied*; *Wauthier* v. *Wilson* (5) *explained and distinguished.*

[**EDITORIAL NOTE.** The only direct authority upon the validity of a guarantee of a loan to an infant is *Wauthier* v. *Wilson* (5) where, *prima facie*, it appears to have been decided that such a guarantee is valid notwithstanding that the loan to the infant is void under the Infants' Relief Act, 1874. In the case now reported, OLIVER, J., decides that a guarantee of an infant's overdraft is invalid, and, examining the judgments of the Court of Appeal in *Wauthier* v. *Wilson* (5) he finds the explanation of that case to have been that the transaction was in fact a contract of indemnity, and not a guarantee as stated in the headnote.

AS TO LIABILITY OF SURETY UNDER ILLEGAL OR VOID CONTRACTS OF PRINCIPAL DEBTOR, see HALSBURY, Hailsham Edn., Vol. 16, p. 26, para, 21; and FOR CASES, see DIGEST, Vol. 26, pp. 96-98, Nos. 667-675.]

Cases referred to:

*(1) *Swan* v. *Bank of Scotland* (1836), 10 Bli. N.S. 627; 26 Digest 97, *670*; 1 Deac. 746; 2 Mont. & A. 656.

(2) *Johnson* v. *Hudson* (1809), 11 East, 180; 12 Digest, 274, *2237*.

(3) *Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch.D. 309; 26 Digest 17, *54*; 51 L.J.Ch. 857; 47 L.T. 290.

*(4) *Garrard* v. *James*, [1925] 1 Ch. 616; 26 Digest, 98, *675*; 94 L.J. Ch. 234; 133 L.T. 261.

*(5) *Wauthier* v. *Wilson* (1911), 27 T.L.R. 582; 26 Digest 97, *672*; *affd.* (1912), 28 T.L.R. 239.

(6) *Chambers* v. *Manchester & Milford Ry., Co.* (1864), 5 B & S. 588; 26 Digest 124, *885*; 4 New Rep. 425; 33 L.J.Q.B. 268; 10 L.T. 715.

ACTION by the plaintiff bank against the guarantors of an infant's overdraft at the bank. The facts are sufficiently set out in the judgment.

Robert Mathew for the plaintiffs.

F. Ashe Lincoln for the defendants.

Cur. adv. vult.

OLIVER, J.: This is an action by Coutts' Bank to recover from two joint guarantors the amount of the overdraft of one Browne-Lecky. None of the facts is in dispute, it being conceded by counsel for the plaintiff bank that Browne-Lecky was at all material times an infant. The clear-cut question of law arises: Can the guarantor of an infant's overdraft at the bank be made liable to pay the bank? There is no question in this case of any bad faith.

Apart from authority, it certainly seems strange that a contract to make good a debt, default or miscarriage of another—which is the classic definition of a guarantee—could be binding where, by statute, the loan guaranteed is, in terms, made absolutely void. That, of course, is the Infants Relief Act,

1874. Looking at the matter broadly, in circumstances of that sort, how can the omission by an infant to pay that which is made void by the statute be described either as a debt or as a default or as a miscarriage ? There is no debt, because the statute says so ; there is no default because the infant is entitled to omit to pay, and there is no miscarriage for the same reason. How someone can be made liable to guarantee a thing of that sort, on broad principles it is difficult to see.

Considering how often one would have expected such a position to have arisen in the past, it is somewhat surprising to find such a dearth of authority. Counsel for the defendants relied on the Scottish case of *Swan* v. *Bank of Scotland* (1) which was decided in the House of Lords in 1836. I observe in passing that that is a Scottish case, but it is dealing with law which, for this purpose, is the same in England and Scotland. In that case the opinion of the House was given by Lord Brougham. The headnote is as follows :

> M., with S. and others, were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit according to the Scottish system of banking. M. in the course of his dealings drew upon the bank by written orders for sums made payable to bearer, and issued at a place more than ten miles distant from the bank ; but dated (contrary to the fact) at a place within that distance, and also post dated ; being in both respects contrary to the Stamp Act (c. 184), s. 13, which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having overdrawn the bank to the amount of £4,378, an action upon the bond was brought against S. by the bank, to recover the amount :— *Held* : no debt had been incurred, and therefore the parties were not liable upon the bond.

There is a case of an overdraft guaranteed by joint guarantors—or "obligors" as they are called in Scotland—arising out of transactions which were both illegal, that is to say punishable, and expressly void by statute. The only difference between those facts and the facts before me is that there is no illegality about the present transaction. It is not illegal to give an infant an overdraft ; it is merely rather unbusinesslike if you ever want to be paid back. Save for that difference, the facts in this case appear to me to be identical in principle.

Lord Brougham dealt with the matter in this way (10 Bli. N.S. 627, at p. 632) :

> There seems no reason at all to doubt that if, for the purpose of protecting the revenue, anything is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it ; thus, if dealing in tobacco without a licence, as in *Johnson* v. *Hudson* (2) is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had besides the penalty, provided that all dealing of the forbidden kind should be absolutely void ? It is clear that, in this case, no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect by making it void ; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise.

It is important to notice that Lord Brougham was basing his opinion in the House of Lords, not upon the illegality of the transaction, but upon the fact that the statute had made it void in terms. He then goes on, (*ibid.*, at p. 634), to review the provisions of the statute, which I need not read save the part which makes the transaction in *Swan's* case (1) void. He says (*ibid.*, at p. 635) :

> But there follows a clear declaration of nullity or avoidance, for it goes on to provide that 'moreover,' that is, over and above forfeiting the penalty, the banker or other person shall 'not be allowed the money so paid, or any other part thereof, in account against the person or persons by or from whom such bill, draft or order shall be drawn or his, her or their executors or administrators' . . .

That seems to me a somewhat odd and cumbrous way of saying the transaction is absolutely void, which is what the Infants Relief Act, 1874, says.

Then (*ibid.*, at p. 636), in terms Lord Brougham, who hitherto has been dealing with general principles, comes back to the particular case. He says :

> Now what is the ground of the bank's action—of the charge given against W. Martin's

co-obligors or sureties ? It is the debt alleged to be due from him to the bank, in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrongdoer is forbidden from having any claims against his customer in account, there is no liablity incurred by the co-obligors, or indeed by W. Martin himself. That is the immediate and direct consequence of the statutory provision.

In this connection, I may mention that in this action the bank originally sued the infant, and they had to discontinue those proceedings. The debt has been abandoned—as of course it had to be—as against the principal. Proceeding, LORD BROUGHAM says :

> It is as if the statute had made void the bond to secure the balance from time to time due ; for if there is nothing due, no balance, the obligation to make that nothing good amounts itself to nothing.

Then he goes on to discuss the operation of banking in Scotland.

That seems to me, as it stands, to be clear authority for the proposition put forward by counsel for the defendants, that the guarantors in this case cannot be successfully sued in respect of this alleged debt which is no debt at all. It was argued for the bank that later cases had established an exception, into which the present case falls. Examples that were cited to me were *Yorkshire Railway Wagon Company* v. *Maclure* (3), a decision of KAY, J., and *Garrard* v. *James* (4), a decision of LAWRENCE, J.

These cases all concern—I say " all " because there were some more of them which were not cited to me but which appeared as citations in the reports to which I have referred—guarantees by the directors of companies of loans made to their companies which were *ultra vires*, and in a number of those cases the directors have been held liable notwithstanding that the companies could not be sued because the loans were *ultra vires*.

I note in passing that in *Garrard* v. *James* (4) LAWRENCE, J., appears to distinguish the case of *Swan* v. *Bank of Scotland* (1), on the ground that in that case what was done amounted to a breach of the law as well as being void, and suggests that that was the reason for the decision. I find it difficult to follow that, because it seems to me LORD BROUGHAM in *Swan's* case (1) expressly says that that is not the reason for his decision ; the real reason is the fact that the statute has made the transaction void.

I pass from those cases because, for the reason I will give in a moment, I do not think that they can apply to this case.

My attention was also drawn by counsel for the bank to the fairly recent case of *Wauthier* v. *Wilson and Another* (5). That, at first sight, appeared to be an authority on the very facts before me, and directly contrary to the sense in which I am giving judgment. That was a case where the person sued was a father who had guaranteed money advanced to his son, and guaranteed it upon a promissory note made by the son. PICKFORD, J., found as a fact that all parties knew that the son was an infant. He said (27 T.L.R. 582 at p. 583) :

> According to the Infants Relief Act, the transaction of loan to the son was void, and what has been argued is that the transaction of loan being void, the contract of guarantee must be void also, because you cannot have a guarantee of a debt which is void and consequently no debt. [That is exactly the argument before me, PICKFORD, J., goes on] My difficulty is this. As I understand the case cited to me of the *Yorkshire Railway Wagon Company* v. *Maclure*, (3) KAY, J., there expressly decided that there may be a transaction purporting to be a debt, which is void, and yet a guarantee given of that so-called debt may be valid. In that case a company called the Cornwall Mineral Railway Company wished to borrow a sum of money, and they borrowed it under the guise of a contract of hire of their rolling stock, but KAY, J., held that, although it was done under that guise, it was a transaction of borrowing. The directors of the company gave guarantees for the debt. They said the guarantees were given in respect of the rent for the wagons, but it was really the debt and interest which was guaranteed. First it was argued that the company were liable, and that if they were not, the directors were liable upon their guarantees. KAY, J., held that the company was not liable and that the transaction so far as it was concerned was *ultra vires* and void altogether. But he held on the authority of *Chambers* v. *Manchester and Milford Ry. Co.* (6) that the guarantee was good. He therefore held in so many words that the guarantee of what purported to be a debt, but which was not a debt because the person borrowing had no power to borrow, was a good guarante. I cannot distinguish that case from this one. There may be differences, but I cannot see them.

and he goes on then to give judgment upon that footing against the guarantor. It is significant that *Swan* v. *Bank of Scotland* (1) does not seem to have been cited to the judge.

But that case did not rest there. It was appealed, and to my mind it is fairly plain that while the Court of Appeal supported the judge's judgment on entirely different grounds, they did not agree with the view he expressed as to the grounds upon which he did decide. They said this was a common law action on a promissory note, and anyone who executes a promissory note is liable A upon it at common law and can only get out of it upon the arising of some equity which makes it inequitable for him to pay. There were no equities here, said FARWELL, L.J., (28 T.L.R. 239); everybody knew all the facts, and to argue that that could give rise to an equity seemed to him to be a gross libel on equity. The Court of Appeal said that on the plain facts before them the father had executed not a guarantee but an indemnity, and was personally liable without any question of guarantee arising. I think it is fairly plain that B the court would not have supported PICKFORD, J., had it turned out to be in reality a contract of guarantee and not of indemnity. It seems to me that that is apparent from the opening observations of FARWELL, L.J., where he says (*ibid.*):

> This is an appeal from a judgment of PICKFORD, J., and I should have been sorry if the court had felt itself bound to reverse that judgment. C

That was a very delicate and well earned compliment to a very great judge, but there it is. The implication of that is: "If we had not come to the conclusion that this was an indemnity and not a guarantee we should have had to reverse even PICKFORD, J."

WARRINGTON, J., says this (*ibid*):

> If the contract of the father was a contract of guarantee, it was a contract to guarantee a debt which was no contract at all. D

The plain implication of what he is saying there is this, though it is not necessary to say it in more precise terms: If this had been a guarantee it is all rubbish to say that the guarantor could have been held liable.

Now it may be that the voidness of a contract to guarantee the debt of a company acting *ultra vires* is different in its consequences from the voidness brought about by the express and emphatic language of a statute, although, E along with PICKFORD, J., I cannot understand what is the difference, nor put it into language. It may be that some day some of these cases, most of which are at *nisi prius*, will come up for review, but I think that the definition given by POTHIER ON CONTRACTS and quoted in DE COLYAR'S LAW OF GUARANTEE, 3rd Edn., published as long ago as 1897, puts the matter in very precise language. POTHIER, quoted on p. 210 of that textbook, says this:

F

> As the obligation of sureties is, according to our definition an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation according to the rule of law . . . "However, where directors guarantee the performance of a contract by their company, which does not bind the latter as being *ultra vires*, the directors' suretyship liability is enforceable.

I should have been much more grateful to DE COLYAR if he had ventured to give G his opinion why that is so, but he does not. He does treat the matter as exceptional, and that is all I can say.

In these circumstances, I find myself bound by what I conceive to be clear legal principle, laid down by the House of Lords in *Swan's* case (1) I think that the guarantors to a bank of an infant's loan, where all the parties know the facts—cannot be sued. H

It was further contended that, by reason of the last paragraph in the long printed document in which the bank indulges in these transactions, in the circumstances which have arisen the last clause constituted a contract of indemnity and not of guarantee. Of course, if that were so there would be no answer to the action at all, because they would be liable as principals. It is as follows:

> The expression 'the debtor' where the principal debtor is a firm shall include the person or persons from time to time carrying on business in the name of the said firm. [That clearly does not apply to the case of a single debtor. It goes on:] where the

debtor is an incorporated body or society or the account is an impersonal one or in any other case to which this clause is applicable [I have underlined those words, because I cannot see any possible meaning which is to be attributed to them] this guarantee shall be taken to include and shall extend to all moneys heretofor or hereafter lent paid or advanced by you in any way for or on account of or apparently for the purposes of the debtor at the request or instance of or by honouring the cheques drafts bills or notes or obeying the order or directions of any of the directors or managers or officials or persons appearing to be or acting as directors or managers or officials for the time being of the debtor. [Pausing there one sees that so far what is clearly being indicated is this : Suppose the debtor is not a person but a firm or a limited company ; there is no language so far that I can find which applies to anyone else. Then we proceed : and you [that is the bank] shall not in any way be prejudiced or affected by the want of borrowing powers on the part of the debtor. [Could that be referring to an infant ?—" the want of borrowing powers " must be referring to the powers under the articles of association of a limited co. It goes on :] or of the directors or managers or officials of the debtor [very inappropriate language to refer to an infant] or by any excess in the exercise of such powers (if any) or any irregularity defect of informality in any security given by or on behalf of the debtor or by the fact that there is no principal debtor primarily liable. [I do not think that that phrase can possibly extend the transaction to an infant, when they are palpably talking about something else. This is the bank's document, and it has to be construed strictly as against them. It goes on :] and all moneys so lent paid or advanced as aforesaid shall be held and taken to be money due to you from the debtor within the meaning of this guarantee.

Every time the word " debtor " is used, every time the phrase " moneys due " is used, this infant who, by statute, is incapable of incurring a debt of this kind, appears to me to be impliedly excluded. The whole structure of that clause, as I interpret it, is inapplicable to an individual in any case ; it is quite plainly drawn with meticulous care and has probably been chopped about, added to and altered from time to time to cover cases where companies have borrowed money *ultra vires*, and so on.

For these reasons, I do not think that that clause applies to the facts of this case at all. All the rest of the contract is plainly a contract of guarantee.

In my opinion this action fails, and there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors : *Farrer & Co.* (for the plaintiffs) ; *A. Kramer & Co.* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Re CHATTERTON'S SETTLEMENT, FOX *v.* POWELL.

[CHANCERY DIVISION (Wynn-Parry, J.), April 11, 1946.]

Powers—Revocation—Special power of appointment—Property subject to power to be divided equally amongst objects of power in default of appointment—Exercise of power by deed containing power of revocation—Subsequent release and discharge of power—No reference in release to previous appointment—Whether release effectual to revoke appointment.

By a settlement made in 1902 on her marriage, Mrs. C. had (in the events that happened) a special power of appointment of a sum of £5,000 among her three daughters. The power was exercisable by deed, revocable or irrevocable, or by will, and in default of appointment the £5,000 was, on Mrs. C.'s death, to be shared equally between the three daughters. By a deed of appointment dated Apr. 1, 1913, which contained a power of revocation, Mrs. C. appointed that, on the determination of her interest therein, £1,000 of the £5,000 should be paid to her daughter Mrs. E., and the residue to her daughter Mrs. P. By a deed of release dated Feb. 4, 1924, which contained no reference to the appointment of 1913, Mrs. C. released and for ever discharged the sum of £5,000 from the power of appointment " to the intent that the said sum of £5,000 may be absolutely discharged from the said powers of appointment and that she [Mrs. C.] may be absolutely precluded from exercising the said powers or any of them and that the said £5,000 may " subject to her own interest therein " devolve upon and become vested in her three daughters in equal shares as tenants in common according to the provisions in the marriage settlement contained in default of appointment thereof." It was contended on behalf of Mrs. P. that the deed of 1924 merely crystallised the position as it then existed and was not effectual to release the appointment of 1913 :—

Held : notwithstanding that it contained no express reference to the power of revocation contained in the deed of appointment of 1913, the deed of release of 1924 was, on its true construction, effectual to revoke the appointment of 1913.

[**EDITORIAL NOTE.** This case follows the principle which is to be gathered from the judgment of Farwell, L.J., in *Re Thursby's Settlement* (5) that a deed purporting to exercise a power of revocation need not refer expressly to the power of revocation contained in the earlier deed of appointment. On the construction of the deed of release considered in this case it is clear that a revocation of the deed of appointment was intended.

As to Powers of Revocation, see HALSBURY, Hailsham Edn., Vol. 25, pp. 566-568, paras. 1009-1015 ; and for Cases, see DIGEST, Vol. 37, pp. 482-486, Nos. 787-814.]

Cases referred to :

*(1) *Langslow* v. *Langslow* (1856), 21 Beav. 552 ; 37 Digest 448, *516* ; 25 L.J.Ch. 610.

*(2) *Garth* v. *Townsend* (1869), L.R. 7 Eq. 220 ; 37 Digest 448, *517*.

*(3) *Pennefather* v. *Pennefather* (1873), 7 I.R. Eq. 300 ; 37 Digest 410, *203i*.

*(4) *Andrews* v. *Emmot* (1788), 2 Bro. C.C. 297.

*(5) *Re Thursby's Settlement, Grant* v. *Littledale*, [1910] 2 Ch. 181 ; 37 Digest 483, *791* ; 79 L.J.Ch. 538 ; 102 L.T. 838.

Adjourned Summons to determine (*inter alia*) whether a deed of release dated Feb. 4, 1924, was effectual to revoke an appointment made on Apr. 1, 1913. By a settlement made in 1902 on the marriage of Mrs. Florence Henrietta Chatterton, a trust fund was settled in favour of her husband and herself successively during their lives, and after the death of the survivor, in the event (which happened) of there being no issue of the marriage, in trust to raise and pay out of the trust fund £5,000 between such of the three named daughters of Mrs. Chatterton by a former marriage, as she might by deed revocable or irrevocable or by will appoint for their own absolute use, and in default of such appointment in equal shares between them with a provision for hotchpot. By a deed of appointment dated June 1, 1906, Mrs. Chatterton appointed that on the decease of the survivor of herself and her husband, £2,000, part of the said £5,000, was to be paid to one daughter F.J.D. (now Mrs. Powell), absolutely, and Mrs. Powell covenanted to settle the same for the benefit of herself, her husband and her issue absolutely. Wynn-Parry, J., held (on the first question in this summons) that the appointment of 1906 was ineffective. The relevant clauses of the appointment of 1913 and of the deed of release of 1924 are set out in the judgment.

J. Pennycuick for the trustees of the settlement.

G. A. Rink for the defendant Mrs. Powell (a daughter of Mrs. Chatterton).

C. L. Fawell for the defendant Mrs. Elverson (a daughter of Mrs. Chatterton).

E. Blanshard Stamp for the executor of Mrs. Tuke (a deceased daughter of Mrs. Chatterton).

Wynn-Parry, J. : The circumstances leading up to the second question in this summons may be shortly stated as follows. On Apr. 1, 1913, Mrs. Chatterton executed a deed poll by which, after reciting the settlement and after reciting the first appointment (*viz.*, the appointment of June 1, 1906, with which I have already dealt), and after reciting her desire to make an appointment in respect of the £5,000 referred to in the settlement, she proceeded as follows: in exercise of the power for the purpose given to her by the settlement and of every other power enabling her in that behalf :

> . . . she doth hereby appoint and direct that on the decease or remarriage (whichever event shall first happen) of herself the said Florence Henrietta Chatterton (i) the sum of £1,000 portion of the aforesaid sum of £5,000 provided for this purpose [by the said settlement] shall belong and be paid to Constance Evelyn Nancye Stuart [one of the three daughters of her former marriage—now Mrs. Elverson] her executors administrators and assigns absolutely. (ii) Subject to the above recited deed poll [*i.e.*, the first appointment] the whole of the residue of the aforesaid sum of £5,000 shall belong and be paid to the said Florence Olive Joan Dooner [now Mrs. Powell] her executors administrators and assigns absolutely.

Then follows a power of revocation, to which I need not refer in detail.

On Feb. 4, 1924, Mrs. Chatterton executed in the form of a deed poll a release. By that document the settlement was recited but no mention is made either of the appointment of 1906 or the appointment of 1913. The relevant part of this document starts with the last recital, and from there to the end it reads as follows:

> And whereas the said Florence Henrietta Chatterton desires to release her said powers of appointment over the said sum of £5,000 now these presents witness that in pursuance of the said desire she the said Florence Henrietta Chatterton hereby releases and for ever discharges the said sum of £5,000 from the said recited powers to appoint the same to the intent that the said sum of £5,000 may be absolutely discharged from the said powers of appointment and that she the said Florence Henrietta Chatterton may be absolutely precluded from exercising the said powers or any of them and that the said sum of £5,000 may subject to her said interest for life or until remarriage devolve upon and become vested in her said three daughters in equal shares as tenants in common according to the provisions in the marriage settlement contained in default of appointment thereof.

In these circumstances the question raised by the second question of the summons is whether that release of Feb. 4, 1924, is effectual to revoke the appointment made by the document of Apr. 1, 1913. In my view this question is, first and last, a question of what is the true construction of the relevant part of the document of 1924 which I have read. Mr. Rink urged upon me that I should apply the principle established over a long number of years, which is not in the least disputed by Mr. Fawell or Mr. Stamp, but which, to be applicable to this case, presupposes that I am not at liberty so to construe this document that its effect is that, either expressly or by implication, the act of Mrs. Chatterton in releasing the £5,000 from her power of appointment was effectual to revoke the previous exercise of the power. Mr. Rink urges that I should look at it in this way: this is a document by which Mrs. Chatterton does not seek to dispose of all her rights by her own act. It is not a case of purported exercise of the power which for some reason is defective: it is nothing more than an act the effect of which is to crystallise the position as it then existed. In support of his argument he cited cases on that basis such as *Langslow* v. *Langslow* (1), *Garth* v. *Townsend* (2) and *Pennefather* v. *Pennefather* (3), where there is a comprehensive statement of the law on that aspect of the matter. But, in my view, there is nothing in any of the authorities to prevent me approaching this document and, in the first place, construing the language as it stands apart from, and neither guided nor embarrassed by, any authority. I am fortified in that by the two authorities to which Mr Fawell and Mr. Stamp drew my attention, *Andrews* v. *Emmet* (4) and *Re Thursby's Settlement* (5), where it is made clear in the judgment of FARWELL, L.J., ([1910] 2 Ch. 181, at p. 186) that, in order that a power of revocation should be effectively exercised, the deed which has the effect of operating as a revocation need not contain any express reference to the power of revocation in the first deed.

In these circumstances, I turn to the release of Feb. 4, 1924. In the recital, Mrs. Chatterton says quite clearly that she desires to release her powers of appointment over the fund of £5,000. Then she says that, in pursuance of that desire, she hereby releases and for ever discharges the said sum of £5,000 from the recited powers of appointment. Pausing there, I take the view that those words, whether they are treated as an express revocation of the 1913 appointment or as an implied revocation, are clearly operative upon that document. I cannot see how the £5,000 can be for ever discharged from the recited powers unless this document sweeps out of the way the earlier and revocable document of 1913. Therefore, even stopping at that early stage in the operative part, in my judgment the words down to the point I have read are effective to operate as a revocation of the 1913 appointment. But the matter is underlined and emphasised by what follows, because in this particular clause of the operative part Mrs. Chatterton goes on to express three distinct intentions: (i) that the said sum of £5,000 may be absolutely discharged from the powers of appointment; (ii) that she may be absolutely precluded from exercising the powers thereunder; and (iii) that the sum of £5,000 may, subject to her life interest, devolve upon and become vested in her three daughters in equal shares as tenants in common. Reading that clause as a whole, in my view the inescapable result is that the force of that language is to revoke the appointment made by the 1913 appointment in view of the revocation reserved by that document. In those circumstances I will declare in answer to question 2 of the summons that the release of Feb. 4, 1924, was effectual to revoke the appointment of Apr. 1, 1913.

Solicitors: *Barfield, Child, Barry, Lucas & Sons* (for the trustees and the executor of Mrs. Tuke); *Blount, Petre & Co.* (for Mrs. Powell); *Emmet & Co.* (for Mrs. Elverson).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*] A

Re PARANA PLANTATIONS, LTD.

[Court of Appeal (Lord Greene, M.R., Morton and Tucker, L.JJ.), May 30, 31, 1946.] B

Contract—Payment—Place of payment—Contract made in Germany—Barter transaction enabling German national to purchase land in Brazil from British company—Purchase money to be paid into company's blocked account in Germany and used by company in payment for German railway material for Brazil—Provision in contract between German national and company for "refund of marks amount paid in" by German national, should delivery of railway material become impossible "by means of force majeure"—Performance of contract impossible and illegal owing to outbreak of war—Whether obligation to refund limited to refunding in Germany. C

An English company had two subsidiary companies in Brazil, a railway company and a land company. The railway company was anxious to buy rolling stock in Germany, and the land company wished to sell its land. A barter transaction was arranged in Germany, with the approval of the D German government, whereby a German national anxious to emigrate might purchase a plot of land in Brazil by paying the relevant sum into a blocked account of the English company with a German bank and authorising the company to use the sum so paid in payment for German railway material to be delivered to Brazil. A German national who was admitted into the scheme became a "participant." A clause in the contract between the participant and the company provided: "In the event of it being E impossible, by reasons of *force majeure*, for the railway material ordered to be delivered, the marks amount paid in is refunded." Further clauses provided (*a*) that the participant might withdraw from the transaction in respect of any of his money which had not been used in paying for the rolling stock, and that any amounts regarding which notice of termination had been given would be repaid when they fell due; (*b*) that acceptance F of the amount, and of the individual German's participation in the transaction, was subject to the provisions of the German Currency Control Office, and to the necessary permits and if it was not possible to obtain these, the amounts paid in would be refunded. The contract was in German. In July, 1938, the claimant, O., a German national who was then living in Germany, became a participant in the scheme and paid 20,600 marks. On the outbreak of the war, further performance of the G contract became impossible because the railway stock could not be delivered, and, moreover (the company being an English company) the contract became illegal under English law. As a result, since the railway material could not be delivered "by reasons of *force majeure*," the company was liable, under the terms of the contract, to refund "the marks amount paid in." It was, however, illegal for the company to refund the money in Germany. The claimant, O., had come to England before the war. H It was contended on his behalf that the contract did not limit the obligation to refund to a refunding in Germany and, therefore, since he was in England when the money became repayable. the company was liable to refund him in England the sterling equivalent of the amount paid by him:—

Held: upon the true construction of the contract, the obligation to refund was limited to a refunding in Germany and the company was not liable to refund to the claimant in England the sterling equivalent of the amount paid by him. The company was not in breach of its contract because the outbreak of war, which itself gave rise to the contractual obligation to refund the money, made it illegal for the refund to be made.

[**EDITORIAL NOTE.** This is an interesting case illustrating the currency laws and the system of barter developed by the late German Government. It is clear that the obligation to refund arising on failure to perform the contract in question is an obligation to pay in Germany only, and the presence of the payee in England, therefore, does not affect the illegality of performance resulting from the outbreak of war.

A The position is that the obligation to refund was suspended until such time as, under English law, it became legal to make the refund.

As to Place of Performance of a Contract, see HALSBURY, Hailsham Edn., Vol. 7, pp. 194-196, paras. 274, 275; and for Cases, see DIGEST, Vol. 12, pp. 451-454, Nos. 3655-3673.]

Cases referred to:

(1) *Di Sora* v. *Phillips* (1863), 10 H.L.Cas. 624; 11 Digest 394, *676*; 2 New Rep. 553; 33 L.J.Ch. 129.

B (2) *Graumann* v. *Treitel*, [1940] 2 All E.R. 188; 162 L.T. 383.

Appeal by the liquidator from an order of Vaisey, J., dated Feb. 25, 1946. The facts are fully set out in the judgment of Lord Greene, M.R.

Sir Cyril Radcliffe, K.C., and *T. D. D. Divine* for the appellant.

S. Pascoe Hayward, K.C., and *I. J. Lindner* for the respondent.

C Lord Greene, M.R.: The appellant company went into voluntary liquidation on Mar. 31, 1944, and the present claim relates to a proof put in by a Dr. Leopold Oppenheim in the amount of £1,943 7*s.* 11*d.*, "being the sterling equivalent at the official rate of exchange on Sept. 2, 1939, of 10.60 reichsmarks to the pound sterling of the sum of 20,600 reichsmarks."

The history of the matter giving rise to the claim is, shortly, as follows. The D company, which is an English company, had two subsidiary companies incorporated in Brazil. One of them was a railway company and the other was a land company. The railway company was anxious to obtain rolling stock from Germany, and the land company was anxious to dispose of its land by selling plots to purchasers. In Germany there were a number of persons who were anxious to leave the country and take up their residence abroad, for reasons which are, unfortunately, familiar to all of us, and Brazil was a country to which E many of them were turning their eyes. The German authorities apparently were prepared to accept, and to authorise, an arrangement which, in substance, was a barter arrangement, running on these lines: the Germans anxious to emigrate were to be allowed to purchase plots of land in Brazil belonging to the land company, and the land company thus obtained German currency which would be put at the disposal of the railway company to buy the rolling stock. The company which was conducting all these negotiations, and with whom the F relevant contract was made, was the parent company, the English company, now in liquidation.

The transaction was one involving considerable complication, and the actual contract is to be found, so far as its relevant terms are concerned, in a document headed "General Conditions." The transaction is described as a barter transaction. Any German national who desired, and was admitted, to take part G in it, became what was called a participant. He became a party to the barter contract by signing a declaration of participation and providing the sum of money which he was prepared to provide for the purpose of acquiring a plot of land for himself or his family in Brazil, to which, subject to any necessary consent of the German authorities, he would subsequently emigrate. The German national paid the relevant sum into a blocked account of the company with which we are dealing, Parana Plantations, Ltd., with one or other of two H German banks, and gave authority to the company to use the sum so paid in in payment for German goods to be delivered to Brazil, namely the rolling stock to which I have referred.

In cl. 2 of the General Conditions there is a provision which is not unimportant. The participant was entitled to withdraw from the transaction in respect of any of his money which had not been used in paying for the rolling stock within certain specified limits, and it was provided that any amounts regarding which notice of termination had been given would be repaid when they fell due. Then in cl. 3, acceptance of the amount, and of the individual German's participation in the transaction, was subject to the general provisions of the German Currency Control Office, and to the necessary permits, and again it is provided that if it was not possible to obtain these, the amounts paid in would be refunded. Cl. 6 provides that in respect of a notice of termination the repayment should take place of any amount not utilised for the purchase of the German manufactured goods on a date there specified. In cl. 7 comes a curious provision, to which perhaps I might refer. The company is given authority to carry out this barter transaction on an exchange basis under which the mark would be valued at not less than 50 per cent. of its value calculated on a sterling basis. What that appears to mean is this. Eventually the land company was going to receive money, by means of this arrangement, for payment for its plots of land. If there had been no special exchange provisions and no exchange control, and there had been a free market, it would have received the equivalent in Brazilian currency of the marks paid in by the individual German. This provision, however, resulted in this, that, in so far as it was put into operation up to the full 50 per cent., the German who paid in a sum of marks in Germany pursuant to the arrangement, would only get a credit, so to speak, in Brazil up to the extent of 50 per cent. of the gold value of the marks. In point of fact, the figure was afterwards altered by consent. The gold value of the mark in terms of milreis according to the official rate of exchange appears to have been 7 milreis to the mark—the official reichsmark rate for milreis was R.M. 1 against 300 milreis divided by 43, which is equivalent practically to 7 milreis to RM. 1—so that the German who deposited RM. 10,000 would have had 70,000 milreis to his credit for the purpose of buying his plot of land. However, the actual rate of exchange that was fixed was not 7 milreis to the mark, but 3, and accordingly the German only received less than 50 per cent. of the gold value of his mark. What precise object the German authorities had in insisting upon this rate of exchange does not clearly emerge, and it does not matter. No doubt they were going to make something out of it in some way, direct or indirect,

Under cl. 8 the participant was to be given a provisional land certificate which entitled him to choose a plot of land belonging to the land company, or appoint a representative to do so on his behalf. Then comes the clause which is really at the heart of this particular controversy. It is as follows :

> In the event of it being impossible, by reason of *force majeure*, for the railway material ordered to be delivered, the marks amount paid in is refunded.

Cl. 9 provides for the delivery of a definite land certificate against the delivery of shipping documents for the railway material ordered. Then, in cl. 10, there is another power to withdraw and receive repayment in certain circumstances, which I need not go into.

On July 8, 1938, the present claimant, Dr. Oppenheim, who was then living in Cassel, became a participant in that scheme. He applied for the necessary permit to the Currency Control Office, and so forth. The sum which he actually paid was 20,600 marks.

On the outbreak of war, the performance of the contract became impossible on the ground that the rolling stock could not be delivered, and the further performance of this contract in so far as the company was concerned, it being an English company, would, on ordinary principles, have become illegal under English law. The effect of that was that under cl. 8 of the General Conditions it became impossible, by reason of *force majeure*, for the railway material ordered to be delivered, and the marks amount was, according to the terms of the contract, to be refunded. Counsel for the claimant suggested that it was open to him to treat the date when the company became liable to refund the marks as having been some date before the outbreak of war, the object of that, of course, being to endeavour to maintain that at the date when it became impossible to deliver the railway material there was nothing illegal in the company repaying the marks. I am afraid it is not possible to take that view. It is quite clear on the facts that nothing is suggested as having prevented the delivery of the railway material other than the outbreak of war itself. Accordingly, the very event which gave rise to the contractual obligation to refund the money was the event which in fact made it illegal for the company to refund it in Germany, it being illegal for this English company to make any attempt to make a mark payment in Germany after the outbreak of war.

The argument which is presented on behalf of the claimant is to this effect. The contract, when it places on the company an obligation to refund, is not limiting that obligation to a refunding in Germany, and the claim to have the money refunded could lawfully be made in any other place. That would be a very curious result, if it were so, because it would appear to leave the creditor in the position to choose the place of payment which suited him best. Looking at this contract, without, for the moment, any reference to any special provisions of the German law, I find no difficulty at all in saying that the obligation to refund, not merely under cl. 8 but under the other clauses to which I have referred, where the participant would be entitled to claim to have his money back, refers, and refers only, to a payment in Germany. Counsel for the claimant pointed out that it must have been in the contemplation of the parties that Dr. Oppenheim was not proposing to remain in Germany. Indeed, that is perfectly true. Assuming that the transaction went through and he got his plot of land in Brazil, his intention, no doubt, was to emigrate; but there is nothing here to suggest that the parties contemplated that he would be outside Germany, in Brazil, or anywhere else, at the time when his right to claim repayment should arise. In fact, the whole scheme of this contract suggests quite clearly that nothing of the kind could have been in the contemplation of the parties, and when one appreciates what the German exchange regulations really were, it is quite impossible, to my mind, to suppose for one moment that the parties can have contemplated that Dr. Oppenheim would emigrate from Germany save in pursuance of this scheme, because the financial penalties which would be inflicted on him if he did so would have been crushing. Therefore I cannot find in that point anything to lead to the view that the contract, on its true construction, was contemplating payment in some place other than Germany.

Dr. Oppenheim was fortunate enough in Aug., 1939, to come to this country, where he took up his residence. What is said is that, he being then in England, there was nothing to prevent the company paying to him in England whatever would be the sterling equivalent of the mark obligation, 20,600 marks. No doubt there was nothing to prevent them in the sense that if they had chosen to do that it would not have been illegal either under English or under German law, but that is not the question which we have to decide. We have to decide whether Dr. Oppenheim could have called upon the company to make that payment to him. In my opinion, he clearly could not have done so. The only contract was to make a payment in Germany, and that contract could not be said to have been broken because the very outbreak of war, which itself gave rise to the contractual obligation to pay, made it illegal for payment to be made, and therefore Dr. Oppenheim could not say that the company, by not paying in Germany, was in breach of its contract.

I have, so far, considered this matter on the construction of this document, without reference to any German evidence. Before I say a word or two about that, it is perhaps right to quote a passage from *Di Sora* v. *Phillips* (1), and I will take the language of LORD CRANWORTH (10 H.L. Cas. 624, at p. 633), where he states the principles on which a foreign contract ought to be construed by an English court:

> The first question to be considered is, what are the rules by which an English court ought to be governed in construing a foreign contract? Where a written contract is made in a foreign country, and in a foreign language [which was the case here], the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction.

In the present case we have that which is extremely helpful, a very clear exposition from the witnesses of the nature of the German currency laws and the way in which they worked in practice. All that may be regarded as surrounding circumstances in the light of which the contract falls to be construed; but I do not find in the evidence of the two gentlemen who have put in affidavits of German law any rule of construction applicable to this contract on any relevant matter or any particular technical term. They give us information as to the German law of contract, and the law as applicable to particular kinds of contracts, but on the question of interpretation of this contract I do not find anything in the evidence of German law which really precludes me in any way, or limits me, in giving to this contract its natural interpretation in the same way as if it was an English document. On the other hand, I think there are indications in the evidence which would confirm the view that I have formed.

The principal evidence of German law is that of Dr. Giesen, and he says this in para. 13 of his affidavit:

> Nothing in the contract provides for the performance of the company's obligation in Germany only.

Pausing there for a moment, this is merely a statement of his opinion; it is not a statement of any rule of German law or of any principle of German construction. It is the witness's own opinion, and it is not for him to express such an opinion. He goes on:

> . . . and there is nothing in German law which makes it obligatory that a debt entered into in Germany can only be discharged there. [Indeed, that is what one would expect; nothing makes it obligatory.] On the contrary, sect. 269 of the German Civil Code provides "if the place of performance is neither determined by the contract nor to be inferred from the circumstances, the performance has to take place where the debtor was domiciled at the time when the relationship creating the obligation arose.

It is quite clear from this that, if the contract does determine the place of performance, or the place of performance is to be inferred, then performance is to take place in that place and there is nothing in the evidence to suggest that the German law provides the contrary. If, on the true construction of this document, the place of performance for payment of this money was in Germany, then German law would require the contract to be performed there. There is nothing to suggest that the creditor, in the case of a contract performance of which is to take place in Germany, is entitled to say: "I will elect to have performance in some other country where, for the moment, I happen to be." The evidence seems to be based throughout on the assumption that under the terms of the contract, on its true construction, performance could be called for elsewhere than in Germany. Dr. Giesen says, for instance, in cl. 7 of his affidavit:

> On the same principle where a debt is expressed in Reichsmark and becomes payable in another country it can be discharged by tendering Reichsmark this being the currency in which the debt is expressed, but the debtor [it is "the debtor" be it observed, not "the creditor"] has the option to discharge the debt by tendering its value in the currency of the country where the discharge takes place and if Reichsmark are no longer available for any reason the latter method of payment is the only possible one.

There again, the whole of that depends on the words "becomes payable in another country" In other words, it is assuming that the debt becomes payable in another country, and if that takes place, notwithstanding that it is expressed in marks, according to German law the debtor has the option to pay in the local currency.

Applying that to the present case, if the assumption that this debt ever becomes payable in a country other than Germany is wrong, then the evidence is not relevant to the question. I need not go through the rest of the expert evidence, because, in my opinion, it does not carry the matter any further.

The result, therefore, is that in my opinion the proof was rightly rejected by the liquidator in the form in which it was presented, but that does not really end the matter, for this reason. The payment of these marks in Germany, as I have said, became illegal on the outbreak of war, which was the event which gave rise to the obligation to pay. Whether or not it is still technically illegal for a British subject to pay a mark sum in Germany, I do not know, but I apprehend that in suitable cases, if it were technically illegal, a licence could easily be obtained. We do not know at the moment when, if at all, it did become lawful to perform this contract by payment in Germany. It is not suggested on behalf of the liquidator (and in my opinion he takes a perfectly proper attitude about that) that the effect of the outbreak of war was to abrogate this contract in its entirety. He puts it no higher than to say that the obligation to refund this money was suspended until such time as, under English law, it should become lawful to make the payment. Assuming that that time has come, then the contract could be performed now by payment of marks in Germany. However, that is not quite the point which would have to be considered, and for this reason. The proof must speak from the date of the winding up, *viz.*, Mar. 31, 1944, and the right of the claimant was to put a value upon his claim as at that date. His claim at that date was a conditional, hypothetical right to receive at some future date in Germany, if and when it should become lawful for the payment to be made, a sum of reichsmarks, the value of which at that assumed future date, in terms of sterling, would have, in some way, to be estimated or guessed. It does not at all mean that his claim was valueless. The liquidator would have to put upon it the best and fairest estimate that he could, and proceed accordingly.

In the present case we are informed that there is, at the present time, an official rate of exchange ruling in Germany—at any rate, for the purposes of the Forces of Occupation—of RM. 40 to the £, and the liquidator tells us that so far as his information goes that was the opening rate. The question might have to be considered whether, in estimating the value of this claim as at the date of liquidation, it would be right to take into account our knowledge of what has subsequently happened. I cannot think that the liquidator would be prevented from doing so, if he thought that was the fairest and most satisfactory method of arriving at a valuation. At any rate, in my opinion, he would not be bound to disregard what has happened. That being so, it appears to me that the liquidator would be acting quite within his powers and duties if he were to admit this proof in the special circumstances of this case, on the footing that the value of the claim as at Mar. 31, 1944, was to be treated as the sterling equivalent of the specified sum of reichsmarks at the exchange rate of RM. 40 to the £. The pre-war rate which was claimed by the claimant was RM. 10.60 to the £, so roughly the effect of that treatment of his claim would give him something round about a quarter of the sterling sum which he claims.

I must not be taken as laying down any sort of principle for dealing with claims in what might appear to be analogous cases, or laying down that which is to be regarded as in any way a direction in law as to what should be done. I am only dealing with the general facts of this particular case. We are told that there are many cases of the same character under this contract, and what I have said in regard to the right of the liquidator to treat the matter on that basis would, unless there are special circumstances differentiating those cases, apply equally to them. When I say that I am not suggesting any line of conduct which a liquidator in a different case should adopt, what I mean is that under some different contract, in some different circumstances, he might have to act on other lines. In my opinion, in this case he can do that which I have stated. So far as the appeal is concerned, it must be allowed, subject to any qualification that may be introduced on the lines I have just indicated.

MORTON, L.J.: I agree entirely with the judgment which has just been delivered, and I only desire to add a brief comment upon two matters. In regard to the construction of the relevant agreement, counsel for the claimant relied on the decision of ATKINSON, J., in *Graumann* v. *Treitel* (2). In that case ATKINSON, J., had to decide upon the construction of a contract dated June 18, 1938, and made in Berlin by two parties both of whom were described as being "of Berlin." The point which the judge had to decide was in regard to the recovery of a payment which was due to one of the parties on Sept. 30, 1938. It was argued in that case that the contract was one to be performed in Berlin, and in Berlin only, but the judge did not take that view. I think the reason for his decision appears in a very few words ([1940] 2 All E.R. 188, at p. 196) where he says:

> The creditor was in London at the time [that is, at the time of the contract]. He had gone over to Berlin only to sign the document. He had been in London for some considerable time. He was going back the next day, and payment would normally have to be made to him there.

It is not surprising that on these facts ATKINSON, J., arrived at the conclusion at which he did arrive, and in my view that case does not really assist upon the construction of the document which we have to construe.

The only other observation I desire to make is in regard to the opening words of para. 13 of the affidavit of Dr. Giesen. His observation: "Nothing in the contract provides for the performance of the company's obligation in Germany only," is open to two constructions. He may have meant simply that nothing in the contract provides in express terms for the performance of the company's obligation in Germany only. If that is what he meant, the statement is, of course, entirely correct. If, on the other hand, the words which I have quoted are intended to be an opinion upon the construction of the document, Dr. Giesen was at that point exceeding his functions, for the reasons already pointed out by the Master of the Rolls.

I agree with the order proposed.

Tucker, L.J.: I agree with the judgment which has been delivered by the Master of the Rolls, and I also agree with the observations which Morton, L.J, has added. Both the matters to which he has referred are matters to which I had intended to refer had he not done so, and I agree with what he said about them.

Appeal allowed. Costs of all parties to be paid out of the assets.

Solicitors: *Holmes, Son & Pott* (for the appellant); *Slaughter & May* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re SIMSON'S ESTATE, FOWLER AND ANOTHER *v.* TINLEY AND OTHERS.

[Chancery Division (Romer, J.), May 10, 13, 15, 1946.]

Charities—Charitable purposes—Gift to a certain vicar "for his work"—Evidence of donee's work admissible—Gift to an individual "for benevolent work"—Gift to "the vicar" of a certain church "to be used for his work in the parish."

By her will, the testatrix gave the following gifts (*inter alia*): (*a*) "unto the Rev. S. G. T., St. Luke's Vicarage, Victoria Docks £500 for his work"; (*b*) to the Rev. S.L.S., £500 "for his benevolent work"; (*c*) the residue "to the vicar of St. Luke's Church, Ramsgate, to be used for his work in the parish." The will ended with the words: "All my clothes to go to the Rev. S.G.T., St. Luke's Vicarage, Victoria Docks, for his benevolent work in that parish." The questions to be determined were whether gifts (*a*), (*b*) and (*c*) were valid charitable gifts:—

Held: (i) the words "his work," as used by the testatrix, had a sufficient degree of ambiguity to permit the introduction of evidence about the donee's work. On the evidence, gift (*a*) was a good charitable gift for the benefit of the poor inhabitants of the parish of St. Luke's Vicarage.

Re Rees, Jones v. *Evans* (1) *applied.*

(ii) whether a gift to an individual in furtherance of his work was a valid charitable bequest depended on the nature of the work of the donee. "Benevolent work" need not necessarily be charitable, and, on the evidence, the benevolent work done by the Rev. S.L.S. was not confined to matters which were charitable in the legal sense, or which were sufficiently ascertained or ascertainable by the court: with the result that gift (*b*) failed.

(iii) upon the true construction of the will, gift (*c*) was a good charitable gift. A vicar's work was well-defined and charitable, and a gift to a vicar *simpliciter* was a good charitable gift. (*Re Garrard* (2) *followed.*) The addition of the words "to be used for his work" merely indicated that the property was not to vest in the vicar for his own personal use; and the words "in the parish" limited, and did not extend, the phrase "to be used for his work."'

Farley v. *Westminster Bank, Ltd.* (5) *distinguished.*

[**EDITORIAL NOTE.** This case illustrates the very fine line dividing valid and invalid charitable gifts. In *Re Ashton's Estate* (5) a gift to vicar and churchwardens for parish work was held invalid, as being too wide. In the case now reported gifts to a vicar as such "for his work" and "to be used for his work in the parish" are held good. The functions of a vicar were summarised by Clauson, L.J., in *Re Ashton* (5) in this way: "he has the cure of souls in the particular district, parish, or ecclesiastical district which is the site of his benefice." In carrying out this charge a vicar commonly carries on many parochial activities which are social or charitable in the first instance, rather than directly ecclesiastical, and if a gift is wide enough to include these, as in *Re Ashton* (5), it will fail. A gift to a vicar for his work, *simpliciter*, however is good, as it was held in *Re Garrard* (2) and it is held in the present case that the mere addition of such words as "in the parish" will not *per se* invalidate the gift by widening it to the point of taking it outside the limits of a charitable bequest.

As to Charitable Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 107-115, paras. 143-152, and pp. 118-122, paras. 155-160; and for Cases, see DIGEST, Vol. 8, pp. 241-245, Nos. 1-50, and pp. 248-254, Nos. 74-160.]

Cases referred to :

*(1) *Re Rees, Jones* v. *Evans*, [1920] 2 Ch. 59 ; Digest Supp. ; 89 L.J.Ch. 382 ; 123 L.T. 567.

*(2) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382 ; 8 Digest 294, *716* ; 76 L.J.Ch. 240 ; 96 L.T. 357.

(3) *Thornber* v. *Wilson* (1855), 3 Drew. 245 ; 8 Digest 317, *986* ; 24 L.J.Ch. 667 ; 25 L.T.O.S. 309 ; *subsequent proceedings* (1858), 4 Drew. 350.

(4) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642 ; 8 Digest 245, *50* ; 71 L.J.Ch. 811 ; 87 L.T. 46.

*(5) *Farley* v. *Westminster Bank, Ltd.*, [1939] 3 All E.R. 491 ; [1939] A.C. 430 ; Digest Supp. ; 108 L.J.Ch. 307 ; 161 L.T. 103 ; *affg.*. S.C. *sub nom. Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1938] 1 All E.R. 707.

ADJOURNED SUMMONS to determine whether certain gifts contained in the will of the testatrix were valid charitable bequests. The facts and the relevant clauses of the will are fully set out in the judgment.

W. J. C. Tonge for the plaintiffs.

D. H. McMullen (for *G. N. Cross*) for the first defendant, Samuel Glasier Tinley).

Harold Lightman (for *R. W. Goff*) for the second defendant, Sydney Lancaster Sarel.

J. Neville Gray, K.C., and *L. M. Jopling* for the third defendant, John Eric Blanchett.

C. L. Fawell for the fourth defendant, the Treasury Solicitor.

H. O. Danckwerts for the fifth defendant, the Attorney-General.

ROMER, J. : The first question I have to decide on this summons is as to the validity of a gift by a will of £500 to the Rev. Samuel Glasier Tinley, of St. Luke's Vicarage, Victoria Docks, "for his work." That gift is contained in the will, dated Nov. 26, 1938, of the testatrix in this case, Kathleen Blanche Simson, of Ramsgate, who died on Feb. 1, 1943, aged 78, and a spinster.

She appointed executors by her will and then gave them certain legacies, and then there followed a paragraph of some length in which the testatrix made various pecuniary bequests, the first of which was :

> I give to the vicar of St. George's Church, Ramsgate, £1,000 to be used for the benefit of his church ; unto the Royal Society for the Prevention of Cruelty to Animals £1,000.

Then comes the gift in question :

> Unto the Rev. S. G. Tinley, St. Luke's Vicarage, Victoria Docks, £500 for his work.

Then there are a number of other legacies, most of which, if not all of which, as far as I can see, are charitable, until the testatrix gets down to certain personal legacies which appear towards the end of this clause. Then there is a gift of residue :

> . . . to the Vicar of St. Luke's Church, Ramsgate, to be used for his work in the parish.

Then there are certain small specific bequests, and the will ends with the words :

> All my clothes to go to the Rev. S. G. Tinley, St. Luke's Vicarage, Victoria Docks, for his benevolent work in that parish.

Certain evidence has been filed in support of the claim which is advanced on behalf of the defendant, the Rev. S. G. Tinley. The plaintiff, Fowler, exhibited to his affidavit the annual report for 1942 of the Victoria Docks Settlement Fund which specifies the members of the general committee, amongst whom is the Rev. S. G. Tinley. It describes in general terms the position of the fund and its activities, showing that the activities have centred round the garden, the church, the day-school, the new centre for boys, and so on. It refers to the difficulties and cost of maintenance and permanent staff, and then it refers to the vicarage garden and the use to which that is put, and to a camp in Essex, where it says that during the summer some thousands enjoy a perfect holiday, funds permitting. Then under the heading "Present needs," it says that they want help in finance, help in kind, and help in service.

That was, to some extent, amplified by the affidavit of the Rev. Tinley himself. He says that he was appointed the vicar of the parish of St. Luke's, Victoria Docks, in 1918, and is still the vicar.

> Throughout this period—save for an interval from 1941 to 1942 while I was serving

> as a chaplain in the Forces—I have carried on work for the benefit of the poor inhabitants of the parish and have been assisted in such work by gifts in money and kind and by the personal services of a number of helpers. The gifts of money are made to a fund known as the Victoria Docks Settlement Fund (St. Luke's). The nature of the work is described in the leaflet which is exhibit A.F.2 to the said affidavit of Arthur Fowler and which was circulated to our helpers and to persons who might be interested in the work. 3. Before the war I kept a card index of all those who helped the work but unfortunately this has been destroyed during the war. I remember, however, that the testatrix Kathleen Blanche Simson used to send us old clothes from time to time and on each occasion she used to be sent a letter of thanks with information with regard to the progress of the work. 4. The parish suffered in the air raids in 1940 and 1941 and many of the children and the older parishioners were evacuated but the evacuees began to return in 1943. The work was never suspended and will be developed to the full as soon as possible. The parish is to be rebuilt as one of the new community districts and I am informed that the work on this is to commence at once.

He then exhibits certain documents, including the annual report of the Victoria Dock Settlement Fund for 1944. It sets out the position, and their hopes and their activities, and suggestions to which money should be devoted, and so on, all being for the benefit of the persons living in this poor parish.

If, in fact, the testatrix had in mind the work to which I have briefly referred, and which has been described in this evidence, I think there is no doubt but that the gift would be perfectly good as being a charitable gift for the benefit of the poor inhabitants of this parish of St. Luke's Vicarage. The only question really is as to whether I can be satisfied that that was what the testatrix had in mind when she gave this bequest to the Rev. S. G. Tinley for his work.

The next-of-kin of the testatrix are unknown to the executors at the present time, and therefore the Treasury Solicitor represents the estate in the event of there being an intestacy and no next-of-kin ascertained, in which case the Treasury would benefit from any property of which the testatrix had failed to dispose. Counsel on his behalf says that when you describe the work of a parson you include in that description many activities which are outside the province of that which is charitable in the eye of the law, and the testatrix has used a perfectly general phrase, "for his work," which, as it includes work which is other than charitable, is too wide to sustain the validity of the gift. I think there would be much to be said for that if by the words "his work" the testatrix meant any activity on the part of the Rev. Tinley associated with his office which he might be expected to perform. But the question is what she really meant by "for his work," and I have come to the conclusion, without very much doubt about the matter, that by "his work" she meant the work which he carried out and which is referred to and described in the evidence which I have read. She knew of it, and apparently took a considerable interest in it, and she refers to it at the end of the will where she says her clothes are to go to the Rev. S. G. Tinley "for his benevolent work in that parish," showing plainly that there the work she had in mind was work in the parish in regard to which a contribution of clothes would be suitable and apt. I have no doubt that that is the work which she had in mind there, and, having regard to that part of the will and to the fact that it was proved that she knew of, and was interested, in the particular work to which evidence has been directed, I have no doubt that she had a similar intention when making the bequest of £500 for his work in the disposition which I am now considering.

It was suggested that I am not really entitled to look at the evidence about the Rev. S. G. Tinley's work because the word "work" is unambiguous and is all-embracing; but if it was a term of ambiguity, then I could look to any evidence which defined the generality of the term, on the authority of *Re Rees* (1). In *Re Rees* (1) it was held that "missionary purposes" is an ambiguous term, and evidence was admissible to show that in that particular will it was intended to be used in a more narrow sense. If the word "work" has a degree of ambiguity about it, then the evidence would be equally admissible. In my view, the words "his work" have a sufficient degree of ambiguity to permit the introduction of evidence of this kind just as much as it was admissible in *Re Rees* (1) in relation to the words "missionary purposes." When one finds "his work" referred to in the middle of a clause which is almost entirely devoted to charitable matters, and when one finds that the word "work" at the end is work for which a gift of clothes is considered a suitable donation, there is, I think, some doubt left in one's mind as to what exactly this lady did mean by reference to "his work". In my judgment, evidence was admissible for the purpose of clearing up that doubt, and, in my view, the evidence has cleared up the doubt, and the work to which she was referring was the work to which the evidence has been directed.

I, therefore, hold this legacy good.

The questions in the summons which I now have to deal with are questions 2 and 3. Question 2 is:

> Whether the legacy in the said will of £500 to the defendant Sydney Lancaster Sarel "for his benevolent work" is a valid charitable legacy or is void for uncertainty or otherwise.

Question 3 is:

> Whether the gift in the said will of the residue of the testatrix's estate "to the Vicar of St. Luke's Church, Ramsgate, to be used for his work in the parish" operates as a valid charitable gift to the defendant John Eric Blanchett or to any and what other person or is void for uncertainty or otherwise.

I think it would be more convenient if I dealt first with the gift of residue, and, with regard to that, the plaintiff, Fowler, states in his first affidavit:

> At the date of the testatrix's will and until 1940 the vicar of St. Luke's, Ramsgate, was the Rev. Gilbert Fleming Williams. The solicitors for the executors addressed a letter to "The Vicar of St. Luke's Church, Ramsgate," informing him of the said legacy and of the question which arose and inquiring as to the nature of his work and received in reply from the deputy diocesan registrar, Canterbury, the letter dated July 24, 1943 [which is exhibited]. Subsequently the executors' solicitors received a further letter from the said deputy diocesan registrar stating that the name of the present vicar was the defendant John Eric Blanchett. I do not know whether the testatrix had any special connection with St. Luke's Church or whether she was personally acquainted with the said Gilvert Fleming Williams.

The letter from the deputy registrar of Canterbury said:

> At the moment there is a vacancy at St. Luke's although it is anticipated that a new incumbent will shortly be appointed.

It then said that a certain Cornelius D. Mayhew was appointed the priest-in-charge, and that it might be desirable in all the circumstances to hold the matter over until a new vicar was appointed. He was subsequently appointed and is the defendant Blanchett. It may be that there was a vacancy in the office of vicar of St. Luke's, Ramsgate, at the date of the testatrix's death, but that would not affect the validity of the gift having regard to the provisions of the Law of Property Act, 1925, s. 180 (2), which preserves, amongst other things, a gift in favour of a corporation sole in certain circumstances which cover the present case. Therefore I am satisfied that the gift does not fail on that ground.

The question, therefore, is whether a gift which is framed in these terms, which is not to a particular individual for the furtherance of that individual's work (as is the case in regard to the other gift I have had to consider), but a gift to the holder of an office, namely, the vicar of St. Luke's Church, Ramsgate, is a good gift or not. The gift is good if the benefits of the gift are sufficiently well defined (*i.e.*, ascertained or ascertainable) or if the gift is charitable although its objects are not otherwise sufficiently defined; but if neither of these qualities is to be attached to the gift, the gift fails, and for this reason, that it is given to the vicar not for his personal use or benefit but as trustee, and a trust is not valid unless it is either sufficiently definite to be executed by this court or is charitable.

I have the assistance of authority to some extent in deciding this case, and, in the first place, it seems quite plain, from the decision of JOYCE, J., ([1907] 1 Ch. 382, at p. 384), in *Re Garrard* (2) that "a legacy" *simpliciter* "to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes." In expressing this view, JOYCE, J., founded himself upon *Thornber* v. *Wilson* (3) and *Re Delany* (4), and I accept it as a true and correct statement of the law. The reason is, I think, to be found in considering what a vicar's work consists of: what are the functions of a vicar, rightly regarded? On that question CLAUSON, L.J., in *Re Ashton* (5) gave a short but, to my mind, comprehensive summary ([1938] 1 All E.R. 707, at p. 715):

> It seems to me material to bear in mind that the functions of the vicar of the church can be summed up in this, that he has the cure of souls in the particular district, parish or ecclesiastical district which is the site of his benefice.

Taking that statement, it would appear to me that the functions of the vicar of the church, as so stated, are definite and charitable; and, accordingly, no difficulty arises, or would arise, where a gift is made to the vicar of a particular church *simpliciter*.

Apart from *Re Garrard* (2) which I have cited for the purpose I have just A
explained, I have had guidance from *Re Ashton* (5) for a further proposition,
as it seems to me, also laid down by CLAUSON, L.J., in the course of his judgment.
The gift which the court was there considering was a bequest of a share of residue
to the respective vicars and churchwardens of two named churches for parish
work. The case, which went to the House of Lords, was eventually decided
on the ground that the gift, framed as it was in those terms, was too wide
to be good. That was the view of the Court of Appeal by a majority and that B
was the unanimous view of the House of Lords. But CLAUSON, L.J., who
dissented, said in the course of his judgment ([1938] 1 All E.R. 707, at p. 715):

> The gift is to them for parish work, but in the context I feel driven to the conclusion
> that "for parish work" means "for their parish work." If a man has a particular
> function and one gives him a gift for some work, *prima facie* it would be for the work
> which he has to perform by reason of the office he fills. I feel no difficulty in so con-
> struing these words—construing them, that is to say, as a gift to the vicar and church- C
> wardens for their parish work, they being ecclesiastical officers of this parish. I think
> that it would be agreed that, if I am right in so construing the words, and if it is for the
> parish work of the vicar and churchwardens—that is to say, to finance the vicar in the
> various multifarious duties which are covered by his duty to care for the souls of his
> parishioners (what is legally termed for the cure of souls)—and to assist the churchwar-
> dens in their duties of furnishing proper ornaments for the church and keeping the
> church in repair, it would seem reasonably clear, I should have thought, that the gifts D
> come well within the strict legal definition of "charity," because they are gifts for a
> religious purpose, aimed at the religious edification and instruction of the parishioners,
> and in providing the material means, in the shape of church ornaments in church,
> for attaining the end of performing the ceremonies which, according to the law of the
> church, are required for perfecting the edification and instruction of the parishioners.

He found himself able to adopt that construction of the will before him, and,
as I read it, took it for granted that, if that was the right construction, the gift E
would be perfectly good.

When the case went to the House of Lords, LORD RUSSELL OF KILLOWEN said ([1939] 3 All E.R. 491, at pp. 493, 494):

> CLAUSON, L.J., found himself able to construe this gift as a gift to the vicar and
> churchwardens, the purposes for which the money was to be applied being restricted
> by the words in brackets to the furtherance of work which it was the duty of the vicar
> and churchwardens to perform. That is to say, the application of the money was F
> restricted to what I may call the religious purposes of the parish in the strict sense.

LORD RUSSELL OF KILLOWEN found himself unable to put so narrow a construction upon the words used by the testatrix; but it seems, I think, clear that, if he had been able to adopt the same construction as CLAUSON, L.J., had adopted, he would not have dissented from the result of that construction as indicated in the passage which I have read from the judgment of CLAUSON, L.J. G

It is, of course, quite plain that, in addition to the strictly ecclesiastical
functions which a vicar is called upon to perform, there are various kinds of
activities—beneficial to the parish and parishioners—which a vicar normally
undertakes, but which, being of a purely benevolent character and being outside,
perhaps, the ambit of his strict duties, are not charitable because they are merely
benevolent. Indeed, it is because of that fact that the *Farley* case (5) was
decided in the way it was. That fact, for example, was recognised by LORD H
ATKIN in his judgment. He said he was unable to accept the construction
which had been urged upon them by counsel for the appellants, that the words
"for parish work" simply meant to express what would be implicit within the
words "the vicar and churchwardens" without the addition of the words
"for parish work." LORD ATKIN said ([1939] 3 All E.R. 491, at pp. 492, 493):

> My Lords, I am entirely unable to accept that construction. I think that the words are quite plainly enlarging words. They are words of definition, it is quite true, but I think that they were used for the very purpose of defining what the testatrix meant

as the purpose for which the money was to be applied, and "parish work" seems to me to be of such vague import as to go far beyond the ordinary meaning of charity, in this case in the sense of being a religious purpose. The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which no doubt are religious from the point of view of the person who is responsible for the spiritual care of the parish, in the sense that they are conducive, perhaps, to the moral and spiritual good of his congregation. However, that, I think, quite plainly is not enough, and the words are so wide that I am afraid that on no construction can they be brought within the limited meaning of "charitable" as used in the law. I find myself in entire accord with what was said by SIR WILFRID GREENE, M.R., in the Court of Appeal ([1938] 1 All E.R. 707, at p. 711): "To my mind the whole question in this case turns on whether or not the words 'for parish work' can in some way be limited, either by their own inherent meaning or by reference to the character and quality of the trustees. I have come to the conclusion, and I do so with regret, that that limitation cannot be imposed upon the words. It seems to me that the words 'for parish work' are of a very wide character, and embrace not merely those limited functions in the parish which it is the duty of the vicar to perform, and not merely those limited functions in the parish which it is the duty of the churchwardens to perform. Nor can I limit those words by narrowing them down to religious purposes in the strictly charitable sense. It appears to me that, taking them as words of ordinary English, they cover any activity in the parish, any work in the parish which trustees of that character may be expected to perform, whether that work be strictly a religious purpose or strictly a charitable purpose, or whether it be a work considered to be conducive to the good of religion, or considered to be benevolent, or generally useful to the inhabitants of the parish or the congregation of the church. It seems to me that the words 'for parish work' cannot be cut down or limited, either by construing them in isolation or by reference to the character of the trustees."

It is suggested in the present case that the gift of the testatrix in the will fails for the same reason as the gift failed in *Re Ashton* (5). It is said that the vicar does many things which are for the benefit of parishioners outside the scope of his strict duties as vicar, and that, accordingly, the words "for his work in the parish" enlarge to the point of destruction the ambit of the first part of the gift, and that the whole gift accordingly fails. It seems to me that this may be said to come down to a short point of construction of the language of the gift itself. If the phrase "to be used for his work in the parish" has no effect on the earlier part of the gift, or, if it has an effect, that effect, on construction, is a narrowing effect, the gift is good. On the other hand, if the words "to be used for his work in the parish" have an enlarging effect, so as to bring within their contemplation the work of a benevolent or quasi-benevolent character such as that referred to by LORD ATKIN and SIR WILFRID GREENE, M.R., in *Re Ashton* (5), then the gift must fail.

In my view, the gift is sufficiently definite to be valid, and is also charitable:

> **I give the residue of my estate to the vicar of St. Luke's Church, Ramsgate . . .**

Pausing there, the gift is good, on the authority of *Re Garrard* (2) and the cases that went before it.

> **I give the residue of my estate to the vicar of St. Luke's Church, Ramsgate, to be used for his work . . .**

Pausing there, again, it seems to me that, up to that point, the gift is still perfectly good. It might be regarded as an indication by the testatrix *ex abundanti cautela* that the property was not to vest in the vicar for his own personal use, but was to be used in furtherance of the work which fell upon him in the ordinary course of a vicar of a parish and, as such, responsible for the care of his parishioners' souls. Then come the words "in the parish." If I am right so far, do those words invalidate, because of the theory of extension, what down to that point appears to be quite good? Again, in my view, they do not. I am a little doubtful myself whether this phrase adds anything to what goes before, but, if it does, it seems to me that the words "in the parish" limit to some slight extent, the earlier phrase, "to be used for his work." There are kinds of work, I suppose, which a vicar sometimes does which strictly might be regarded as work done outside the parish—certainly, if he is a rural dean, and, possibly, if he is interesting himself, for example, in missions. But be that as it may, what the extent of the narrowing may be I do not determine, because it is enough for my purpose if I am satisfied—and I am satisfied—that they do not have an extending effect.

Therefore, it seems to me that the proper way to construe this gift is as a gift of the residue of the estate to the vicar of St. Luke's Church, Ramsgate, to be used for his work in the sense of work proper, *i.e.*, in the fulfilment of his functions as vicar—the work which was defined by CLAUSON, L.J., in his judgment in *Re Ashton* (5)—and the words " in the parish " (if, indeed, they have any material effect at all) have a somewhat narrowing effect.

It seems to me that there is a very considerable difference between a case like this and *Re Ashton* (5). A gift to a vicar and churchwardens " for parish work " is a general phrase covering a multitude of activities, and, as such, was held to be too wide, but a gift to a vicar " for his work in the parish " involves a totally different conception. It merely means that the gift is to be used for the purposes of such part of his work, *i.e.*, his functions connected with the care of souls in the particular district—as lie within the particular parish. In my judgment, such work is both sufficiently definite and is charitable.

The next question which I have to decide is: Is the gift to the Rev. Sydney Lancaster Sarel, of St. Matthew's Rectory, Bethnal Green, of £500, " for his benevolent work " a valid charitable legacy ? That gift differs from the one I have just been considering because it is a gift, not to the holder of a particular office, but to an individual in furtherance of his work, and, therefore, it becomes relevant to find out what the work of that individual was.

Certain evidence has been put in accordingly. Fowler exhibited a letter which the defendant, Prebendary Sarel, wrote on July 1, 1943, to this effect :

> I understand that the legacy in Miss Simson's will is an absolute gift, similar to a gift to a person's executor to use for such charitable purposes as they think fit. If the responsibility of administering it falls to my lot, I shall try to arrange to pass it on to one or more of the charitable institutions in Bethnal Green. I have lived and worked there for over 35 years, though I am no longer at the rectory. My official post is that of rural dean, the bishop's representative in the district, with the duty of keeping the bishop in touch with the clergy and people, and supervising their work. In addition to this I occupy my time in the following way : (i) Giving assistance (as well as advice) to the local clergy, especially the single-handed men, by taking charge of their parishes so that they can get a short holiday or a rest during an illness to save them txpense and worry ; also taking charge during an *interregnum* owing to death or change, eii) Municipal work, hospital, public assistance, educational work, etc. (iii) Local charities, nursing institution, dispensary almshouses, etc. On reckoning up I find that I am a member of at least 36 of these bodies and chairman of 12 of them, and after 35 years in the district I hope that I have accumulated enough experience to carry out Miss Simson's wishes.

He supplemented that letter by an affidavit in which he says :

> At the date of the testatrix's will I was not only rural dean of Bethnal Green but also rector of St. Matthew's, Bethnal Green, and vicar of St. Philips, Bethnal Green. 2. I retired from the rectory in June, 1939, and from the vicarage, on July 31, 1939, and from the rural deanery on Dec. 31, 1943. 3. I am a prebendary of St. Paul's Cathedral which office I have held since 1927. 4. At the date of the said will and of the testatrix's death I was carrying out all the work specified in my letter dated July 1, 1943. 5. Since my retirement from the rectory, vicarage and rural deanery I have continued and am still continuing to reside in Bethnal Green and to carry out all the work I formerly did there as specified in my said letter except of course that I no longer discharge the duties of a rector, vicar and rural dean. 6. I respectfully desire to amplify my said letter by explaining that at the date of the testatrix's will my work consisted of the following : membership of committee for Bethnal Green London County Council Hospital and for public assistance, and of Queen Adelaide's Dispensary, the Queen's Nursing Association, Oxford House and St. Margaret's House Settlement, as school manager for the London County Council schools, also as governor of the Parmiter School. I also visited patients in various hospitals practically daily and assisted the local clergy in the neighbourhood of Bethnal Green as well as those at St. Paul's Cathedral. I also helped to administer certain small charities and that since the will it has not changed. 7. If I am held entitled to the bequest specified in para. 2 of the originating summons I intend to apply it exclusively for charitable purposes in Bethnal Green.

It is said on his behalf that, having regard to that evidence, the purposes, or, rather, the work which he was doing was such as to validate this gift, the work being sufficiently definite, ascertained, and charitable.

I find it very difficult indeed to hold that this gift is good. One has, in the first place, the danger signal in the word " benevolent "—of course, that would not vitiate the gift in the least if, in fact, it turned out that the whole of the work of Prebendary Sarel was not only benevolent but charitable as well. But, in my judgment, I cannot hold that what he describes as his work was confined to functions and activities which are charitable in the strict sense. It is to be observed that the matters he refers to in his affidavit and his letter do not apparently involve the expenditure of money at all; they are matters of personal service rendered by this gentleman on committees, and so on, and although connected with institutions and bodies which expend moneys in various ways, his work in connection with them does not require the expenditure of money at all. In addition to that, para. 6 of his affidavit sets out a variety of things which he said he was doing at the time of the testatrix's will, but it quite plainly cannot be regarded, and I am sure was not intended to be regarded, as a comprehensive category because there is no reference there to anything he did in the capacity of rector.

In Re Ashton's Estate (5), it was said that benevolent work, which is the exact description used by this testatrix, formed part of the life of a rector and was outside the scope of strict charity. Therefore, it would seem that the Rev. Sarel could apply this money in furtherance of those benevolent activities or objects which are not strictly within his duties as priest.

Moreover, in opposition to his claim, it is objected that the letter refers to municipal work which is plainly outside the scope of charitable activity; and so it is. I do not think that the Rev. Sarel, in his affidavit, intended actually to oust from his list of activities the municipal work he referred to in his letter. I do not read "municipal work" in his letter as being a kind of general description of what follows after, but as a separate item of activity, and for this reason, that "for public assistance" appears as an individual item in para. 6 of his affidavit. In addition to that, it is to be observed that he was a rural dean. It may well be that all the benevolent work he did as a rural dean was also strictly charitable in the sense which is recognised in these courts: but such has not been proved.

In the result, it seems to me that the benevolent work which the Rev. Sarel was doing has not been shown, on the evidence, to be confined to matters which are charitable in the legal sense, nor are they matters which are sufficiently ascertained or ascertainable by this court. As, therefore, they are not either charitable or definite, I cannot sustain the validity of this gift and must hold that it fails.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Taylor, Jelf & Co.* (for the plaintiffs); *Loxley & Preston* (for the defendant Tinley); *Bramston, Skelton & Dowse* (for the defendant Sarel); *Markby, Stewart & Wadesons* (for the defendant Blanchett); *Treasury Solicitor.*

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

WESTERN INDIA MATCH CO. LTD. *v.* LOCK AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J.), May 27, 31, 1946.]

Public Authorities—Limitation of actions—Steamship requisitioned by Minister of War Transport operating on charter—Loss of commercial cargo by fire—Alleged negligence of Minister's officers in loading and discharge of cargo—Acts done in execution of public duty or authority—Limitation Act, 1939 (*c.* 21), *s.* 21.

A steamship, requisitioned by the Minister of War Transport under the Defence (General) Regulations, 1939, reg. 53, while operating under a charter to the Minister, was loaded at Basra, by special arrangement, with, *inter alia*, a cargo of the plaintiffs' potassium chlorate, a class of cargo permitted only in certain vessels. The loading of and the route to be taken by the ship were directed by L. and a naval officer W., who were, respectively, the Minister's representative and the divisional sea transport officer at that port, and a bill of lading was signed. On the arrival of the ship at Bombay, the divisional sea transport officer at that port gave orders for the berthing of the ship and announced that his headquarters would attend to the discharge of the cargo. During the unloading operations the plaintiffs' cargo was destroyed by fire. In an action for damages against L.'s executive and the sea transport officers, the defendants' plea that the claim was barred by the Limitation Act, 1939, s. 21, was ordered to be tried as a preliminary point of law. It was contended on behalf of the plaintiffs that this was an ordinary commercial adventure, the carrying of a commercial cargo by the Minister as charterer of the ship for which a bill of lading had been signed; that this gave rise to private commercial obligations and that there was nothing to show that the defendants were acting in pursuance or execution or intended execution of an Act of Parliament or of any public duty or authority or otherwise than as agents for a charterer :—

A Held : under reg. 53 the Minister had power to take the ship and then to use it and deal with it as he might think to be expedient in the public interest, and he must be able to decide what cargoes should, in the national interest, be carried in a ship requisitioned by him and to make such arrangements as he thought desirable for the loading, discharge and turn round of the vessel so as to get the best possible use of her; he was therefore, by his officers, exercising the powers conferred on him by the B regulation for the benefit of the public, or for what he considered the benefit of the public, and so was exercising a public duty, and he and his officers were also exercising an authority conferred upon them by the regulation; consequently the action was barred by the Limitation Act, 1939, s. 21.

[**EDITORIAL NOTE.** The basis of this decision is the opinion of Lord Maugham expressed in *Griffiths* v. *Smith* (2) that it is sufficient for a public authority seeking to C rely on the Public Authorities Protection Act, 1893 (see, now, the Limitation Act, 1939) to establish that the act giving rise to the claim was in substance done in the course of exercising for the benefit of the public an authority or power conferred on a public authority. The Minister was exercising such a power in requisitioning the ship in question and the fact that no member of the public could enforce the duty does not affect the matter since, as expressed by Lord Maugham, "public duty or authority" in the statute does not imply a positive obligation. It would appear to mean a duty legally D enforceable.

As to Acts done in Execution of Statute, Public Duty or Authority, see HALSBURY, Hailsham Edn., Vol. 26, pp. 293-297 paras. 611-616; and for Cases see DIGEST, Vol. 38, pp. 106-112, Nos. 761-795.]

Cases referred to :

*(1) *Bradford Corporation* v. *Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83.

*(2) *Griffiths* v. *Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 164 L.T. 386. E

*(3) *The Danube II*, [1921] P. 183; 38 Digest 103, 741; 90 L.J., P. 314; 125 L.T. 156.

*(4) *Hartin* v. *London County Council* (1929), 141 L.T. 120; Digest Supp.

Preliminary Issue of Law to determine the question whether an action for damages for loss of a cargo destroyed by fire was barred by the Limitation Act, 1939, s. 21. The facts are fully set out in the judgment.

H. U. Willink, K.C., and *A. J. Hodgson* for the plaintiffs.

F *The Attorney-General* (*Rt. Hon. Sir Hartley Shawcross, K.C.*) and *Hon. H. L. Parker* for the defendants.

Cur. adv. vult.

Lord Goddard, L.C.J. : The plaintiffs in this action claim damages for the loss of a valuable cargo of potassium chlorate which was destroyed by fire in the course of being unloaded at the port of Bombay from the s.s. *City of Barcelona* in the year 1942. This ship had been requisitioned by the Ministry G of War Transport and was operating under charter to the Minister, the form of charterparty being that applicable to requisitioned hired transports known as T.99A. The cargo was loaded at a Persian Gulf port, and one Lock, whose executrix is the first defendant, was the Minister's representative at Basra. The other two defendants are the divisional sea transport officers for Basra and Bombay respectively and are officers in the navy. It is alleged that the loss occurred through their negligence both in the loading and discharge of the H cargo, and among the defences raised by them is a plea that the claim is barred by the Limitation Act, 1939, s. 21, which in effect replaces the Public Authorities Protection Act, 1893. If that plea is upheld there is an end to the action, as admittedly the writ was not issued in time. Accordingly an order was made for this defence to be tried as a preliminary point of law under R.S.C., Ord. 25, r. 2, and, as a trial under this rule is in the nature of deciding a demurrer, the court is confined to a consideration of the pleadings and documents referred to therein.

The question that has to be decided is whether the defendants (in which expression I include Lock, now deceased) who were admittedly representatives or acting as officers of the Minister in relation to ships and cargoes in the Persian Gulf and the port of Bombay, were, in loading and discharging the cargo in this requisitioned ship, performing a public duty or authority.

The ship was requisitioned by the Minister under the Defence (General) Regulations, 1939, reg. 53, which authorises the Minister, who it is agreed is "a competent authority" within the meaning of that regulation, not only to requisition ships but to use or deal with them when requisitioned for such purpose and in such manner as he thinks expedient in the interests, to put it shortly, of the successful prosecution of the war and of maintaining essential supplies. The ship having been requisitioned, a charterparty was executed in the form used for requisitioned transports, and, while cl. 9 provides that the charterer shall not be responsible for loss sustained by the owners through the negligence of, among others, stevedores or other qualified persons employed by the charterer in the loading, stowage or discharge of the cargo, I do not think that this clause or any other in the charterparty throws any light on the question I have to decide. The routeing of the ship was directed by Lock and, I suppose, the defendant Wiles as sea transport officer, and they allowed the shipment on board of the cargo in question, for which a bill of lading was signed. It appears that special arrangements were made for the shipment by the ship in question, as this class of cargo was only permitted in certain vessels. In addition to this cargo the ship was carrying 144 tons of machinery. She duly arrived at Bombay, and the Minister's local agents communicated with the divisional sea transport officer at that port, who is the third defendant, and he gave orders for the berthing and announced that his headquarters would attend to the discharge. Beyond it being admitted that the divisional officer was acting on behalf of the Minister, I know nothing of the position of that officer or under what authority or order he was acting, nor as to whether the local government had taken possession of the docks and, if so, by what authority, though I think it may safely and properly be assumed that a naval authority was acting as harbourmaster.

The plaintiffs contend that the facts disclose no more than that there was an ordinary commercial adventure, the carrying of a commercial cargo by the Minister as charterer of the ship, for which a bill of lading had been signed. They contend that this gives rise to private commercial obligations and that there is nothing to show that the defendants were acting in pursuance or execution or intended execution of an Act of Parliament or of any public duty or authority or otherwise than as agents for a charterer.

It would have been more satisfactory had I been furnished with some precise information as to the position of sea transport officers and of the conditions prevailing at the port; but no technical points were taken, and the parties evidently desire a decision based on the realities of the position, which, no doubt, were that the navy was in control of the port and, at least as regards requisitioned ships sailing under the orders of the Government, they took control of them when they arrived at the port.

It is beyond question that the Crown (and for this purpose the Minister and his officers must be regarded as the Crown) is a public authority, and whether a public authority is protected by the section depends on whether the act complained of arose out of the discharge of a public duty or the exercise of a public authority: see *Bradford Corpn.* v. *Myers* (1). I do not find it necessary to quote passages from the speeches in that case, because, though LORD HALDANE pointed out ([1916] 1 A.C. 242 at pp. 250, 251) that it may be difficult to extract from the words of the Act a comprehensive principle which would serve as a guide for the future, in *Griffiths* v. *Smith* (2), LORD MAUGHAM has summarised the effect of that case and those which had preceded it in a passage which I venture to think goes far to solve any difficulty. He said ([1941] 1 All E.R. 66 at p. 76):

> My Lords, since the decision of this House in *Bradford Corpn.* v. *Myers* (1) and the tacit or express approval of the cases to which I have referred, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on

the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are 'public duty or authority,' and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation.

Here the Minister had the power to take the ship and then to use it and deal with it as he might think to be expedient in the public interest, nor can one doubt that it was his duty so to do, though that duty might be one which would be described as of imperfect obligation. In other words, it was not a duty that the courts would enforce, though I have no doubt that, were the Minister to requisition a vessel, say a yacht, and use it for his private pleasure, if such a thing could be imagined, the court would very promptly interfere. The Minister must be able to decide what cargoes should, in the national interest, be carried in a ship requisitioned by him and to make such arrangements as he thinks desirable for the loading, discharge and turn round of the vessel so as to get the best possible use of her.

In my opinion, therefore, he was here, by his officers, exercising the powers conferred upon him by the regulation for the benefit of the public or for what he considered to be for the benefit of the public, and so was exercising a public duty, although, no doubt, no member of the public could complain or take proceedings against them or him if he did not act as he did: see *per* Lord Sterndale, M.R., in *The Danube II* (3) ([1921] P. 183, at p. 187).

Moreover, not only were the Minister and his officers performing a public duty, but they were, in my opinion, exercising an authority conferred upon them by the regulation. An authority to be used for the public benefit, as this was, is, in my opinion, on the authority of the *Bradford* case (1) a public authority.

I desire to refer briefly to *Hartin* v. *London County Council* (4). In that case the defendants had unsuccessfully prosecuted a clerk in their employment, and the action was brought by the latter for malicious prosecution. The Public Authorities Protection Act was pleaded, and Avory, J., in ruling against the plea, gave as his ground for so doing that a public duty in the statute means a duty which can be legally enforced. He accordingly held that a duty to prosecute for an offence was not a public duty within the statute. While as at present advised I should not be disposed to differ from that case in its result, I do not think the particular reason given by the judge for his ruling can now be upheld, in view of the judgment of Lord Sterndale, M.R., in *The Danube II* (3) and the passage from Lord Maugham's speech in *Griffiths* v. *Smith* (2) which I have already quoted. The latter expressly stated "public duty or authority does not imply a positive obligation," by which I understand him to mean an obligation which can be legally enforced. It may be that a more satisfactory ground for the decision would be that a duty to prosecute is one common to all the King's subjects who believe that a criminal offence has been committed, because it is in the interests of the public that criminals should be brought to justice. It is more in the nature of a moral obligation than a legal power or right, and, if that be the true view, it could not be a public duty within the meaning of the statute. If it were otherwise, that is, if the question depended on whether the duty is one which could be legally enforced, it would be impossible, as counsel for the applicants pointed out, for officers of the Crown, the highest public authority of the realm, ever to have the benefit of the Act, for there is no means of compelling the Crown to perform any duty. At the same time, I do not desire to be taken as deciding that, whenever the defendant is an officer of the Crown, commissioned or otherwise, and is acting on behalf of the Crown, he must necessarily be entitled to the benefit of the section. I need only give as an illustration an action by a lessee of a house on Crown property against an officer acting in the course of his duty. In such a case it might well be (I say no more) that only questions of private right would arise.

I must, therefore, give effect to the plea and hold that the action is barred. Judgment will be entered for the defendants, with costs as between solicitor and client.

Action barred. Judgment for the defendants with costs.

Solicitors: *Ince & Co.* (for the plaintiffs); *Treasury Solicitor* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

SZALATNAY-STACHO *v.* FINK.

[COURT OF APPEAL (Scott, Somervell, and Cohen, L.JJ.), May 23, 24, 27, 28, 29, June 5, 1946.]

Libel—Privilege—Absolute privilege—Qualified privilege—Official communications on State matters—Conflict of laws.

Conflict of laws—Libel—Privilege—Official communications on State matters.

The appellant, a Czechoslovak citizen, was acting minister in Cairo under the Czechoslovak Government from 1934 to 1944. The respondent, also a Czechoslovak citizen, was, at the material time, public or general prosecutor of the Czechoslovak Military Court of Appeal, which was a court established in England under the Allied Forces Act, 1940, the Czechoslovak Government being in England at that time. The respondent forwarded to the Military Office of the President of the Republic, in London, a number of written statements by Czechoslovak soldiers, concerning the activities of the appellant while Czechoslovak diplomatic representative in Egypt. In a covering letter he formulated against the appellant, in his official capacity as acting minister, charges of serious criminal offences, including treason. In an action by the appellant for libel, HENN COLLINS, J., held that by the comity of nations the court should extend to the communication the same protection as the Czechoslovak courts would afford, and as no action would lie in those courts against the respondent, a state official acting as such, the communication was absolutely privileged. If he were wrong about that he would have held that there was qualified privilege and no malice :—

HELD : (i) the principle of absolute privilege for official documents in English law was based on public interest, and would not necessarily apply to corresponding foreign documents ; at the material time the Czechoslovakian Government was in England as an ally in the war, an unprecedented state of affairs ; it might well be in those circumstances that the public interest would justify the application to Czechoslovak official documents of the principles applied to English documents.

(ii) at the material time there were no Czechoslovak courts available in England or in Czechoslovakia before which the appellant, not being a soldier, could be charged, and having regard to the document and its destination, its purport was to forward, for investigation and any action that might be thought proper, information which had come into the respondent's possession, supplemented by statements taken from soldiers, which accused the appellant of specified crimes ; it was therefore not a first step in criminal proceedings and should not be protected on that account.

(iii) having due regard to the exceptional position of the Czechoslovak Government, the principle of the comity of nations did not compel or entitle the English courts to apply Czechoslovak law to acts done in England, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials which was not afforded under English law ; the communication was, therefore, not absolutely privileged.

Hart v. *Gumpach* (1) *distinguished.*

(iv) the principles of English law were applicable to a document produced and published in England.

(v) it was clearly the respondent's duty to act ; and those to whom the document was sent had a common interest or duty with the respondent in the matters in question ; having regard, on the one hand, to the fact that the appellant was a civilian, and, therefore, outside the respondent's official duties, and on the other, to the respondent's position as a military officer holding a responsible position and bound to take action on the information before him, he did no more than his duty in the circumstances ; and the document was the subject of qualified privilege. There being no evidence of malice the defence prevailed.

Decision of HENN COLLINS, J., ([1946] 1 All E.R. 303) *affirmed on other grounds.*

[**EDITORIAL NOTE.** In the court below HENN COLLINS, J., held that the document here in issue was absolutely privileged, basing his decision upon views expressed in *Hart* v. *Gumpach* (1) as to the comity of nations. In that case, however, everything had happened in the country whose law was alleged to apply, while in the case under consideration the law suggested as applicable to English proceedings for libel published in

England was that of a foreign country whose Government was temporarily functioning in England owing to the emergency of war. In these circumstances the Court of Appeal hold that the principle of *Hart* v. *Gumpach* (1) is inapplicable. The decision of the court below, however, is upheld upon the question of qualified privilege.

As to Absolute Privilege of Official Communications on State Matters, see HALSBURY, Hailsham Edn., Vol. 20, p. 468, para. 568; and for Cases, see DIGEST, Vol. 32, p. 111, Nos. 1428, 1429.

As to Privileged Occasion, see HALSBURY, Hailsham Edn., Vol. 20, p. 470, para. 573; and for Cases, see DIGEST, Vol. 32, pp. 112-113, Nos. 1437-1453.

As to Application of Foreign Law, see HALSBURY, Hailsham Edn., Vol. 6, p. 195, paras. 235, 236; and for Cases, see DIGEST, Vol. 11, pp. 307-309, Nos. 9-17.]

Cases referred to:

*(1) *Hart* v. *Gumpach* (1873), L.R. 4 P.C. 439; 32 Digest 112, *1444*; 9 Moo. P.C.C.N.S. 241; 42 L.J.P.C. 25.

(2) *Watson* v. *McEwan, Watson* v. *Jones*, [1905] A.C. 480; 32 Digest 109, *1407*; 74 L.J.P.C. 151; 93 L.T. 489.

(3) *Beresford* v. *White* (1914), 30 T.L.R. 591; 32 Digest 109, 1408.

(4) *Lilley* v. *Roney* (1892), 61 L.J.Q.B. 727; 32 Digest 109, *1406*.

(5) *Bottomley* v. *Brougham*, [1908] 1 K.B. 584; 32 Digest 102, *1329*; 77 L.J.K.B. 311; 99 L.T. 111.

(6) *Dawkins* v. *Paulet (Lord)* (1869), L.R. 5 Q.B. 94; 32 Digest 110, *1426*; 9 B. & S. 768; 39 L.J.Q.B. 53; 21 L.T. 584.

(7) *Hare & Meller's Case* (1587), 3 Leon. 163; 32 Digest 108, *1397*.

Appeal by the plaintiff from a decision of Henn Collins, J., dated Dec. 19, 1945, and reported ([1946] 1 All E.R. 303). The facts are fully set out in the judgment of the court delivered by Somervell, L.J.

F. W. Beney, K.C., *Valentine Holmes, K.C.*, and *John Foster*, for the appellant.

G. O. Slade, K.C., and *Arthian Davies* for the respondent.

Cur. adv. vult.

Somervell, L.J. [delivering the judgment of the court]: This is an appeal by the plaintiff in a libel action which was tried before Henn Collins, J. The plaintiff, who is a Czechoslovak citizen, was acting minister in Cairo under the Czechoslovak Government from 1934 to 1944. The alleged libel is contained in a document dated Nov. 17, 1941, signed by the defendant with documents attached and sent to the Military Office or Chancellery of the President of the Czechoslovak Republic. The defendant, who is also a Czechoslovak citizen, was at the material time public or general prosecutor of the Czechoslovak Military Court of Appeal, which was a court established in this country under the Allied Forces Act, 1940, the Czechoslovak Government being in this country at that time as our ally. Before the war he was a practising lawyer. The document is plainly defamatory of the plaintiff, and—to use a neutral expression—is concerned with very serious accusations against him in his official position as acting minister, including a charge of treason and other criminal offences. The defendant admits that he made and sent the document; he does not justify, but pleads that the words were published by him without malice and in the honest belief that they were true. He says that the occasion was one of absolute privilege, or, alternatively, of qualified privilege. Henn Collins, J., decided that the occasion was one of absolute privilege. If he was wrong about that, he would have held that there was qualified privilege and no malice.

The document of Nov. 17, 1941, is marked "*duv*," which means confidential. It is headed: "The Military Office of the President of the Republic, London," and the first three paragraphs are as follows:

> The general prosecutor received on several occasions information from members of the Czechoslovak army in England regarding the activity of the Czechoslovak envoy in Cairo, Dr. Szalatnay-Stacho. The above-named being a civil person, the general prosecutor could not institute criminal proceedings and has therefore ordered administrative examinations of all persons who could elucidate the question. The contentions of Corporal Milos Kuna, which are supported in particular by the statement of Lieutenant-Colonel Josef Bartik as regards the opinion of the French and English intelligence service of the above-named Czechoslovak envoy, are so grave that the general prosecutor considered it his duty to bring the matter to the notice of the President of the Republic. The envoy Dr. Szalatnay-Stacho is accused of the following. . . .

There are then four paragraphs which may be summarised: (1) That after Mar. 15, 1939,—the date of the German occupation of Prague—he established in Cairo connection with the German Legation and committed the crime of treason; (2) That he embezzled £2,500 Egyptian belonging to the Czech community in

Egypt ; (3) That he invited Czechoslovak workers to collaborate with the Germans and dissuaded Czechoslovak citizens from joining the Czechoslovak forces in France ; (4) That in associating with or assisting three named Germans he committed certain further crimes, namely, fraud, military betrayal, and the misuse of official power. All the paragraphs refer to provisions of the code dealing with the offences in question.

There are attached a number of statements. The first in date and the most detailed of the statements attached was by Corporal Kuna, who before the war was a merchant in Cairo.

On the issues as raised by the pleadings, the truth of the accusations or allegations in the statements attached to the defendant's document is not in issue. There are no grounds for any suggestion that they are true. Evidence was, however, admitted that in fact, after Mar. 15, 1939, the plaintiff took a strong line diametrically the opposite of that of which he was " accused " as set out in para. 1 above, and was not guilty of the treason or disloyalty alleged. It is also, perhaps, fair to the plaintiff to point out that he retained his position under the President of the Czechoslovak Republic till 1944 and was receiving his salary when he gave evidence. Counsel for the plaintiff told the court that the plaintiff brought these proceedings in the hope that some plea would be raised which would enable the court to investigate the truth of these charges. This is understandable. On the other hand, it is perhaps right to say that on the view put forward by the defendant as to his part in the matter, which the court, agreeing with HENN COLLINS, J., substantially accept, we can find no ground for the criticism of his conduct in these proceedings which was, perhaps, suggested by counsel for the plaintiff.

There is one matter of history which explains how the plaintiff came into possession of the document on which he relies. Before his appointment terminated in 1944, he had heard some rumours of charges against him. When he came back to London he was told confidentially that the defendant had made charges against him. He saw an opinion of the legal adviser to his Foreign Office. This document, of which he had had a copy, was not disclosed, but he said that it dismissed the charges as pure nonsense. The plaintiff, who by this means had got some knowledge of what had happened, made an application to the district prosecutor to the court martial of the Czechoslovak Army for a criminal prosecution of the Commander in Chief, the defendant, and other persons. This is a proceeding which has no exact parallel in our law, but appears to be a formal demand for a prosecution which was, in this case, for misuse of official power. This procedure is subject to an appeal. It was in the course of these proceedings that the plaintiff saw the actual document relied on. There was, as a result of the plaintiff's application, no prosecution, but he issued the writ in the present action. It has been necessary to refer to this in order to explain how these proceedings started and it also may have some relevance to the plaintiff's complaint of the defendant's attitude in these proceedings. The court is only concerned with the legal issues, but, if it is sought to base an argument on any failure of the defendant to express regret or take up a friendly attitude, it may be necessary to bear in mind the plaintiff's first action with regard to the matters with which the case is concerned.

HENN COLLINS, J., decided that the document was absolutely privileged. He based this part of the decision on a finding that in Czech law an action like the present could not be brought against the defendant by reason of the fact that he was a state official and acting as such. He decided that, by the comity of nations, His Majesty's Courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their domestic courts would afford. He relied on certain dicta in *Hart* v. *Gumpach* (1) (L.R. 4 P.C. 439, at p. 464).

Before considering this reasoning, it is necessary, in order to deal with the first argument of counsel for the defendant under this issue, to consider the question on somewhat wider lines. The application of the principles of absolute privilege to foreign official documents is one on which there is little, if any, direct authority. The principle in our law is based on public interest, and, as it seems to us, would not necessarily apply to corresponding foreign documents. At the material time the Czechoslovak Government was in this country as our ally in the war. This was an unprecedented state of affairs. Whatever may be the position in normal circumstances it may well be that in these circumstances the public interest would justify the application to Czechoslovak official documents of the principles applied to our own documents. Accepting this principle, it is necessary to consider in the light of it counsel's first submission on this part of the case, which was that this document should be protected as the first step in criminal proceedings. He referred to *Watson* v. *McEwan* (2) and to *Beresford* v. *White* (3) which held that a proof of a witness had absolute privilege; to *Lillie* v. *Roney* (4) where a letter to the Law Society in the form prescribed for A initiating disciplinary proceedings against a solicitor was held absolutely privileged; to *Bottomley* v. *Brougham* (5) where the same principle was applied to the report of an official receiver to the court under the Companies Act. The case of *Dawkins* v. *Paulet* (6) does not seem to us to apply to the defendant's action here. In that case the defendant, a military officer, was acting strictly within his official military duties with reference to a court of inquiry on another officer. In the view we take of this document, it was not the first step in criminal B proceedings. At that time there were no Czechoslovak courts available either here or in Czechoslovakia before which the plaintiff, not being a soldier, could be charged. Apart from this point, we think that, having regard to the document and its destination, its purport may be summarised as follows: "This information has come into my hand supplemented by certain statements I have taken from soldiers. The statements accuse the plaintiff of serious crimes, which are specified. C I forward the dossier for investigation and any action that may be thought proper." This, certainly, is far more remote from actual or contemplated proceedings than any of the cases cited.

Counsel for the defendant did not argue that the document was protected as an act of state. He did rely on *Hare & Meller's Case* (7). This was a case in 1588. It is very shortly reported, but it states that the exhibiting of a bill to the Queen is not in itself any cause of action, on the ground that the Queen D is the head and fountain of justice, and, therefore, it is lawful for all her subjects to resort to her to make their complaints. The circumstances in which the bill was exhibited are not set out, but it is, in our view, impossible to regard the present document sent to the Military Chancellery of the President as coming within any such principle as that stated.

Henn Collins, J., based his decision, as we have stated, on a different principle. Although the document was made and published in England, he E felt that he must consider what would have been the rights of the parties if the action had come before a Czechoslovakian court. In *Hart* v. *Gumpach* (1) the observations were *obiter* and the position was, as it seems to us, essentially different. The action was brought before Her Majesty's Supreme Court for China between two British subjects both in the service of the Chinese Government, based on false representations alleged to have been made by the defendant in his official capacity in China. F In that case, therefore, everything had happened in China, the country whose law it was suggested might be applied to the documents. Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law, to acts done here, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil G suits to acts done by officials, which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out it would, in our opinion, have to be expressly provided for by legislation.

We, therefore, decide that this document was not absolutely privileged.

There remains the question of qualified privilege, and, if that is established, of malice. H In the first place, it is necessary to be clear as to the relevance of Czechoslovak law. In our opinion, the principles of English law are applicable to a document produced and published in England. In considering whether there was a duty on which a plea of qualified privilege can be based, it is, of course, necessary to consider the position and duties of the defendant as an official of the Czechoslovak Government and the position of those to whom the document was published.

The defendant's action started as a result of the statement made by Corporal Kuna. The plaintiff, not being in the military forces, was outside the defendant's jurisdiction. But no official, as it seems to us, would be justified in merely disregarding statements which suggested that a servant of the state had been guilty of disloyal action, if he honestly believed that they were or might be true. Counsel for the plaintiff was inclined to concede that, if the defendant had contented himself with passing on the original document to a proper authority, he could not have disputed that there would be a qualified privilege. He contended that what was done went beyond what privilege would protect. He submitted that the defendant had formulated charges, had himself initiated investigations, and passed on the result to the wrong authority. He said that the defendant, in a letter of Mar. 22, 1944, had stated that he relied on an article in the military code of procedure which did not apply, and that in evidence he said he had relied on a provision of the statute law which did not cover what he had done.

These points have to be considered, but the general circumstances require to be clearly kept in mind. An official had information put before him alleging disloyalty and treason by another official who was under another department. Unless he had grounds for knowing the allegations were false, it was, in our opinion, clearly his duty to act. Counsel for the plaintiff submitted firstly that he had exceeded his duty in having statements taken from a soldier who was referred to in the Kuna document, and later from other soldiers who, it was said, might have knowledge of the events in question. In his official capacity he was in a position to set in motion machinery for getting statements from soldiers. In our opinion, he was justified in taking this course. The allegations were serious, and the defendant stated in the letter already referred to of Mar. 22, 1944, that there was at that time no department of the Ministry of the Interior dealing with state security.

The further statements might have supported, added to, or weakened the case as put forward in the original documents. Having got this material, it is said he formulated charges in the document of Nov. 17, which he signed, referred to at the beginning of this judgment. In the statement of claim the various statements attached to that document take up some seventeen pages of fairly close typescript. It would seem clear that, in forwarding material of this kind to a higher authority, any official would summarise its effect. In our opinion this document is not, as was suggested, a formulation of charges which the defendant is putting forward on his own responsibility, but a summary of the charges made in the documents, with the addition of references to what the defendant regarded as the material sections of the Criminal Code. It was said that the charges as formulated went beyond the evidence, including hearsay, of the statements. We are doubtful whether this is so, but, in any event, we are satisfied it was an honest attempt to summarise the accusations. From the defendant's point of view these would fail to be considered by those to whom the document was sent in the light of any information they already had and any further investigations they chose to make.

Complaint was also made that the defendant had not made inquiries of other departments, including the Ministry of Foreign Affairs, where there would be the plaintiff's own reports as to his conduct, and, very likely, other information supporting his actions. The defendant, however, realised, quite rightly, that, the plaintiff being a civilian, it was not a case of which he could take charge. We have already stated our view as to the statements he took from soldiers. He might well have been exceeding his duty if he had sought to carry out a wider investigation.

Looking at the matter in the light of the general principles of our law, we do not regard either of these points as destroying the claim of privilege. A good deal of argument and cross-examination was devoted to showing that the defendant had exceeded his statutory duties under Czechoslovak law. It was pointed out that he had no statutory duty to investigate charges and take statements except in cases where the charge under consideration was against a soldier. In his evidence, though not in a letter he had previously written, he said he acted under para. 12 of the Defence of the Republic Act. That paragraph makes it a criminal offence if any person who obtains knowledge in a credible manner that certain specified offences have been committed fails to report to authority. The specified offences include some, but by no means all, of the offences referred to in the document sued on. Counsel for the plaintiff, therefore, pointed out that this paragraph did not cover the defendant's action. He relied on the inconsistency between this evidence and the statements in the letter of Mar. 22, 1944, previously referred to. It is obvious that the duty sufficient to support a plea of qualified privilege goes far wider than duties the breach of which is a crime. The evidence of the defendant was given through an interpreter under considerable difficulties to counsel and, probably, to the witness. There may well have been some confusion in the witness's mind when he was asked under what "powers" he made his report. It may well be that the only duty enforceable by criminal sanction which he could refer to was the paragraph in question. The court has, however, to have regard to all the circumstances in deciding whether there was a duty sufficient to support qualified privilege. The fact that he honestly thought he was under a duty does not avail him, nor would a mistake as to the basis and extent of his duty, or the nature of the duty sufficient under our law to support a claim of privilege, be fatal, though it might be relevant on the question of malice.

In considering this question, we have to apply English law, having due regard to the defendant's position and obligations as an official of the Czechoslovak Government. We have already dealt with the main grounds on which counsel for the plaintiff submitted that he exceeded the limits or abused the occasion of the alleged privilege. We have considered all the points put, including some which were more stressed on the issue of malice but may have some relevance to the present question. Having regard, on the one hand, to the fact that the plaintiff was a civilian and, therefore, outside the defendant's official duties as a prosecutor, and, on the other, to the defendant's position as a military officer holding a responsible position and bound to take action on the information put before him, we do not think he did more than was his duty in the circumstances.

Counsel for the plaintiff took a further point, that he ought not to have sent the document to the Military Office or Military Chancellery of the President. We think there is nothing in this point. The defendant had information that some of the matters dealt with had previously been reported to the President. Being himself a military officer, it seems to us perfectly natural and proper that he should have sent it as he did to the Military Chancellery of the President. In our view, those to whom the document was sent had a common interest and duty with the defendant in the matters in question.

There remains the issue of malice. There was no suggestion of any personal ill-will extraneous to the actual acts which have been set out. HENN COLLINS, J., formulated the issue in this way:

> Given the occasion, was the defendant using it in singleness of mind in pursuance of his duty, or was he not.

That, of course, is a question of fact. After reviewing the evidence he says:

> First and last I have to ask myself whether the defendant was acting in good faith, and I am convinced that he was.

The matter was re-argued before us. We do not think it necessary to deal with all the points in detail, some of which have already been dealt with when considering privilege. We will say a few words about one matter which was pressed upon us. Much of the material is hearsay, and one document purporting to set out an earlier "suspicion" of the intelligence service was said to be scandalous and irrelevant hearsay. Counsel for the plaintiff submitted as evidence of malice that the defendant had sent forward all these documents, and had not made a selection. We do not think this affords any evidence of malice. We think he was clearly right to forward the whole file. One may take as an example the intelligence report complained of and accept everything that counsel for the plaintiff said about it. It was not suggested that the defendant had concocted it, nor, indeed, was he asked how it came into his possession. If higher authority in the course of its investigations became aware how groundless these suspicions were, it might well desire to investigate how they came to be put forward. It seems to us entirely consistent with the defendant's duty that he put forward everything which he had received. It would, of course, require strong reasons to induce us to differ from HENN COLLINS, J., who saw the defendant and heard him, albeit through an interpreter, give his evidence. Having heard the arguments and considered the evidence, we fully agree with his conclusion.

In the result, the court is of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Dehn & Lauderdale* (for the appellant); *Blyth, Dutton & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

A

FRIEND *v.* WALLMAN.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), May 17, 20, June 4, 1946.]

Practice—King's Bench Division—Interlocutory applications—Application on summons for directions for admission of written statement under Evidence Act, 1938, *s.* 1 (2)—*Order by master allowing evidence—Jurisdiction—"Court"—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 99 (1) (*d*)—*Evidence Act,* 1938 (*c.* 28), *s.* 1—*R.S.C., Ord.* 30, *r.* 2 (2) (*d*)—*R.S.C., Ord.* 54, *r.* 12. B

On the summons for directions in an action for damages for negligence, the plaintiff applied under the Evidence Act, 1938, s. 1 (2), to put in evidence photostat copies of two statements made by two United States soldiers who had returned to America. The master made an order admitting the evidence. Sect. 1 (1) of the 1938 Act provides: "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact" if the maker of the statement has personal knowledge of the matters dealt with in the statement and is called as a witness in the proceedings. By a proviso to the subsection, the maker of the statement need not be called as a witness "if he is beyond the seas and it is not reasonably practicable to secure his attendance." By sect. 1 (2): "The court may at any state of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsect. (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence (*a*) notwithstanding that the maker of the statement is available but is not called as a witness; (*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document" certified to be a true copy. It was contended by the defendants that there was no jurisdiction to make such an order in chambers:— C D E

HELD: (i) there was no rigid rule whereby the word "court" must be construed as excluding jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. F

(ii) sect. 1 (2) of the 1938 Act clearly contemplated that an order might be made before trial: it would, therefore, be an interlocutory order. Interlocutory applications were normally made in chambers, and not to the Divisional Court (as would otherwise be the case in the King's Bench Division). G

(iii) the general subject-matter dealt with in the provisions of the Evidence Act, 1938, s. 1, was one which, under existing rules, could be dealt with in chambers, because under R.S.C., Ord. 30, r. 2 (2) (*d*), which was in operation when the 1938 Act was passed, power was given to "the court or a judge" on the summons for directions to make orders relating to documentary evidence.

(iv) when jurisdiction was given to the judge in chambers, with certain immaterial exceptions it could be exercised by a master under R.S.C., Ord. 54, r. 12. H

(v) the interlocutory applications contemplated by sect. 1 of the 1938 Act could, therefore, be dealt with in chambers, and the master had jurisdiction to make the order in question.

(vi) "interested persons" within sect. 1 (3) of the 1938 Act means personally interested in the result of the proceedings.

[**EDITORIAL NOTE.** When it is intended to give jurisdiction in chambers a common formula is "the court or a judge." There is no fixed rule on the matter, however, and the word " court " alone may be construed as sufficient to give jurisdiction in chambers. In the case reported the word is so construed in the Evidence Act, 1938, s. 1, since the subject-matter dealt with by that section could, at the time of the passing of the Act, have been dealt with in chambers under existing rules.

As to " persons interested " reference may be made to *Robinson* v. *Stern* [1939] 2 All E.R. 683 and *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* [1941] 1 All E.R. 311 : compare Phipson on Evidence, 8th Edn., p. 267.

As to Proceedings at Chambers, see HALSBURY, Hailsham Edn., Vol. 26, pp. 40-44, paras. 63-67 ; and for Cases, see DIGEST, Vol. 16, pp. 177-181, Nos. 829-867. A

For the Evidence Act, 1938, s. 1, see HALSBURY'S STATUTES, Vol. 31, pp. 145, 146.]

Cases referred to :

*(1) *Baker* v. *Oakes* (1877), 2 Q.B.D. 171 ; 16 Digest 179, *841* ; 46 L.J.Q.B. 246 ; 35 L.T. 832.

*(2) *Smeeton* v. *Collier* (1847), 1 Exch. 457 ; 16 Digest 177, *829* ; 17 L.J.Ex. 57.

(3) *Dallow* v. *Garrold* (1884), 14 Q.B.D. 543 ; 16 Digest 178, *834* ; 54 L.J.Q.B. 76 ; 52 L.T. 240. B

(4) *Clover* v. *Adams* (1881), 6 Q.B.D. 622 ; 16 Digest 177, 830.

Interlocutory Appeal by the plaintiff from an order of Croom-Johnson, J., dated Mar. 29, 1946. The facts are fully set out in the judgment of the court delivered by Somervell, L.J.

C. N. Shawcross for the appellant.

Horace C. Fenton for the respondent. C

Cur. adv. vult.

Lord Greene, M.R. : The judgment of the court will be read by Somervell, L.J.

Somervell, L.J. [delivering the judgment of the court] : The plaintiff in the proceedings in which this appeal arises alleges that on Aug. 2, 1943, a collision occurred between the bicycle which he was riding and a motor car driven by the second defendant as servant or agent of the first ; that the second D defendant was negligent, and he claims damages for injuries. The collision is admitted and that the second defendant was servant or agent of the first, but negligence is denied, and there is an allegation of negligence on the part of the plaintiff.

The writ was issued on July 17, 1945. On Nov. 9, 1945, the plaintiff's solicitors wrote to the defendants' solicitors inclosing copies of two statements relating to the collision purporting to be made by two United States soldiers. The E solicitors stated that the two soldiers had returned to the United States and asked whether the defendants were prepared to admit the statements in evidence and referred to the Evidence Act, 1938. The actual documents which the plaintiff desires to read are photostat copies of statements which were dated in Mar., 1944, and the photostat copies had been re-signed by the soldiers on July 31, 1945. The defendants did not agree to their being admitted and the F matter was raised before Master Moseley on the summons for directions. The defendants took the point that there was no affidavit as to the absence of the soldiers beyond the seas. They were content if a letter from the United States authorities were produced. The matter came on again before Master Baker, and a letter dated Mar. 12 was produced, which in our opinion, having regard to the agreement, is clearly evidence on which the court can act that the conditions in this respect of the Evidence Act, 1938, are satisfied. The precise G nature of these conditions appears later. Master Baker made an order admitting the evidence. The defendants appealed to Croom-Johnson, J., who allowed the appeal on the basis, as submitted by the defendants' counsel before him, as it had been before the master, that he had no jurisdiction. The court was told that Croom-Johnson, J., intimated that if he had had jurisdiction he would not have made the order. From this decision the plaintiff appeals to this court. H

In order to make clear the issue as to jurisdiction, it is necessary to read the relevant sections of the Evidence Act, 1938. Sect. 1 (1) provides :

> In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say (i) if the maker of the statement either (*a*) had personal knowledge of the matters dealt with by the statement . . . and (ii) if the maker of the statement is called as a witness in the proceedings : Provided

that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

Down to the proviso the section is dealing with the admissibility of written statements which would not be admissible under the existing law even though the maker of the statement is called. This matter is also dealt with in sect. 1 (2) which is the subsection under which the present application is made. Sect. 1 (2) says:

> In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsect. (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence (*a*) notwithstanding that the maker of the statement is available but is not called as a witness; (*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

Sect. 1 (3) was referred to in the course of the argument and was relied on to some extent by counsel for the respondents. It provides:

> Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

In the first place, it appears to us quite clear that sect. 1 (2) contemplates that an order may be made before the trial. The opening words and the reference to undue delay make this plain. Such an order would be an interlocutory order. The question is whether such an order can be made in chambers or must be made in open court. It was agreed that, in the King's Bench Division, if the matter cannot be dealt with in chambers, it would have to come before the Divisional Court, presumably on a motion.

The word "court" can clearly in ordinary language bear different meanings according to the context. Considering the matter apart from authority, it is obvious, for example, that the words "an application to the court" may, in certain contexts, clearly mean an application in chambers. In other contexts it might as clearly mean an application to the judge at the trial or otherwise in open court.

Before considering the relevant sections of the Supreme Court of Judicature (Consolidation) Act, 1925, and the Rules of the Supreme Court, it is necessary to see how the authorities stand on this question of construction. In *Baker* v. *Oakes* (1) the rule in question was one which provided that costs should follow the event:

> . . . unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the court shall otherwise order.

No application was made at the trial and it was held that "court" did not include a judge in chambers. BRETT, J.A., referred to what is, no doubt, a common formula when it is intended to give jurisdiction in chambers, *viz.* "the court or a judge." He also referred to the importance of the normal right to costs and clearly thought an application to the Divisional Court appropriate if the issue was not dealt with at the trial.

Other cases show that there is no rigid rule. We were referred, among others, to *Smeeton* v. *Collier* (2), *Dallow* v. *Garrold* (3), and *Clover* v. *Adams* (4). In *Smeeton* v. *Collier* (2) the question was whether a power conferred on the court could be exercised by a judge in chambers. PARKE, B., said (1 Exch. 457, at pp. 463, 464):

> In the construction of the Act, we must hold that the courts may exercise the power given to them by it in the common and ordinary way, unless it contain something to the contrary . . . By the application of this principle of construction to the present statute, upon which this question arises, it seems to me it is not limited to acts done in court [*i.e.*, in open court], and therefore that my brother PLATT [the judge in chambers] clearly had authority to make this order.

In recent years, the expression "the court or a judge" has been frequently used, and, in this expression, the "court" means a judge or judges in open court, and "a judge" means a judge sitting in chambers.

We are, however, clear, both on authority and in principle, that there is no rigid rule which compels us to construe the word "court" as excluding jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. In the first place, interlocutory applications are normally made in chambers and not to the Divisional Court. The matter, however, does not rest there. R.S.C., Ord. 30, r. 2 (2) (*d*), gives power to the court or a judge on the summons for directions to make orders relating to documentary evidence. This rule is in very wide terms and questions might arise if it was sought to be used to make orders, otherwise than by the agreement of the parties, which admitted evidence which was inadmissible under the common law rules of evidence as extended or modified by statute. That question does not arise here. When jurisdiction is given to the judge in chambers, the jurisdiction, with certain exceptions which are not material, can be exercised by a master by R.S.C., Ord. 54, r. 12, made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (1) (*d*). We should have stated that R.S.C., Ord. 30, r. 2 (2) (*d*), was in operation at the time of the passing of the Evidence Act, 1938. The general subject-matter dealt with in the provisions of that Act with which we are concerned was, therefore, one which, under existing rules, could be dealt with in chambers. In our opinion, therefore, the interlocutory applications contemplated by the section of the Evidence Act, 1938, with which we are concerned, falling as they do within the words of R.S.C., Ord. 30, r. 2 (2) (*d*), are covered by it, and the appellant succeeds on the issue of jurisdiction.

Counsel for the respondents took two further points. The first of these was that there was no evidence that the soldiers were "beyond the seas." In our opinion, this question does not arise under the Evidence Act, 1938, s. 1 (2), where those words do not appear. The letter which was accepted by counsel for the respondents instead of an affidavit might well be regarded as evidence of absence beyond the seas if it were necessary, but it is, in our opinion, clearly sufficient to satisfy the words of sect. 1 (2). He also submitted that the soldiers were "interested persons" within sect. 1 (3) of the Act. We can find no evidence of this. "Interested" clearly means personally interested in the result of the proceedings. Counsel for the respondents also drew attention to the reference in the master's order to R.S.C., Ord. 37, r. 1. It is unnecessary to set out that order which gives power to the judge at the trial to exercise, *inter alia*, the powers under R.S.C., Ord. 30, r. 2 (2) (*d*). We think that the relevant order is R.S.C., Ord. 30, r. 2, but, in our opinion, it is not necessary to refer to it in the order to be made.

On the merits, counsel for the respondents relied on the delay and on other matters. We have considered his submissions, but subject to a matter mentioned below, we think the plaintiff is entitled to an order. It is obviously of great convenience that a party should be able to know whether or not documentary evidence is admissible before he prepares for trial. If an order is refused it may, in some cases, not be worth proceeding further. He ought also to be relieved, if the facts as then known justify it, from the expense of further efforts to trace or procure the attendance of the witnesses. If he was in all or most cases left to apply to the judge at the trial, these objects would not be attained. On the other hand, if, contrary to expectation, a witness became readily available at the time of the trial, it might be wrong that his statement should be read instead of his giving oral evidence. We put this point to counsel for the appellant who was willing to accept a conditional order in the following terms:

> That pursuant to the Evidence Act, 1938, the two written statements exhibited to an affidavit sworn herein by William Simpson Nicoll Harrison on May 21, 1946, be admitted at the trial of this action as evidence tending to establish the several facts therein respectively set out unless it be proved or admitted at the trial of the action that the person whose statement it is sought to read is present in this country and available as a witness.

In these circumstances, the appeal will be allowed.

Appeal allowed. Costs of the application down to and including the order of the master to be costs in the action. The subsequent costs of the appeal to the judge and to the Court of Appeal to be the plaintiff's costs in any event.

Solicitors: *Harrison, Sugden & Co.* (for the appellant); *Thompson & Co.* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

ADAMS *v.* NAYLOR.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Porter, Lord Simonds and Lord Uthwatt), March 28, April 1, May 29, 1946].

Emergency Legislation—"War injuries"—"Caused by the use of explosive in combating the enemy"—Minefield on foreshore—Injuries to children by exploded mine—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *ss.* 3, 8—*Personal Injuries (Civilians) Scheme,* 1941 (*S.R. & O.* 1941, No. 226). A

On Aug. 8, 1942, three boys, aged about 13, were playing on certain sandhills which fringe the Lancashire coast just above the high-water mark. In 1940 and 1941 the military authorities, as a provision against enemy attempts at invasion, had constructed a minefield in the sandhills, and, to prevent the risk of the public entering the mined area, had surrounded it with a fence about 6ft. high, consisting of uprights and coils B of thick barbed wire, a double coil on the lower part and a single coil above. Against this fence, at intervals of about 100 yds., notices were affixed in the form of red boards with a warning in white letters of extreme danger and a direction to "keep out." The wind, however, had in places blown the sand so as to alter the contour of the ground and to bury the lower part of the fence. At the place where the boys were playing, a hillock of sand had formed which was sufficient to submerge for a length of some C 15 ft. all of the fence except the top 12 or 15 ins. and to cover the lettering of the adjacent notice board. In retrieving a ball which had been kicked over the top strand of wire one boy happened to cause one of the buried mines to explode and was instantly killed, while another was seriously injured. In an action for damages by the injured boy and the administratrix of the deceased boy the respondent admitted that he was the D officer of the Royal Engineers who was at all times in control and responsible for the maintenance and safeguarding of the minefield, and he was sued on an allegation of negligence in failing to keep the fence effective, in failing to cause adequate inspection and in not giving adequate warning of danger. In addition to denying negligence the respondent pleaded that the death of the one boy and the injuries to the other were caused by a "war injury" within the meaning of the Personal Injuries (Emergency E Provisions) Act, 1939, and that the claims in the action were therefore barred by sect. 3 of that Act. CASSELS, J., decided the case on that ground. SCOTT, L.J., and MORTON, J., thought the section did not cover the facts in the present case and reached their respective conclusions on other grounds. MACKINNON, L.J. did not deal with the point:—

HELD: the mine was being used in combating the enemy and the injuries were war injuries caused by that use; the section therefore applied and in F consequence the claim in the action failed and the appellants were remitted to any rights they might have under the Personal Injuries (Civilians) Scheme 1941.

Per cur.: Since a claim in tort cannot be made directly against the Crown it is customary to make it against the servant of the Crown whose fault will justify a personal action against him, in the hope, or with the G promise, that, if the action succeeds, public funds will be used to pay the damages and costs awarded against the defendant. But it is surprising and misleading to refer to him as the "nominal" or "nominated" defendant. Such language seems to suggest that the issues at the trial are really issues between the plaintiffs and the Crown and that the defendant is mentioned as a party merely as a matter of convenience. That is not the true position. The courts before whom such a case comes H have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owes a duty of care to the plaintiffs and has failed in discharging that duty. The Crown is not in any sense a party to the action.

Decision of the Court of Appeal ([1944] 2 All E.R. 21) *affirmed on other grounds.*

[**EDITORIAL NOTE.** This decision depends upon a consideration of the question whether a minefield is being used in combating the enemy although no enemy is present.

The House take the same view as to this as was taken by Cassels, J., at the original hearing, namely, that since a minefield is in its final position as an instrument of war and acts, *inter alia*, as a deterrent to fighting at that point, it is in fact used in combating the enemy, and the claim under consideration therefore fails.

The enormous increase in the activity of the State during and since the war with the resultant increase in actions of tort arising out of its operations, has tended to obscure the constitutional principle that "the King can do no wrong." The reminder in these judgments that there is in such cases no such thing as a "nominal" defendant is timely. Until a change in the law is made (long overdue, in the opinion of many) the rule remains in full force, and unless the personal negligence of the Crown servant sued can be established an action of tort must fail.

For the Personal Injuries (Emergency Provisions) Act, 1939, ss. 3, 8, see HALSBURY'S STATUTES, Vol. 32, pp. 1063, 1065 ; and for the Personal Injuries (Civilians) Scheme, 1941, see *ibid.*, Vol. 34, p. 795.]

Appeal from a decision of the Court of Appeal, dated June 21, 1944, and reported ([1944] 2 All E.R., 21). The facts are fully set out in the opinion of Viscount Simon.

Rose Heilbron for the appellants.

The Attorney-General (*Rt. Hon. Sir Hartley Shawcross, K.C.*) and *H. I. Nelson, K.C.* for the respondent.

The House took time to consider its opinion.

Viscount Simon: This is an appeal from an order of the Court of Appeal (MacKinnon L.J. and Morton, J., Scott, L.J., dissenting), dated June 21, 1944, affirming a judgment dated Nov. 11, 1943, of Cassels, J., sitting without a jury at Liverpool Assizes, in favour of the respondent in consolidated actions in which the appellants were the plaintiffs and the respondent was the defendant.

On the afternoon of Aug. 8, 1942, three boys, Robert Adams, aged 12, Charles Adams, aged 13, and Frank Smith, aged 13, were playing on the sandhills which fringe the Lancashire coast between Crosby and Southport just above the high-water mark. In 1940 and 1941 the military authorities, as a provision against enemy attempts at invasion, had constructed a minefield in the sandhills, and, to prevent the risk of the public entering the mined area, had surrounded it with a fence about 6 ft. high, consisting of uprights and coils of thick barbed wire, a double coil in the lower part and a single coil above. Against this fence, at intervals of about 100 yds., notices were affixed in the form of red boards with a warning in white letters of extreme danger and a direction to "keep out." The wind, however, had in places blown the sand so as to alter the contour of the ground and to bury the lower part of the fence. At the place where the boys were playing, a hillock of sand had formed which was sufficient to submerge for a length of some 15 ft. all of the fence except the top 12 or 15 ins. and to cover the lettering of the adjacent notice board. One of the boys kicked a tennis ball over the top strand of wire and in retrieving it Frank Smith happened to cause one of the buried mines to explode and was instantly killed, while the appellant, Robert Adams, was seriously injured. The other appellant is the mother of Frank Smith and is suing as administratrix of the boy's estate.

The respondent admits that he is the officer in the Royal Engineers who was at all times in control and responsible for the maintenance and safeguarding of the minefield, and he is sued on an allegation of negligence in failing to keep the fence effective, in failing to cause adequate inspection and in not giving adequate warning of danger.

In addition to denying negligence, the respondent pleads that the death of Frank Smith and the injuries to Robert Adams were caused by a "war injury" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, and that the claims in the action are therefore barred by sect. 3 of that Act. Cassels, J. decided the case on this ground: Scott, L.J. and Morton, J. thought that the section did not cover the facts in the present case and reached their respective conclusions on other grounds: MacKinnon, L.J. did not deal with the point.

After the argument before us on this point was concluded, it appeared that the House was unanimous in holding that the section did apply, and we consequently dismissed the appeal with the intimation that our reasoned opinions would be delivered later.

The Personal Injuries (Emergency Provisions) Act, 1939, was passed on the outbreak of war. Its long title is:

> An Act to make provision as respects certain personal injuries sustained during the period of the present emergency,

and its primary object was to authorise the making of a scheme under which payments might be made out of public funds in respect of war injuries sustained by defined classes of persons. Some such arrangement was obviously called for, since otherwise victims of German air raids (to take one example), would, generally speaking, have no claim for any payment or compensation. The statute [by sect. 1 (1) (*a*)] provided that the war injuries which would attract payment under the scheme should be such as were:

> . . . sustained by gainfully occupied persons (with such exceptions, if any, as may be specified in the scheme) and by persons of such other classes as may be so specified . . .

The scheme applicable at the date when this accident happened was the Personal Injuries (Civilians) Scheme, 1941. In addition to war injuries sustained by a gainfully occupied person, this scheme covers a war injury sustained by a person who either had attained the age of 15 years at the date of the injury or has attained that age since that date.

As a complement to the authorisation to bring such a scheme into existence, sect. 3 of the Act provides that no compensation or damages shall be payable in respect of war injury such as, apart from the provisions of the Act, would be payable (*inter alia*):

> . . . whether by virtue of any enactment, by virtue of any contract, or at common law . . . on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

If, therefore, the claim made by or on behalf of these two boys is "a war injury," sect. 3 is a conclusive bar to the claims in this action and any remedy must be sought, instead, in the provisions of the scheme so far as the scheme would cover their case.

The definition in the Act of "war injuries" is as follows [sect. 8]:

> "War injuries" means physical injuries—(*a*) caused by—(i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (*b*) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

Counsel for the appellant contended that the injuries to the two boys did not fall within this definition. According to this argument, the burying of the mine which exploded was not "the use of any weapon, explosive, or other noxious thing . . . in combating the enemy." She argued that this language could not apply when there was no enemy at or near the spot to be fought and that "combat" implied active fighting against an actual invader. This was also the view of SCOTT, L.J., and of MORTON, J. SCOTT, L.J. supported his view by observing ([1944] 2 All E.R. 21, at p. 27):

> I cannot think it was the intention of Parliament to take away a civilian's right of action in such a case as the present, and on ordinary principles of statute interpretation the fundamental right of the subject of coming to the King's courts for redress of wrongs should not be treated as taken away by Parliament except by quite clear language.

I think, however, that this view fails to take sufficiently into consideration that the primary object of the Act is not to take away rights of compensation but to make provision for compensation under a scheme which would cover large numbers of civilians who would otherwise not be compensated at all. The list of those covered by the scheme is not the same as the list of those excluded from taking ordinary proceedings, but the primary object of the Act is to give rights rather than to take them away.

MORTON, J. ([1944] 2 All E.R. 21, at p. 30) thought that if the words were interpreted to cover this case, as CASSELS, J. had held:

> . . . it might well be held that a person who performs the vital act of filling a shell at a factory is "combating" the enemy.

I do not agree that this would follow, for the preparation of a weapon, to make it ready for use, and even the storing of a weapon till it is used, are quite distinct from the actual using of the weapon. If the mine is not being used when it has been buried in the sand in the hope that the enemy will step on it or, alternatively, in the hope that the barrier of the minefield will prevent him from advancing over it, when is it used ? It seems to me that the mine was being used in combating the enemy and the injuries were war injuries caused by this use. Counsel for the respondent pointed out, by way of analogy, that if one were to imagine British sailors landing on the shore and marching over the minefield with a result that they caused a mine to explode and were injured thereby, it would A be natural to say that they were injured because the mines were being " used " in combating the enemy.

I agree with the trial judge in thinking that the words do apply to the circumstances we have to consider and that in consequence the claim in the action fails and the appellants are remitted to any rights they may have under the scheme.

What I have said disposes of the matter, but there is one feature of the issues B raised, apart from the statute, upon which it seems well to add a word.

The claim is a claim in tort and since such a claim cannot be made directly against the Crown, it is customary to make it against the servant of the Crown whose fault will justify a personal action against him, in the hope, or with the promise, that, if the action succeeds, public funds will be used to pay the damages and costs awarded against the defendant. It is common practice, C when a Crown servant may be involved, for the Crown on request to supply the name, for example of the driver of a Crown vehicle or of the navigating officer of a Crown ship at the time of the accident. Otherwise the plaintiff could in many cases not commence his action at all. It is only fair that the Crown authorities, when appealed to by the plaintiffs to furnish the name of the Crown servant who was in charge of the minefield and responsible for its maintenance, should comply with the request ; and in the defence it is admitted that the D defendant is the person who was at all material times in control and responsible for the maintenance and safeguarding of the minefield. The question whether he is personally liable is of course a question for the court on the evidence. But it is to me somewhat surprising and, I think, misleading, to refer to him, as the evidence does, as the " nominal " or " nominated " defendant. Such language seems to suggest that the issues at the trial are really issues between the plaintiffs and the Crown and that the defendant is mentioned as a party merely E as a matter of convenience. That is not the true position. The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owes a duty of care to the plaintiffs and has failed in discharging that duty.

Whether the plaintiffs in the present case would succeed in doing this it is F superfluous to inquire, since the decision goes against them on other grounds ; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

Lord Thankerton : My Lords, I have had the opportunity of considering G the opinion delivered by Viscount Simon, and I agree with his reasoning and his conclusion that the consolidated actions are excluded by the Personal Injuries (Emergency Provisions) Act, 1939.

As regards the intervention of the Crown by " furnishing the name, rank and other particulars of the officer who should be made defendant," it becomes unnecessary to come to a decision in this case as to what its implications are, or as to the meaning of the first question to the respondent in this case as to H whether he was the " nominal defendant in this matter." It is beyond doubt that no claim in tort will lie against the Crown in respect of a wrongful act done by its servants in the performance or supposed performance of their duty ; the only remedy, if any, must be against the person who actually committed the wrongful act as personally liable therefor. It would seem to be equally clear that in an action against the person alleged to have actually committed the wrongful act, (1) any nomination by the Crown is quite unnecessary, and (2) any suggestion by the Crown as to who actually committed the wrongful act is improper, and may tend to prejudice the defence. It is not for the Crown to say who is, or may be, personally liable. This second point is well illustrated in the present case, in which the respondent appears neither to have been at the top nor the bottom of the ladder of responsibility. On the other hand, there can be no such objection if the Crown merely supplies the name of a member of the Forces who is sufficiently identified in the application—as, for instance, if the request is for the name of the driver of the service vehicle, which was involved in the accident, or the name of the member of the Forces who was in command of the body of men—large or small—involved in the accident; for that would require no element of selection by the Crown. But that was not the form of request in the present case, *viz.* "We should be obliged if you would furnish us with the name, rank and other particulars of the officer who should be made defendant."

Lord Porter: My Lords, I find myself in complete agreement with the opinion expressed by Viscount Simon and I concur in the result.

Lord Simonds: My Lords, the facts in this case have been fully stated and I do not restate them. I propose only to say a few words upon the question on which we differ from the opinions expressed by Scott, L.J. and Morton, J. in the Court of Appeal. That question is whether the Personal Injuries (Emergency Provisions) Act, 1939, affords a good defence to the actions brought by the appellants against the respondent. My Lords, it is conceded that, if the injuries suffered by the deceased boy Frank Smith and the appellant Robert Adams were "war injuries" within the meaning of the Act, the defence must prevail. What then are "war injuries"? Omitting words irrelevant to the present case I find them defined [Sect. 8] as

> . . . physical injuries . . . caused by . . . the use of any . . . explosive . . . either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy . . .

The simple question then is whether these two boys suffered injury by the explosion of a mine which was used in combating the enemy, and by that I mean, was at the time of the explosion being used in combating the enemy. My Lords, it will not, I suppose, be denied that a mine whether on land or sea may be a weapon of combat. It is a weapon primarily of defence designed to deny the enemy a line of approach or, if he will not be denied it, to destroy or at least delay him. When then is it used in combating the enemy? It was at this point that counsel for the appellants appeared to me to fail to give any satisfactory answer. She rightly, I think, rejected the view that a minefield is used only when the enemy is in the midst of it and was forced to the contention that it was at least in use in combating the enemy when the attack was "actual" or "imminent." I do not know what in this connection the latter word means. But, whatever it may mean, so to limit the use of the mine in combating the enemy appears to me to ignore its function: it will often be the existence of the minefield which prevents the attack from being either actual or imminent: its use and effect are deterrent, but it is none the less used in combating the enemy. I must conclude then, that, as soon as a minefield is laid *in situ* for the military purpose of preventing the enemy landing at a particular spot or causing him damage and delay if he does so, it satisfies the definition of the Act and that any one who is injured by an explosion of a mine in that field during the war emergency suffers a "war injury."

As the respondent succeeds on this plea, it is unnecessary to deal with any other issue, but I wish to express my emphatic concurrence with what has fallen from Viscount Simon in regard to the view that in such an action as this the defendant is not "nominal" and that the real defendant before the court is the Crown. No one who has experience of these matters will doubt that legislation upon the subject of proceedings against the Crown and particularly in regard to tortious acts committed by its servants is long overdue. It is nearly twenty years ago that the protracted labours of a committee appointed by Lord Birkenhead, whose terms of reference were modified by his successor Lord Haldane, resulted in the production of a draft Bill covering the whole field. Its provisions may not be in all respects satisfactory; at least they would form the basis of discussion. Nothing could indicate more clearly than the circumstances of this case the desirability of clarifying the position, for I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer in His Majesty's Army, to a member of the public in respect of acts done or omitted to be done in course of his military service. I will only say that I am far from fully satisfied that the problems here involved have been fully appreciated in the course of the proceedings. I agree that the appeal should be dismissed.

Lord Uthwatt: My Lords, in this case the Crown in the year 1941 as incident to its war operations took possession of some sandhills near the Lancashire coast and thereon constructed a minefield. Two children in August, 1942, trespassed on the land, and one of them thereby caused a mine to explode. He was killed and his companion was seriously hurt. The question at issue under the Personal Injuries (Emergency Provisions) Act, 1939, is whether the injuries so sustained were " war injuries " as that phrase is defined in that Act.

The definition of " war injuries " in that Act so far as material is as follows:

> " War injuries " means physical injuries caused by . . . the use of any weapon explosive or other noxious thing . . . either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy.

No one doubts that a mine is an explosive and a noxious thing. The argument for the appellants was that in the circumstances the mine was not being used in combating the enemy. Combating, it was said, involved active fighting—a view which appealed to Scott, L.J.—or involved, as regards land operations, the actual presence of an enemy on the soil of this country—a view which appealed to Morton, J. To my mind both these views place on the word " combating " an artificial and unduly narrow meaning, not required by the purposes to which the Act is directed. On the facts the mines had been put in their final position as instruments of warfare. In that position, and merely by virtue of that position, they were being used in combat; for enemy operations in that locality might be thereby deterred or indeed prevented. Neither actual fighting with the enemy nor the presence of the enemy on the soil of this country is implicit in the functional use of mines as instruments of warfare in combating the enemy.

Morton, J. was of the opinion that if the word " combating " covered the operations present in this case it might well be held that a person who performs the vital act of filling a shell at a factory is combating the enemy. I do not agree. In substance such a person is not combating the enemy but doing acts enabling someone else to combat the enemy; and under the definition it is the use of a weapon, explosive, or other noxious thing in combating the enemy—not merely making something for future use in combating the enemy—that is essential.

In my opinion therefore the defence based upon the Act succeeds and this appeal should be dismissed.

This conclusion renders it unnecessary to consider whether apart from the defence given by the Act the defendant was under any liability to the plaintiff, but I desire to make some observations upon this part of the case.

The allegation made in the statement of claim as to the defendant's connection with the matter was that he was the officer of the Royal Engineers in control and responsible for the maintenance and safeguarding of the minefield. It was not suggested that he was in possession of the minefield. On the issue under the Act it was proved that the Crown was in possession of the minefield and had laid the minefield, but on the main issue these facts were not pleaded nor was any plea put forward that the maintenance of an unfenced minefield was justifiable as a due exercise by the Crown of its prerogative or statutory powers relating to the defence of the realm. The Crown—the party responsible—did not appear in the picture at all. So far as the pleadings were concerned, the assumption of control and responsibility for the maintenance and safeguarding of an unfenced minefield on land not in his possession appears to be simply an eccentricity on the part of an officer of the Royal Engineers. This divorce from reality was not allowed to continue. A new departure was made. In the proceedings the Crown was standing behind the defendant and apparently by agreement the defendant was treated as the occupier of the land and identified with the Crown. The question of the defendant's liability was discussed in the Court of Appeal on that footing. The case pleaded against him was not dealt with. VISCOUNT SIMON has emphasized that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with LORD SIMONDS, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question. The matter could not be dealt with on the basis wished by the Crown.

The case indeed is a good example of the shifts to which the Crown is driven by the maintenance of the rule that against the Crown no action for tort will lie. I agree with what LORD SIMONDS has said upon the desirability of legislation dealing with the Crown's liability in tort. Such legislation is long overdue and the increasing activities of the state in affairs which affect the ordinary man make the matter urgent. For the Crown—described by MAITLAND as "the head of a highly organised corporation aggregate of many"—in the application of this rule embraces the state.

Appeal dismissed.

Solicitors: *Sidney Pearlman*, agent for *Livermore & Silverman*, Liverpool (for the appellants); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-law.*]

DWYER AND ANOTHER *v.* MANSFIELD

[KING'S BENCH DIVISION (Atkinson, J.), March 25, 26, 28, 1946.]

Highways—Nuisance—Interference with access to shop—Formation of queues at adjacent shop.

Nuisance—Shopping queues—Interference with access to adjacent shops.

The defendant carried on business as a greengrocer in a shop which was situated between shops occupied by the plaintiffs. On occasions when supplies of potatoes or soft fruit arrived queues of customers formed on the pavement on either side of the entrance to the defendant's shop. In an action for damages for nuisance the plaintiffs alleged that the causing of queues to collect opposite their shops interfered with their respective businesses with a resultant loss of custom:—

HELD: even if the plaintiffs had established that the queues amounted to a nuisance, which they had not, they had failed to prove that the defendant, who had done nothing unnecessary or unreasonable, had created it or was responsible for it; or that they had suffered any damage.

[**EDITORIAL NOTE.** The prevalence of queues owing to shortage of consumer goods makes this case of considerable topical interest. Undoubtedly the practice of forming queues outside shops causes a certain amount of temporary inconvenience to adjacent shopkeepers and their customers, but it is held that where the shopkeeper is carrying on his business in a proper way and doing nothing unnecessary to attract crowds he is not liable for an action for nuisance. The position is clearly distinguishable from that existing in the theatre queue cases, where the acts of the defendant were responsible for the public interest which caused the crowds to collect.

AS TO COMMON LAW NUISANCES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 354—363, paras. 483—485; and FOR CASES, see DIGEST, Vol. 26, p. 427, Nos. 1470, 1471.]

Cases referred to:

(1) *Harper* v. *Haden* (*G.N.*) *& Sons*, [1933] Ch. 298; Digest Supp.; 102 L.J. Ch. 6 148 L.T. 303.

(2) *R.* v. *Jones* (1812), 3 Camp. 230; 26 Digest 423, *1414*.

(3) *A.-G.* v. *Smith* (*W.H.*) *& Sons* (1910), 103 L.T. 96; 26 Digest 425, *1443*.

(4) *Hubert* v. *Groves* (1794), 1 Esp. 147; 26 Digest 453, *1690*.

(5) *Rose* v. *Miles* (1815), 4 M. & S. 101; 36 Digest 212, *553*; *affg.*, S.C. *sub. nom. Miles* v. *Rose* (1814), 5 Taunt. 705.

(6) *Greasly* v. *Codling* (1824), 2 Bing. 263; 26 Digest 454, *1691*; 9 Moore C.P. 489; 3 L.J.O.S.C.P. 262.

(7) *Ricket* v. *Metropolitan Ry. Co.* (*Directors, etc.*) (1867), L.R. 2 H.L. 175; 11 Digest 140, *265*; 36 L.J.Q.B. 205; 16 L.T. 542.

(8) *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N.C. 281; 26 Digest 453, *1684*; 2 Scott 446; 1 Hodg. 281; 5 L.J.C.P. 23.

(9) *Herring* v. *Metropolitan Board of Works* (1865), 19 C.B.N.S. 510; 11 Digest 141, *268*; 34 L.J.M.C. 224.
(10) *Barber* v. *Penley*, [1893] 2 Ch. 447; 26 Digest 428, *1473*; 62 L.J.Ch. 623; 68 L.T. 662.
(11) *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631; 26 Digest 428, *1475*; 83 L.J.Ch. 281; 110 L.T. 284.
(12) *R.* v. *Carlile* (1834), 6 C. & P. 636; 26 Digest 428, *1477*.

ACTION for damages for nuisance. The facts are fully set out in the judgment. A

G. H. Crispin for the plaintiffs.

R. E. Borneman for the defendant.

Cur. adv. vult.

ATKINSON, J.: This is an action brought by the plaintiffs Dwyer and Kornfield, who have shops in High Street North, East Ham, against the defendant, Mansfield, who also has a shop there, in respect of alleged interference with their respective businesses by the causing of queues to collect opposite B their shops, whereby they have lost custom. Dwyer's shop is No. 136. He carries on business as a jeweller. Next door to him No. 134, is the defendant, who carries on business as a greengrocer. Then there is a shop occupied by a man named Schenker. Then comes Kornfield's shop, No. 130. He sells waterproof goods . . .

Queues have been a very common sight during and since the war, particularly in the neighbourhood of food shops, and I should have thought still more so C in the neighbourhood of cinemas. They are evidence of a respect for fair play and orderliness and they are encouraged, and indeed insisted upon, by the police. They are much better than unruly crowds, each struggling to get in first.

What is the law that I have got to apply? What is the test? I think the law is best dealt with for this purpose in *Harper* v. *G. N. Haden & Sons, Ltd.* (1). That was a case where the plaintiff said he was being interfered with by the defendants who were carrying out certain building operations. They were raising D the height of their premises and the usual scaffolding and the like was put up, and there is no doubt it did interfere with the plaintiff's shop. The plaintiff carried on business as a fruiterer, and the defendants were adding another storey to their premises. The trouble began in Aug. 1931 and continued for quite a time. There was a hoarding 7 ft. high right across the footpath and piles of building material. BENNETT, J., had held that the obstruction was illegal. E He also held that the defendant had done nothing beyond what was necessary for the work they were carrying out, but in his view that did not establish the legality of it. The Court of Appeal reversed that decision and LORD HANWORTH, M.R., laid down the law very clearly. ([1933] Ch. 298, at p. 302):

> A long sequence of authorities and judicial pronouncements can be referred to which declare that many inconveniences of the kind in question in this action must be submitted to without there being a legal remedy in respect of them. [He goes on to F talk about the repairing of houses, and drainage, and the like]. It is when the inconvenience is unreasonably prolonged that the public have a right to complain and the party may be indicted for a nuisance: see per LORD ELLENBOROUGH in *R.* v. *Jones* (2); *A.-G.* v. *W. H. Smith & Son* (3). And in cases where an indictment for a nuisance would lie, as for obstructing a public way by the deposit of earth and rubbish, a party in an action on the case can only succeed if he can prove a special injury and grievance to himself: *Hubert* v. *Groves* (4); *Rose* v. *Miles* (5); *Greasly* v. *Codling* (6). That G injury must be the direct, necessary, natural and immediate consequence of the wrongful act: *Ricket* v. *Metropolitan Ry. Co.* (7). In *Wilkes* v. *Hungerford Market Co.* (8) a bookseller recovered the loss occasioned to his business by the diversion of customers from frequenting his shop during the time that the obstruction was unnecessary and unreasonable, but not for the time during which the obstruction was reasonable. [That was the Fisher Street case and access to the books at a shop had been almost completely blocked. At times it was completely blocked for 18 months, and it was left to the jury to say what period of time was reasonable or to what extent had a H reasonable period been exceeded. They found that the period over 12 months was unreasonable, so no damages were given in respect of 12 months, but only for the time which the jury found had been unreasonable.] The wrongful act was only during the former span [that is the time during which it was unnecessary and unreasonable.] . . . The above principles were affirmed and illustrated in *Herring* v. *Metropolitan Board of Works* (9) WILLES, J., there says: It appears to me that the construction of the hoarding being necessary for the due performance of the works by the Board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause for action . . .

Then he says this (*ibid.* at p. 304):

> These cases establish the following propositions [I have not referred to all the cases that LORD HANWORTH, M.R. referred to, but it is his summary]:—(1) A temporary obstruction to the use of the highway or to the enjoyment of adjoining premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and duration. (2) If either of those limitations is exceeded so that a nuisance to the public is created the obstruction is wrongful, and an indictment to abate it will lie. (3) If an individual can establish: (*a*) a particular injury to himself beyond that which is suffered by the rest of the public; (*b*) that the injury is directly and immediately the consequence of the wrongful act; (*c*) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered . . . These conditions mean that there must be a wrongful act in the sense that the user complained of was unreasonably exercised . . .

It really does not matter for the purposes of this case whether you regard it as a public nuisance or a private nuisance. An individual can only sue in respect of a public nuisance if he is able to prove some injury to himself over and above that or different in character from that suffered by the public. In a private nuisance he has merely to prove that through the wrongful acts of the defendant he has suffered material damage.

Then LORD HANWORTH, M.R. goes on with further cases, which I do not think I need refer to. There is an excellent little summary on p. 307. He is referring to *Lingke's* case (10) which he says:

> . . . must be taken as depending upon its particular facts and not as a bar to the current of authority which affirms that the plaintiff must prove that the defendant's act was wrongful, in the sense that it was unnecessary or unreasonable, and so unjustifiable.

LAWRENCE, L.J., said much the same thing (*ibid.* at p. 308):

> A private individual can maintain an action in respect of a wrongful obstruction of the highway; but, in order to do so, he must establish that he has suffered some particular, direct and substantial loss or damage beyond what is suffered by him in common with all other members of the public affected by the nuisance.

He quotes from a judgment of BYLES, J., in *Herring's* case (9) on p. 312:

> As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way; but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected inclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances. [and on the following page, quoting again] These are the sort of things that it is recognised people may do in respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action.

ROMER, L.J.'s judgment is on the same lines.

That is what I have to bear in mind, and that is the law I have to apply: Has the defendant wrongfully—and that means unnecessarily or unreasonably—caused queues to collect which inflicted substantial injury upon either of these plaintiffs? Normally, I am quite satisfied that there was nothing to complain of, but there were times on Fridays and Saturdays in June and July when free and easy access to the plaintiffs' shops may have been at times interfered with . . .

In these days, to suppose that you are suffering a legal wrong because merely half the front of your shop, some feet away, has got a queue of people opposite it, is an absurdity. If there is half the shop left, so that anybody can get in who wants to, to my mind it is nonsense to talk about nuisances . . .

It seems to me that, at the outset the plaintiffs have a great difficulty in this case in proving that anything happened which in fact was a nuisance. I am quite sure that Dwyer fails in that respect, and I think Kornfield does, too, because, although there were several occasions when one might very well say that the queue amounted to a nuisance, I have no evidence of the length of time it was there; but it happened so seldom that I am satisfied that it would be very difficult to hold that a nuisance was established. But, even if it were, that does not carry the plaintiffs very far, because they have got to prove that the nuisance, if there were one, was due to something for which the defendant was to blame, due to an unlawful act, due to doing something which was unnecessary and unreasonable and, therefore, unjustifiable.

What was his position ? The defendant had got, as he had to have, a licence from the Ministry of Food to carry on this shop. The licence specifiies the goods that he is permitted to deal in, mainly vegetables and fruit. The defendant's story was this, and I accept his evidence. He said the trouble in February was this: "Oranges suddenly came on the market and I received, under the A Minister's scheme, a distribution. I received my quota and I had got to sell." There is a statute, or an order, under which a shopkeeper, having goods allotted to him for sale, is bound to sell, and he is bound to sell to all comers. He says: "Queues did form, and in substantial numbers, and I did my best to deal with it. I applied and obtained permission for leave to sell my oranges at the back of my shop." That ended the trouble which was complained of in February. Whenever he got oranges after that he had sold them there, and there was no further com- B plaint when there were oranges. Towards the end of May there were tomatoes, cherries and, later on, strawberries. He quite agrees that when there was a supply allotted to him of soft fruit, which happened occasionally, again he would get queues of the kind complained of, varying in size. "They were very temporary," he says, "because I had very small supplies. They were sold out very rapidly." He said the real trouble and the trouble which caused queues in June, which he agrees was the worst month, was the potato shortage. He said: "In June C and July, tailing off in August, when the main crop came along, there was a great shortage of potatoes. I did what, indeed, probably all greengrocers did; I could not sell and did not sell more than a pound per ration book, so that everybody, all my customers, should, at any rate, get some. This did cause queues. I could not help it. Potatoes were allotted to me. I had got to sell them and sell them in a reasonable and fair way. It is an essential article D of food. People are so anxious to make sure that they get their pound that they did come in large numbers. But what else could I do ? I was doing nothing unreasonable or unjustifiable. The customers were dealt with as rapidly as I could." I cannot think that what he did makes him in any way blameworthy.

In all cases that have been referred to the defendant had done something to create the crowd. If you take the theatre cases, *Charley's Aunt* was the beginning of them. In *Charley's Aunt* case, *Barber* v. *Penley* (10), for two hours E before each performance it was not a matter of queues, but great crowds collected, and crowds of not a very orderly kind. The plaintiff, who kept a lodging house next door, adjoining the theatre, was able to prove that the people who lodged in the house could not get in or out. It was not a matter of there being difficulty; the access to her lodging house was absolutely blocked by unruly crowds for about two hours before each performance every day, and there was a prospect of that continuing for some time. F

Then, in the other theatre case which was relied upon, *Lyons* v. *Gulliver* (11), there were two popular performances daily. The access to the plaintiff's adjacent premises were obstructed during important periods of the day by reason of the assembly of a crowd and the formation of a queue, at times five deep, on the kerb or in the gutter in front of the plaintiff's premises previously to the opening of the doors of the theatre. That was held to be actionable. PHILLIMORE, L.J., G dissented most vigorously, but, COZENS-HARDY, M.R., and SWINFEN EADY, L.J., held that that amounted to a nuisance. But in those two cases, and in every case where an injunction has been granted, the defendant has been responsible for the invitation. He has done something which created the demand, which invited the people there and brought them there. In each of those cases the results could have been avoided, as was pointed out in the *Charley's Aunt* case. If the doors had been opened earlier, so that the people could get in, the crowds would H be avoided or reduced; but, at any rate, they created the demand. They had done something unnecessary.

The case which I think is most helpful here is *R.* v. *Carlile* (12), a case not very far removed from the one I have to deal with. There the defendant was a shopkeeper, and he caused crowds to collect which interfered with the access to other shops. What he had done was this: He had got a grievance against the mayor and various members of the local council and he had made effigies of these people, figures caricaturing them, and put them in his window, and these effigies attracted the crowds which were complained of. It was held that he was, therefore, responsible for creating the nuisance, because he had done something with the intention of attracting people and done something which was wholly unnecessary for the carrying on of his business. PARK, J., said this (6 C. & P. 636 at p. 649):

> In the present case, one question is, whether this act of the defendant was at all necessary for the *bona fide* carrying on of his trade; for if it was, and he did not take A up more time in the doing of it than was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us today, that he considers his trade to be injured by it.

That is the nearest passage I can get which deals with a man carrying on his business in a *bona fide* way and doing nothing but that which was necessary for the carrying on of his business, and that is the comment which PARK, J., makes B about it. So far from the law dropping on him, the law would do what it could to protect him. I have been referred to no case, nor have I been able to find one, where a shopkeeper carrying on his business in the ordinary normal and proper way has been indicted for nuisance or had an action brought against him. If it were so, with a shop carrying on its business in the proper way and distributing food essential for the public, because queues form in their anxiety C to get what is in short supply, there must be thousands of shopkeepers who would be liable to actions in this country. For years we have seen queues, fish queues and all sorts of queues, at least as bad as what we see here. It would really mean that they would be carrying on a necessary business under quite intolerable conditions. Views have differed as to how far the police ought to interfere. PHILLIMORE, L.J. took a very strong view about that. He thought that if what was being done amounted to a nuisance it was for the police D to interfere, but his was a dissenting judgment and the law is that if you really create a nuisance you cannot get away with it by saying the police ought to have seen it did not happen.

But here, even if a nuisance had been proved, I take the view that it has not been proved that the defendant created it or was responsible for it. It was the short supply of potatoes, I am satisfied from his evidence, that caused these queues to collect, and that is not a matter for which he was responsible. Asking E myself again the question "Has it been proved that he did anything which was unnecessary or unreasonable?" I am quite satisfied that he did not. He did everything that he reasonably could; and the plaintiffs would fail on that ground.

When it comes to the third element which they have to prove, damage, they break down completely.

In my view, these actions fail on all three grounds. I think the plaintiffs have failed to establish a nuisance. They have certainly failed to establish that F the defendant has done anything improper, anything illegal, anything unreasonable, anything which he could have avoided. He carried on a normal business in the only way in which he could; and, on the question of whether they have proved damage, I think they have hopelessly failed. Therefore, I give judgment for the defendant, with costs.

Judgment for the defendant with costs.

G Solicitors: *Duthie, Hart & Duthie* (for the plaintiffs); *James H. Fellowes* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

H.M. ATTORNEY-GENERAL AND NEWTON ABBOT RURAL DISTRICT COUNCIL *v.* DYER.

[Chancery Division (Evershed, J.), May 7, 8, 9, 10, 13, 14. 15, June 6, 1946.]

Highways—Dedication—Lane used as public footway for over 40 *years prior to* 1923—*Right of public to use lane disputed in* 1923—*Whether period of* 40 *years must end after* 1934 *when Rights of Way Act*, 1932, *came into operation—Rights of Way Act*, 1932 (*c.* 45), *ss.* 1 (1), (2), (3), (5), (6), 2 (1), 4.

Statutes—Retrospective operation—Rights of Way Act, 1932 (*c.* 45), *s.* 1 (2), (6).

A certain lane had been used as a public footway as of right and without interruption for over 40 years prior to 1923, in which year D., the owner of property through which the lane passed, first disputed the right of the public to use the way. The Rights of Way Act, 1932, s. 1 (2), provides: "Where any such way has been enjoyed as aforesaid for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way." On the facts of the case, it had been found that there was no sufficient evidence that there was no intention to dedicate the way during that period. By sect. 1 (6) of the Act, the period of 40 years mentioned in sect. 1 (2) "shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question" by notice or otherwise. In an action brought by the rural district council to establish the right of way, it was contended on their behalf that the requirements of sect. 1 (2) of the Act had been satisfied. It was contended by D. that the requirements of sect. 1 (2) had not been satisfied because, on the true construction of the Act, the period of 40 years must end on a date later than Jan. 1, 1934 (when the Act came into operation): if the Act were given a retrospective effect, the vested interests of landowners would be adversely affected, and it was contrary to the proper principles of construction so to interpret an Act as adversely to affect existing rights:—

HELD: (i) since the Rights of Way Act, 1932, was substantially a procedural Act, the rule against giving to it retrospective effect had no application.

Marsh v. *Higgins* (1) *and Waugh* v. *Middleton* (2) *distinguished.*

The Ydun (3) *applied.*

(ii) upon the true construction of the Act, by virtue of sect. 1 (6), one or both of the termini of the periods specified in sect. 1 (1) and (2) might be before, as one or both might be after, the date of the Act's commencement, subject to the reservation contained in sect. 2 (1), *viz.*, that the Act might not be relied upon in proceedings pending on Jan. 1, 1934, nor was the Act available, for example, upon an appeal to disturb a judgment by a court of competent jurisdiction pronouncing against the existence of a highway in any such pending, or in earlier, proceedings. The council had, therefore, satisfied the requirements of sect. 1 (2) of the Act, and were entitled to obtain the appropriate relief.

[**EDITORIAL NOTE.** It is a principle that in construing statutes retrospective effect may be given to statutes dealing with matters of procedure. It is decided in this case that the Rights of Way Act, 1932, iss ubstantially a procedural Act, since it is not designed to create new rights or causes of action. Accordingly, the Act is applicable to a period of forty years terminating before the operative date of the Act, although this will have a retrospective effect.

As to Dedication of Highways, see HALSBURY, Hailsham Edn., Vol. 16, pp. 223—236, paras. 269—285; and for Cases, see DIGEST, Vol. 26, pp. 293—311, Nos. 245—430, and Supplement.

For the Rights of Way Act, 1932, see HALSBURY'S STATUTES, Vol. 25, p. 191.

As to the Retrospective Effect of Statutes, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513—516, para. 670; and for Cases, see DIGEST, Vol. 42, pp. 693—700, Nos. 1083—1168.]

Cases referred to:

(1) *Marsh* v. *Higgins* (1850), 9 C.B. 551; 42 Digest 706, *1230*; 1 L.M. & P. 253; 19 L.J.C.P. 297; 15 L.T.O.S. 113.

(2) *Waugh* v. *Middleton* (1853), 8 Exch. 352 ; 42 Digest 626, *274* ; 22 L.J.Ex. 109 ; 20 L.T.O.S. 262.

(3) *The Ydun*, [1899] P. 236 ; 42 Digest 699, *1156* ; 68 L.J.P. 101 ; 81 L.T. 10.

ACTION by the Attorney-General, on the relation of the Newton Abbot Rural District Council, and by the relators as joint plaintiffs claiming : (i) a declaration that there is a public right of way on foot over a certain lane in the parish of Bishopsteignton, near Newton Abbot in Devon ; (ii) injunctions restraining the defendant, the fee simple owner of a tenement at one end of the lane through which the lane passes, from interfering with the use by the public as foot passengers of the lane ; (iii) certain other subsidiary relief. On the facts, it was found that the lane in question was enjoyed as a footway as of right and without interruption for a period of over 40 years immediately prior to the right being brought into question by the defendant in 1923, and there was no sufficient evidence that there was no intention to dedicate the way during that period. The tenement at one end of the lane through which the lane passed was conveyed to the defendant in 1921. In 1923, he sought to exclude the public from the lane and a controversy thereupon ensued between him and the parish council, and later the rural district council (the relators and joint plaintiffs). In 1925, the council intimated to the defendant that they proposed to bring proceedings to establish, if they could, the existence of a public right of way on foot over the lane. As a result, the defendant agreed not to dispute the right of way for foot passengers. In 1937, the defendant reasserted his right to exclude the public from the lane, but desisted on a complaint from the council. From 1941, however, he had again attempted to exclude the public from the lane, with the result that on May 28, 1943, the council issued the writ in this action. The report deals only with the judgment on the question of construction of the Rights of Way Act, 1932.

C. E. Harman, K.C., and *Geoffrey Cross* for the plaintiffs.

Raymond Jennings, K.C., and *Hubert A. Rose* for the defendant.

Cur. adv. vult.

EVERSHED, J. : On this state of facts, the plaintiffs claim the appropriate relief as having satisfied the requirements of the Rights of Way Act, 1932, sect. 1 (2). To the objection of counsel for the defendant that it is not open to the plaintiffs upon their pleadings to invoke the Act, my answer is that the plaintiffs are not bound to plead it. But counsel for the defendant has also raised a second point of some nicety on this aspect of the claim. The period of 40 years covered by the plaintiffs' case ends and must, within the terms of sect. 1 (6) of the Act, end with the time when the defendant first brought the right of the public to use the way into question in 1923 or 1924, *i.e.*, nearly 10 years before the date when the Act came into operation on Jan. 1, 1934. Counsel for the defendant concedes that the periods of 40 or 20 years specified in sect. 1 of the Act may start at a time anterior to its coming into force but contends that, upon the construction of the Act, such periods must end on a date later than Jan. 1, 1934. Any other view would, says he, make the Act retrospective, or retrospective to an extent greater than would be justified by the true canons of interpretation of statutes. Having regard to the lapse of time since the coming into force of the Act, the point may not be of far-reaching importance, but since it is of some public interest I feel bound to deal with it fully.

The language of sect. 1 (2) and (6) of the Act, material to the present issue, are as follows :

> 1 (2) where any such way has been enjoyed as aforesaid [*i.e.*, as of right and without interruption] for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless. . .

By subsect. (6) the period of 40 years :

> . . . shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise.

The reference to notice is a reference to subsect. (3) of the same section, providing that a notice inconsistent with dedication placed before or after, and maintained after, Jan. 1, 1934, shall, in the absence of proof to the contrary, be sufficient to negative any intention to dedicate.

As I construe them, the words which I have quoted from subsects. (1) and (6) would, taken by themselves, appear to cover the case of a period of 40 years

both termini of which were earlier than the date of commencement of the Act. But counsel for the defendant in support of his contention that, since the effect of the Act would otherwise adversely affect the vested interests of landowners, no greater retrospective effect should be given to it than its language necessarily demands, draws attention to certain other of its provisions. The provisions as to notice are clearly intended, as he argues, to give to the landowner a means of protection against the presumption of dedication. Further, the provisions of sect. 1 (5) giving express power to a reversioner to maintain such notices notwith- A
standing the terms of the lease or tenancy, and the provisions of sect. 4, whereby remaindermen have the right to protect themselves by proceedings for injunction as if they were in possession of the land over which the alleged rights of way run, are likewise intended to give means of self-protection to persons whose rights would otherwise be adversely affected by the Act. Finally, counsel for the defendant points to the interval between the passing of the Act (*viz.*, July 12, 1932) and its coming into effect (*viz.*, Jan. 1, 1934). In the light of these considerations B
he claims that it would be contrary to the proper principles of construction so to interpret the Act as adversely to affect existing rights by applying to periods terminating before its coming into operation and before, therefore, the landowners could take the measures for self protection, the opportunity for which the interval between the passing of the Act and its coming into operation must be treated as specially designed to give.

In support of this argument reference was made to *Marsh* v. *Higgins* (1) C
and *Waugh* v. *Middleton* (2), decided upon the question of the extent of the retrospective effect of the Bankruptcy Law Consolidation Act, 1849, and particularly of sects. 224 and 225 of that Act, relating to deeds of arrangement and their binding effect on non-assenting creditors. In *Marsh* v. *Higgins* (1) it was held that the section did not operate to deprive a creditor of his vested rights in an action commenced prior to the coming into operation of the Act D
notwithstanding that a deed had been, in fact, executed (before the commencement of the action) which answered the description of a deed of arrangement within sect. 224 of the Act—the use (*inter alia*) in the sections of the future perfect tense not being regarded as importing retrospective effect, having regard to the use of the same tense elsewhere in the same sections in a sense which could not have been intended as retrospective. In *Waugh* v. *Middleton* (2) the matter was carried a step further, since in that case the defendant had not started E
proceedings when the Act came into operation. It was held that, notwithstanding the use of the word "now," the plaintiff was not debarred from prosecuting his claim on the ground (as pointed out by Alderson, B.), that it would be monstrous to deprive the plaintiff, who had not assented to the pre-Act deed, of his right of action when by no possibility could he have obtained the protection which the Act of bankruptcy (*i.e.*, the execution of the deed by the debtor) gave to the non-assenting creditors as a consideration why they should F
be bound by it.

The argument is formidable, but I have reached a conclusion adverse to it. In the first place, it is to be borne in mind that the Act of 1932 is substantially a procedural Act in the sense that it is designed not to create new rights or new causes of action, but rather to simplify and render more easy the means of making good claims of a well-established kind. In so far as the statute may properly G
be described as procedural, the rule against giving to it retrospective effect has no application: see, *e.g.*, MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 199. It is no doubt true that vested rights may in a sense be thereby affected, but this is likely to be true, incidentally, of any so-called procedural Act—for example, the Public Authorities Protection Act, 1893, which, though barring altogether a cause of action after the specified interval of time, was held nevertheless to apply where the cause of action arose before the Act came into H
operation: see *The Ydun* (3). In this connection the Rights of Way Act, 1932, is, in my judgment, distinguishable from the provisions of the Bankruptcy Law Consolidation Act, 1849, the subject of the two cases above cited, which created altogether new rights and obligations for the first time. True it may be that the provisions of the 1932 Act relied upon by counsel for the defendant give a measure of protection to landlords of which they may be deprived in the case of a period which has expired before Jan. 1, 1934, but the effect of these provisions is not conclusive one way or another, and in every case the question of fact will

remain whether, in all the circumstances, an intention to dedicate is or is not to be inferred.

Apart from these general considerations there are, in my judgment, other provisions in the Act pointing against the defendant's view. In the first place, the reference in sect. 1 (6) to "notice as aforesaid" appears necessarily to contemplate a case in which the alleged public right has been brought into question before the operation of the Act, *i.e.*, by a notice erected before that date and since maintained. Nor in that subsection is there any context (such as appeared in *Marsh* v. *Higgins* (1)) necessarily limiting the sense of the future perfect "shall have been." But, as a stronger indication, counsel for the plaintiffs relied upon the terms of sect. 2 (1), providing in effect that nothing in the Act should effect any pending proceedings and that where a court of competent jurisdiction in such proceedings decides, or in earlier proceedings has decided, against the existence of the alleged right of way, the Act should not apply save in relation to enjoyment of the way after the date of the decision. If the argument for the defendant is well-founded, the whole of this subsection would appear to be otiose or, at best, declaratory only, and counsel for the defendants were constrained to admit that it must be taken to have been inserted *ex abundanti cautela.*

I ought not, in my view, to give to a whole subsection of this short Act so negative an effect, unless I am compelled so to do, and in my judgment I am not so compelled. In my judgment, the true interpretation of the Act is that, by virtue of sect. 1 (6), one or both of the termini of the periods specified in sect. 1 (1) and (2) may be before, as one or both may be after, the date of the Act's commencement, subject to the important reservation contained in sect. 2 (1), *viz.*, that the Act may not be relied upon in proceedings pending on Jan. 1, 1934 (proceedings in which necessarily the use of the alleged way must have been brought into question before that date) nor is the Act available, for example, upon an appeal to disturb a judgment by a court of competent jurisdiction pronouncing against the existence of a highway in any such pending, or in earlier, proceedings.

I should refer to a further argument on the part of counsel for the defendant, namely, that if the view contended for by counsel for the plaintiffs is correct, then the end of the period relied upon might in theory be on a date however remote before the commencement of the Act—it might, *e.g.*, be not in 1924 but in 1824. This argument is surely over-fanciful. If one can sensibly assume a case in which the alleged right has been more or less continuously in dispute for over 100 years without its having been litigated, it is difficult to see how the claimants could prove actual enjoyment as of right and without interruption for a full period which would have ended about a quarter of a century before the birth of the oldest possible local inhabitant.

In the result, therefore, I hold that the plaintiffs are entitled to rely upon the 1932 Act in respect of a period of upwards of 40 years prior to the defendant's assertion of his right to exclude in 1923 or 1924, and that they have satisfied all the requirements of sect. 1 (2) of the Act in regard to such period.

I should add that I must not be taken to be expressing any view on the meaning of the words "capable of dedicating" in sect. 1 (1) of the Act of 1932.

The conclusion of the whole matter is that the plaintiffs are, in my judgment, entitled to the declaration and injunction for which they ask. They are also entitled to their costs of the action.

Judgment for the plaintiffs with costs.

Solicitors: *Smith & Hudson* (for the plaintiffs); *Pyke, Franklin & Gould* (for the defendant).

Reported by B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

STAFFORD *v* LEVY.

[Court of Appeal (Morton and Tucker, L.JJ.), June 3, 1946.]

Landlord and Tenant—Rent restriction—Tenant adjudged bankrupt—No disclaimer of lease by trustee in bankruptcy—Bankrupt permitted by trustee to remain in residence—No statutory tenancy acquired.

By a lease dated Jan. 30, 1943, the respondent let a house in London to the appellant at a rent of £75 a year. In February, 1944, the appellant was adjudicated bankrupt, and thereupon, by the operation of the bankruptcy law, the lease became vested in his trustee in bankruptcy. The trustee in bankruptcy did not disclaim or assign the lease, but retained the premises, continued to pay the rent, and permitted the appellant and his wife to continue to reside in the house. The lease determined on Mar. 25, 1946, and the trustee in bankruptcy did not claim any further interest in the premises. In an appeal from an order refusing leave to defend and giving judgment for possession of the house to the respondent, it was admitted that there could be no challenge to the right of the respondent to possession unless the appellant had become in some way a statutory tenant under the Rent Restrictions Acts :—

Held : the appellant could not have become a statutory tenant under the Rent Restriction Acts ; there was, therefore, no arguable point of law to be determined and the appeal must fail.

[**EDITORIAL NOTE.** As pointed out by Lord Sterndale in *Reeves* v. *Davies* (1), once the interest of a tenant has vested in his trustee in bankruptcy he has no further interest in the premises. No question of a statutory tenancy can, therefore, arise, whether the trustee disclaims during the currency of the lease, as in *Reeves* v. *Davies* (1), or whether the lease terminates by effluxion of time as in the circumstances now reported.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401 ; and for Cases, see DIGEST, Vol. 31, pp. 575, 576 ; Nos. 7226-7255.]

Cases referred to :

(1) *Reeves* v. *Davies*, [1921] 2 K.B. 486 ; 31 Digest 577, *7264* ; 90 L.J.K.B. 675 ; 125 L.T. 354.

(2) *Sutton* v. *Dorf*, [1932] 2 K.B. 304 ; Digest Supp. ; 101 L.J.K.B. 536 ; 47 L.T. 171.

Interlocutory Appeal from an order of Hallett, J., dated May 17, 1946. The facts are fully set out in the judgment of Morton, L.J.

H. V. Lloyd-Jones for the appellants.

J. C. Leonard for the respondent.

Morton, L.J. : This is an appeal by the defendants from an order of Hallett, J., whereby he dismissed an appeal from a master, the master having refused the defendants leave to defend and having given judgment for possession of a house to the plaintiff.

The facts are not in dispute, and the only question we have to determine is whether the defendants have made out that there is an arguable point of law to be determined, so that they should have leave to defend. By a lease dated Jan. 30, 1943, the plaintiff let a house known as No. 14 Cholmley Gardens, Hampstead, to the first-named defendant for the term therein mentioned at a rent of £75 a year. In or about the month of February, 1944, the first-named defendant was adjudicated bankrupt, and thereupon, by the operation of the bankruptcy law, the lease became vested in his trustee in bankruptcy. The trustee in bankruptcy did not disclaim or assign the lease, but retained the premises and continued to pay the rent. It appears that, under some arrangement of which we know nothing, the bankrupt and his wife were permitted by the trustee in bankruptcy to continue to reside in the house. It is admitted that the lease determined on Mar. 25, 1946, and the trustee in bankruptcy did not claim any further interest in the premises, and it is admitted that there can be no challenge to the right of the plaintiff to possession, unless the defendants have become in some way statutory tenants under the Rent Restrictions Act.

For my part, I am quite unable to see how the defendants can have become statutory tenants. It was pointed out by Lord Sterndale, M.R., in *Reeves* v. *Davies* (1) ([1921] 2 K.B. 486, at p. 490) :

> . . . where by statute the interest of the tenant of a house has been entirely divested or taken away from him and vested in his trustee by operation of law, the tenant has no more interest in the property than any passer-by in the street, and has no right to intervene.

It is true that in *Reeves* v. *Davies* (1) there was a disclaimer by the trustee in bankruptcy, but in my view the absence of a disclaimer does not assist the defendants in the present case. The only result is that, while in *Reeves v. Davies* (1) the lease came to an earlier end owing to the action which the trustee in bankruptcy thought fit to take, in the present case the lease was allowed to determine, without any disclaimer by him, on Mar. 25, 1946.

The other case cited to us, *Sutton v. Dorf* (2), does not, in my opinion, bear upon the point now before us. It was a decision of the Divisional Court that a statutory tenancy under the Rent Restrictions Act is not "property" of the statutory tenant within the meaning of the Bankruptcy Act, 1914, s. 167, and does not pass to his trustee in bankruptcy under sec. 63 of that Act. That case does not, I think, assist us in any way. I shall only observe that I think there must be some inaccuracy in the statement of the facts in that case, as from the facts stated in [1932] 2 K.B. at p. 304 it would appear as though the contractual tenancy was still continuing at the time when the trustee in bankruptcy disclaimed. However, I think there must be some omission in the statement of facts, as the court was clearly invited to deal with that case, and did deal with that case, on the footing that the tenant was in possession under a statutory tenancy.

I cannot see that any defence is raised in this case which could possibly succeed, and in my view the appeal must be dismissed.

TUCKER, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade* (for the appellants); *J. N. Nabarro & Sons* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law*].

Dicta of MORTON, L.J., at p. 259, *applied.* HARRISON *v.* HOPKINS. [1949] 2 All E.R. 597.

LAWRANCE *v.* HARTWELL.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), June 25, 26, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Contractual tenancy—Death of tenant—Defendant sole executors and sole beneficiary—Defendant residing in house at time of tenant's death and continuing to reside there afterwards—Contractual tenancy terminated by notice to quit—Whether defendant "tenant" within the meaning of the Rent Restrictions Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17) *s.* 12 (1) (*f*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 3 (1).

By a verbal agreement made on June 25, 1940, the landlord of a house to which the Rent Restrictions Acts applied let the house to Mrs. C., the rent being payable 6 weeks in advance. About July 14, 1944, H., a step-niece of Mrs. C., went to live with her in the house and had continued to live there up to the present time. Mrs. C. died on Jan. 9, 1945, and by her will H. was appointed sole executrix and was the sole beneficiary. Probate of the will was granted to H. on Jan. 27, 1945. On June 21, 1945, the landlord gave H. notice to quit expiring on Aug. 13, 1945, and on Dec. 27, 1945, he started an action for recovery of possession. It was contended on his behalf that H. was not entitled to the protection of the Rent Restrictions Acts because her occupation immediately before the expiry of the notice to quit was in her capacity as executrix and a person holding in a representative capacity could not become a statutory tenant since the Acts gave a purely personal right of residence:—

HELD: (i) since, on Mrs. C.'s death, her interest in the house vested in H., H. was *prima facie* a person "deriving title under the original" tenant, and therefore herself became a tenant under the Acts by virtue of sect. 12 (1) (*f*) of the 1920 Act. Since H. was sole beneficiary, as well as executrix, under Mrs. C.'s will and was genuinely occupying the house as her residence, she was entitled to the protection of the Rents Restrictions Acts.

(ii) an executor who is living in the house at the time of the testator's death and at the time the notice to quit expires, and who has not up to that time taken any step to divest himself of the interest in the property, becomes a statutory tenant.

[**EDITORIAL NOTE.** This case considers the question of how far a person holding in a representative capacity can become a statutory tenant. It was held in *Mellows* v. *Low* [1923] 1 K.B. 522 that an administrator, and in *Collis* v. *Flower* (2) that an executor, were statutory tenants, as being persons "deriving title under the original tenant." In *Skinner* v. *Geary* (1) Scrutton, L.J., pointed out that in *Mellows* v. *Low* no notice to quit had ever been given, and the common law tenancy therefore remained, while in *Collis* v. *Flower* (2), which in his view, was wrongly decided, notice to quit was given after the tenant's death, and the executor was not living in the house. From the judgment of Scrutton, L.J., in *Collis* v. *Flower* (2) it would seem that where the executor is in actual occupation and has not assented to a bequest to anyone else there is nothing to exclude him from the protection of the Rent Restrictions Acts, and it is so held in the case now reported.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334-335, paras. 400, 401; and for Cases, see DIGEST, Vol. 31, pp. 562, 563, Nos. 7097-7107, and Supplement.]

Cases referred to:

(1) *Skinner* v. *Geary*, [1931] 2 K.B. 546; Digest Supp; 100 L.J.K.B. 718; 145 L.T. 675.

(2) *Collis* v. *Flower*, [1921] 1 K.B. 409; 31 Digest, 563, *7105*; 90 L.J.K.B. 282; 124 L.T. 510.

Appeal by the plaintiff from an order of His Honour Judge Cave, K.C., made at Bournemouth County Court and dated Feb. 19, 1946. The facts are fully set out in the judgment of Morton, L.J.

Stephen Chapman for the appellant.

J. T. Molony for the respondent.

Morton, L.J.: In this case the plaintiff, as the owner of a house known as "Westcott," 86 Redhill Drive, Bournemouth, claimed possession of that house as against the defendant. The county court judge refused the order for possession and held that the defendant was protected by the Rent Restrictions Acts. In my view, the decision of the county court judge was right, notwithstanding the skill with which counsel for the plaintiff has constructed an argument out of what I regard as being rather unpromising material.

The facts are these. The house was bought by the plaintiff in 1926 and in 1934 it was let by him to one Charles for a term of 3 years certain at a rent of 23*s*. 6*d*. a week. Charles continued in occupation as tenant after the expiry of the 3 years' term, but, at some time in or before 1940, Charles died and his widow continued to live in the house. On June 25, 1940, a new agreement was come to, a verbal agreement between the plaintiff and Mrs. Charles, whereby Mrs. Charles agreed to stay on at a rent which was apparently 23*s*. 6*d*. a week to start with although it may have been reduced to 21*s*. a week later, that rent being payable every 6 weeks in advance. At some time after July 14, 1944, the defendant, who was a step-niece of Mrs. Charles, went to live with Mrs. Charles in this house and the defendant has continued to live in the house up to the present day. On July 25, 1944, Mrs. Charles made her will, and there is now no doubt that by that will the defendant was appointed sole executrix and was the sole beneficiary. On Jan. 9, 1945, Mrs. Charles died and on Jan. 27, 1945, probate of her will was granted to the defendant. There is no doubt that at this stage all the rights of Mrs. Charles in respect of that tenancy became vested in the defendant. On June 19, 1945, the present plaintiff started an action for possession against the present defendant which was dismissed by the same county court judge. He dismissed it, I understand, on the ground, which appears to be a perfectly sound ground, that the contractual tenancy had never come to an end and it vested in the defendant as executrix. On June 21, 1945, the plaintiff gave the defendant notice to quit expiring on Aug. 13, 1945, and no question has been raised as to the validity of that notice, so I take it that the contractual tenancy did expire on Aug. 13, 1945.

On Dec. 27, 1945, the plaintiff started the present action. At the hearing the plaintiff gave evidence as to the history of the matter and no other evidence was called except that the probate of the will was put in and was in evidence before the judge. The judge dismissed the action, He used the following words in his written judgment:

I hold the defendant is protected as tenant at common law and in possession, to whom notice has been given, but who occupies a house protected by the Rent Act, and against whom none of the circumstances entitling a landlord to possession against a protected tenant are alleged.

It is common ground that this house is of such a kind as to come within the protection of the Acts if the defendant is entitled to claim that protection, and it is also common ground that if the defendant is entitled to claim that protection no grounds have been shown by the plaintiff which would justify the court in making an order for possession. The whole question before us is: is the defendant a tenant protected by the Rent Restrictions Acts or not?

It is convenient, first, to look at the statutory provisions which are applicable and I think I should first turn to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, which is as follows:

> (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either . . .

Then there are set out certain conditions which have to be fulfilled. I need not read them but, of course, it is necessary for the defendant to satisfy the court that she is a "tenant" within the meaning of the Rent Restrictions Acts. I turn next to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*f*):

> The expressions "landlord," tenant," "mortgagee," and "mortgagor" include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor.

I pause there to say that the defendant in the present case cannot bring herself within subpara. (*g*) of that section because, apart from the question (which I need not discuss) whether she could be regarded as a member of the tenant's family, she did not reside in the property for as long as 6 months before the tenant's death and that period of residence is rendered necessary by sect. 13 of the Act of 1933. But *prima facie* the defendant is "a person deriving title under the original tenant" and is, therefore, within the Act. Counsel for the plaintiff, however, contends that the occupation of the defendant immediately before the expiry of the notice to quit was an occupation purely in her capacity as executrix. He submits, correctly, that the common law tenancy has come to an end and that the Acts give a purely personal right of residence. It has been held in cases to which I need not refer (they are well known) that that right of residence cannot be assigned nor can it be demised by will. It has also been held that a company cannot claim the protection of the Acts because a company is incapable of residing, within the meaning of the Acts. Counsel for the plaintiff submits that a person who holds the property in a representative capacity as executrix is in the same position. I think there is a short and complete answer to the argument of counsel for the plaintiff. The interest of the testatrix in this property vested in the defendant on the death of the testatrix. The defendant became a person deriving title under the original tenant, and, therefore, herself became a tenant under the Acts and the whole legal and beneficial interest in this house was in fact vested in this defendant. No other person had any interest in it whatsoever, legally or beneficially. Lastly, the defendant was genuinely occupying the house as her home or residence.

In these circumstances, it seems to me that the defendant clearly comes within the provisions of the Rent Restrictions Acts. But the matter has been very fully and ably argued from another point of view and I do not think it would be right to disregard that argument or to refrain from expressing the views which I have formed upon it. For that purpose I propose to assume for the moment that the defendant had no beneficial interest at all in the testatrix's estate. In those circumstances would the defendant be protected by the Acts? On the assumption that I have made, the defendant would still be a person deriving title under the original tenant and in fact the defendant would still be in possession although there would be this difference in the situation, that sooner or later a beneficiary might come along and say "That house was demised to me and I desire to reside in it. Please assent to my taking over, and leave the house." But, in the meantime, the position is that the defendant is in the house. In my view, an executrix who is living in the house at the time of the testatrix's death, who is living in the house at the time the notice to quit expires, and who has not up to that time taken any step to divest herself of the interest in the property, does become a statutory tenant.

There is no direct authority upon the point, but I think there are passages in the judgment of this court in *Skinner* v. *Geary* (1) which support that view. In that case the plaintiff claimed from the defendant possession of a dwelling-house. It was admitted that the premises came within the scope of the Rent A Restrictions Acts and it was admitted that due notice to quit had been served and had expired. The defendant denied that the plaintiff was entitled to posesssion of the premises and pleaded that he was entitled to retain possession by virtue of the Rent Restrictions Acts. The facts werethese. For a considerable period before 1919 the defendant had been the occupier of the premises as well as the tenant. In 1919 he went to live in a house in another district of which his wife was the tenant. A married sister of the defendant's wife with B her husband then resided at the house in question until June, 1930, when she left, and a sister of the defendant went to live in the house. This sister was residing there when proceedings were begun in the county court. The county court judge found that the defendant was not in actual possession of the premises at the material time—*viz.*, at the time the notice to quit was given—and that he did not retain possession within the meaning of the Rent Restrictions Acts by occupation of his wife's or his own relatives, since the purpose of that C occupation was not to preserve the house as a residence for the defendant. The county court judge accordingly made an order for possession of the premises. On appeal, the appeal was dismissed on the ground that the fundamental principle of the Acts was to protect a tenant who was residing in the house and that a tenant, to be entitled to the protection of the Acts, must be in personal occupation of the premises in respect of which he seeks that protection. D SCRUTTON, L.J., pointed out ([1931] 2 K.B. 546, at p. 559]) that the right of a statutory tenant was "a purely personal right to occupy the house as his home." He then went on to consideration of *Collis* v. *Flower* (2) and said ([1931] 2 K.B. 546, at pp. 562, 563):

> In *Collis* v. *Flower* (2), which it will be noted was decided at a very early stage in the consideration of the Acts, the tenant of a dwelling-house died. By her will she E appointed an executor. Another person who resided in the house with her was the testator's residuary legatee. This person continued to reside in the house just as she had done while the tenant was alive. The landlord served a notice to terminate the common law tenancy upon the executor, who by law was the person entitled to that tenancy, and brought an action for possession against both the executor and the residuary legatee, who was actually living there. The county court judge held that as there was no assent by the executor to the residuary legatee remaining there in part satisfaction of her rights as residuary legatee she was not the tenant, and that as the F executor was not in occupation of the house he could not claim the protection of the Acts. The Divisional Court reversed that decision, holding that the executor was the tenant of the house and entitled to the protection of the Acts, although he was not in occupation of the house. In my opinion that decision was wrong for the reasons I have stated. The executor who had the common law tenancy which had been terminated by notice to quit was not in occupation, and in my opinion the original tenant having no right to dispose of the property by will could give no statutory right to the executor, who did not live in the house and who therefore could not claim to G be a statutory tenant.

The observation in the middle of the last sentence, in which SCRUTTON, L.J., said that the original tenant had no right to dispose of the property by will, appears to overlook the fact that at the time of the death of the tenant no notice to quit had been served. I think, for once, SCRUTTON, L.J., possibly made a slip at that point, but that does not affect the matter which is before H us for decision. The vital point is that, in my view, SCRUTTON, L.J., thought that the reason why the executor was not entitled to protection was that he was not in occupation, and that if the executor in *Collis* v. *Flower* (2) had been living in the house, he would have been entitled to the protection of the Acts. I think that is a fair inference from the language he has used, and there is nothing in the other judgments which appears to me to be contrary to that view.

I need not, I think, refer to the earlier cases to which our attention was directed. The position is that there is no authority for the proposition that an executor who has proved the will, who has not assented to a bequest to someone else, and who is in actual occupation of the house at the termination of the common law tenancy, is not entitled to the protection of the Acts. There is no direct authority the other way, but, in my view, supported as I think by the observations of SCRUTTON, L.J., in *Skinner* v. *Geary* (1), there is nothing to exclude such an executor from the protection of the Acts. He is a person deriving title from the original tenant and he is in actual occupation of the premises.

In my view, this appeal must be dismissed with costs.

SOMERVELL, L.J.: I agree.

ASQUITH, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Walmsley & Stansbury*, agents for *Marshall Harvey & Dalton*, Bournemouth (for the appellant); *Bell, Brodrick & Gray*, agents for *Other, Manning & Allin*, Bournemouth (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SIMS *v.* WILSON.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), June 20, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Premises required for daughter—" Greater hardship "—Onus of proof—Matters to be considered—Sale or storage of furniture—Future hardship—" Other accommodation "—Whether necessarily protected accommodation—Offer of accommodation in house whereof possession sought—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1), *Sched. I* (*h*).

County Courts—Appeal—Note of judgment—Duties of counsel and solicitors.

The respondent was tenant of and resided, alone with his wife, in a house, owned by the appellant, which contained three bedrooms, two sitting rooms and a kitchen, with the usual offices. The appellant also owned, in the same street, a similar house, which was occupied by the appellant herself, a married daughter and her husband and child, another married daughter whose husband was shortly expecting to join her, and their child. The appellant claimed possession, under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) and Sched. I, para. (*h*), of the house occupied by the respondent for one of her married daughters, her husband and their child, a boy of three. Certain accommodation had been offered by the appellant to the respondent in the house, possession of which was claimed, and the respondent had offered to give up to the appellant one bedroom and one sitting room with the joint use of the kitchen. The county court judge gave judgment for the respondent:—

HELD: (i) although it was doubtful whether or not accommodation in the house whereof possession was sought was " other accommodation " within the meaning of the proviso to Sched. I, para. (*h*), the fact that accommodation in that house or part of that house was offered to the tenant would clearly be one of the circumstances of the case which a judge could take into consideration.

(ii) the burden was upon the tenant to prove that greater hardship would be caused by granting the order or judgment than by refusing to grant it.

(iii) the fact that an order for possession would confront the tenant with the alternative of either selling his furniture or storing it, was one of the circumstances which a judge was entitled to take into account in arriving at a conclusion on the question of " greater hardship."

(iv) a judge was entitled to take into consideration future, as well as, present hardship.

(v) the fact that any other accommodation available would not be protected by the Rent Restrictions Acts was a matter which a judge would be entitled to take into consideration, along with the other circumstances of the case, but he would not be right in thinking that, unless accommodation protected by the Rent Restrictions Acts was provided, he would be precluded from making an order for possession under Sched. I, para. (*h*).

(vi) although a judge might secure complete protection for a tenant by some such expedient as refusing to make an order unless the landlord (*a*) agreed that the tenant should have certain accommodation at the house then occupied by him, and (*b*) entered into a contract which would give to the tenant the same protection with regard to his occupation of that accommodation as he would have enjoyed if he had been protected by the Rent Restrictions Acts, there would be no misdirection on his part if, in fact, he did not put forward that suggestion.

(vii) on the facts there was evidence upon which the judge could properly come to the conclusion at which he arrived and no misdirection had been established; the court, would therefore, not interfere.

Per cur.: On an appeal from a county court the Court of Appeal should be provided with as full a note as possible of the judgment of the county court judge. It is the duty of counsel to take a note of the judgment in the court below; and if no note of the judgment is taken by the judge for the purpose of an appeal, counsel's note should be available for the use of the Court of Appeal in addition to the judge's note of evidence. If the parties are represented by solicitors in the county court and the county court judge delivers an oral judgment giving reasons for his decision, the solicitors should take the best note that they can of the judge's observations and an endeavour should be made to have an agreed note for the Court of Appeal. If it is found impossible to agree a note, such notes as are made by the respective solicitors should be available for the use of the court.

[**EDITORIAL NOTE.** This case is of considerable interest in view of the vast number of "hardship" cases with which county court judges are at present confronted. The question of "greater hardship" is one of fact, and the Court of Appeal indicates some of the matters which are proper to be taken into account in arriving at a conclusion and which will not, therefore, form a basis for appeal on the ground of misdirection.

The reference in the judgments to the taking of a note of the judgment in the county court extends to solicitors the duty indicated as lying upon counsel by Scott, L.J., in the course of a case reported as a Practice Note in [1943] W.N. 80.

As to Recovery of Possession of Premises Required for Occupation by Landlord or his Family, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and for Cases, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Cases referred to:

(1) *Bumstead* v. *Wood* (1946), 62 T.L.R. 272.
(2) *Practice Note*, [1943] W.N. 80.

Appeal by the plaintiff from an order of His Honour Deputy Judge Turner, made at Biggleswade County Court and dated Feb. 5, 1946. The facts are fully set out in the judgment of Morton, L.J.

E. Daly Lewis for the appellant.

Desmond Neligan for the respondent.

Morton, L.J.: In this case the plaintiff, Mrs. Mary Sims, who is the appellant in this court, claims possession of No. 18, Clifton Road, Henlow, in the county of Bedfordshire, from the defendant, Mr. Harry Wilson. It is common ground between the parties that the defendant's tenancy of this house has been determined and that he can only remain in possession, if at all, by reason of the protection of the Rent Restrictions Acts; but the plaintiff contends that the order for possession ought to be made under certain statutory provisions to which I shall shortly refer. The plaintiff occupies a similar house in Clifton Road which is known as "Marina Villa." Each of the two houses has three bedrooms, two sitting rooms and a kitchen, with the usual offices. It would appear that there is a box room at Marina Villa and it may be that there is also a box room at No. 18, Clifton Road, but I do not think that is material and it is not made quite clear by the evidence. In No. 18, of which possession is sought, there live only the defendant and his wife. They are both of working age and they are both in fact employed in Henlow; the defendant himself is a cook at the Three Counties Hospital there and his wife works in the laundry. The plaintiff wants possession of No. 18 for her daughter, Mrs. Wyatt, and the daughter's husband and their child, a boy of three. At the present time there are six persons living in the plaintiff's house; the plaintiff herself, Mr. and Mrs. Wyatt and their son, another married daughter, Mrs. Bigley, and her child aged about four, and shortly a seventh person will wish to live in the plaintiff's house, Marina Villa, because Mr. Bigley, who is in the Forces, is shortly expecting to be demobilised.

The statutory provisions applicable are, first of all, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1). Sect. 3 (1) is as follows :

> No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(*a*) the court has power so to do under the provisions set out in the First Schedule to this Act ; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

The application in this case was made under Sched. I, para. (*h*), and I must now turn to that Schedule. It begins :

> A court shall, for the purposes of sect. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for (i) himself ; or (ii) any son or daughter of his over eighteen years of age ; or (iii) his father or mother : Provided that an order or judgment shall not be made or given on any ground specified in para. (*h*) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

Two questions have arisen on that proviso. In the present case certain accommodation has been offered to the tenant in No. 18 itself, and the first question is whether that is " other accommodation " within the meaning of the proviso. I confess that I feel some doubt as to whether that is so or not, but I do not propose to express a concluded opinion on the matter because, whether or not accommodation in the house whereof possession is sought is " other accommodation " within the meaning of the proviso, I think that the fact that accommodation in that house or part of that house was offered to the tenant would clearly be one of the circumstances of the case which the county court judge could take into consideration. The other question is whether in so far as the burden of proof may be material, the burden is upon the tenant to satisfy the court that greater hardship will be caused by granting the order or judgment than by refusing to grant it, or whether the burden of proof is the other way. We were not referred to any authority upon this point, but, for my part, I incline to the view that the burden is upon the tenant to prove that greater hardship would be caused by granting the order or judgment than by refusing to grant it. It seems to me that this is the natural construction of the proviso, and, further, if the landlord has satisfied the court that the dwelling-house is reasonably required by him for the occupation of himself or, for instance, as in this case his daughter, it is obvious that some hardship would be caused to the landlord by refusing the order. I think once the landlord has brought himself within the provisions of para. (*h*) it is for the tenant then to satisfy the court that greater hardship would be caused by granting the order than by refusing it.

In the present case the county court judge heard the evidence of the plaintiff and of Mr. Wyatt, to whom I have already referred, and of the defendant. It would appear that the defendant offered to give up to the plaintiff one bedroom and one sitting room with the joint use of the kitchen at No. 18, but the plaintiff was not satisfied with that. She said : " If I had two more rooms "—that is to say, as I read her evidence, at Marina Villa—" my house would not be overcrowded. If Wilson offered two rooms I am not prepared to accept them." I read that as meaning that if Marina Villa were a bigger house to the extent of two rooms she would not be overcrowded, but that Wilson's offer did not satisfy her. She then went on to say : " Wyatt wants the room as an office, not for a dwelling-house."

The county court judge, having heard all that evidence, gave judgment for the defendant, with costs on Scale A. That judgment may have been based upon one or both of two reasons. In the first place, the county court judge may have thought that it was not reasonable to make the order and it is possible, if he formed that view, that he may have taken into account the offer made by the defendant. On the other hand, he may have come to the conclusion that, although the application was otherwise reasonable, greater hardship would be caused by granting the order than by refusing to grant it. So far as his note goes, we do not know precisely what view he took ; but it is conceded and rightly conceded, by counsel for the plaintiff that this question of " greater hardship " is a question of fact on which there is no appeal unless there is no evidence upon which the county court judge could so find, or unless he has misdirected himself in some way. It was submitted, however, for the plaintiff, first of all, that there was no evidence upon which the county court judge could properly arrive at this conclusion. I am unable to give effect to that contention. I do not propose to travel all through the evidence, but I think there was evidence upon which the county court judge could come to that conclusion ; and I say nothing as to whether I should myself have arrived at the same conclusion.

It was then submitted by counsel for the plaintiff that the county court judge had misdirected himself, and he put his argument under four heads. First of all, he said that the county court judge took into account the matter of the defendant's difficulty in disposing of his furniture and that the county court judge must have attached too much weight to that circumstance. For my part, I think that the fact, if it be a fact in any particular case, that an order for possession will confront the tenant with the alternative of either selling his furniture or storing it, is one of the circumstances which a judge is entitled to take into account in arriving at a conclusion on the question of " greater hardship." How much weight should be given to it is not a matter which one can usefully discuss. It must, I think, depend upon the circumstances in each case. But I cannot find that there was any misdirection in law if the judge did take that matter into account, as indeed I think he did.

This brings me to a matter on which it might be useful if I said a few words. In the present case there was no agreed note of the judgment of the county court judge, although it is quite plain from what we are told that he did deliver an oral judgment. We are informed by the associate that in a case before this court on Mar. 30, 1943, Scott, L.J., said this [see *Practice Note*, [1943] W.N. 80 (2)]:

> It is the duty of counsel to take a note of the judgment in the court below, and, if no note of the judgment is taken by the judge for the purpose of an appeal, counsel's note should be available for the use of the Court of Appeal in addition to the judge's note of evidence.

I respectfully agree with that observation and I would add this to it. If, as in the present case, the parties are represented by solicitors in the county court and the county court judge delivers an oral judgment giving reasons for his decision, the solicitors should take the best note that they can take of the judge's observations and an endeavour should be made to have an agreed note for the use of the Court of Appeal. If it is found impossible to agree a note, such notes as are made by the respective solicitors should be available for the use of the court. In saying that, I am confining my observations to a case such as the present, where there is no note by the county court judge himself setting out the reasons which led him to arrive at his conclusions. That matter arises in the present case because in the course of his argument for the plaintiff counsel referred to an extract from his instructions giving certain information as to what the county court judge said. Fortunately, on this extract being shown to the solicitor for the defendant, he was able to say that it was in substance accurate ; so that we have some assistance in the present case in knowing to some extent what the judge said. Of course, a note made at the time, and agreed, would be more satisfactory.

The second point taken by counsel for the plaintiff is that the county court judge took into account future hardship to the defendant ; according to the note, the judge said that he had not only to limit his consideration to present hardship, but had to address his mind to future hardship. I cannot appreciate what future hardship the county court judge had in mind in the present case, but, if he did take into consideration some future hardship, I think he was justified in so doing, having regard to the decision of this court in *Bumstead* v. *Wood* (1).

The third point relied upon by counsel for the plaintiff was that the county court judge thought himself bound to refuse an order for possession unless the other accommodation enjoyed by the defendant would be within the protection of the Rent Restrictions Acts. If the judge had taken that view I think he would have misdirected himself. I think the fact that any other accommodation available would not be protected by the Rent Restrictions Acts, is a matter which he would be entitled to take into consideration, along with all the other circumstances of the case, but the judge would not be right in thinking that unless accommodation protected by the Rent Restrictions Acts is provided he would be precluded from making an order for possession under Sched. I, para. (*h*). For my part, however, I cannot put that rather strained construction upon the note which is available of what the judge said. I do not think it would be right to arrive at the conclusion that he did misdirect himself in that way and for my part I very much doubt if he thought any such thing.

Lastly, counsel for the plaintiff submits that it would have been possible for the county court judge to secure complete protection for the defendant by the following course of action: he could have said: "I shall not make an order for possession unless you, the plaintiff (*a*) agree that the defendant shall have certain accommodation in No. 18, and (*b*) enter into a contract which will give the defendant the same protection with regard to his occupation of that accommodation by the Rent Restrictions Acts." It is probably quite true that the judge might have adopted some such expedient and a contract might have been worked out which would give that protection; but I think it is quite impossible to say that there was any misdirection on the part of the judge because he did not in fact put forward that suggestion. The suggestion, I gather, was not put forward at the hearing on behalf of the plaintiff; no doubt, it did not occur to anyone.

In my view, the decision of the judge on this question of fact is unassailable. There was evidence upon which he could properly come to the conclusion at which he arrived and I cannot find that any misdirection is established.

This appeal must be dismissed with costs.

SOMERVELL, L.J.: I agree and I do not desire to add anything to what MORTON, L.J., has said on the point at issue in this appeal; I agree with everything that he has said.

I want only to add a word to express my concurrence with what has been stated about the importance of this court being provided with a note, and as full a note as possible, of the judgment of the county court judge. If one looks in this case at the notice of appeal, it becomes quite clear that most of the points, not all, could only be made if the court had available a note of the reasons which led the county court judge to come to his conclusion. For example—I take only one example—one of the grounds of appeal is that the judge misdirected himself in law in that he took into account what he described as "future hardship." Unless there was some note of what he said showing that he did take that into account, that point, as it seems to me, could not be made. The court were not provided with any such note; but counsel for the plaintiff had some instructions which counsel for the defendant at a comparatively late stage in the proceedings on behalf of his clients agreed was substantially accurate. But it seems to me that where points as to misdirection are going to be taken it really is essential in the appellant's interest finally, if he wants to make the points good, that there should be as full a note as possible taken at the time by those before the county court judge, and, of course, it is desirable, as has been already said, that such note should be agreed between the parties if they are able to agree.

I agree that the appeal should be dismissed.

ASQUITH, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Bower, Cotton & Bower,* agents for *Hartley & Hine,* Hitchin (for the appellant); *Cameron, Kemm & Co.,* agents for *Chaundler & Son,* Biggleswade (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

JARRETT *v.* BARCLAY'S BANK, LTD. AND NASH.
NASH *v.* JARRETT.

[Chancery Division (Wynn-Parry, J.), June 3, 4, 5, 1946.]

Emergency Legislation—Mortgage —Leave to sell—Mortgage of freehold property to secure bank overdraft—Bankruptcy of mortgagor—Mortgagor's trustee in bankruptcy made sole respondent to summons under Courts (Emergency Powers) Act, 1943—"*Interest*" *in mortgaged property—Bankrupt mortgagor not entitled to be heard—Courts (Emergency Powers) Act*, 1943 (c. 19), *ss.* 4 (3), (4), 7—*Courts (Emergency Powers) Rules*, 1943 (*S.R. & O.*, 1943, *No.* 1113), *r.* 20 (i) (iv), (2), (3).

In order to secure an overdraft on the joint banking account of her husband and herself, Mrs. J., by a legal charge dated Apr. 26, 1939, charged certain freehold premises, of which she was the owner, to the bank. On May 15, 1940, Mrs. J. was adjudicated bankrupt and the Official Receiver became her trustee in bankruptcy. Her husband, J., was given licence by the Official Receiver to remain in the premises and carry on his business there. From time to time the bank wrote to J. and Mrs. J. asking them to make some payments towards reducing the overdraft, but they replied that they were unable to do so. Early in 1945, the bank negotiated a conditional contract for the sale of the premises, and wrote to the Official Receiver, to Mrs. J. and to J., stating that the sum of £2,290 was due on the joint account; the letters to the Official Receiver and to Mrs. J. were expressed to be written pursuant to the legal charge. The bank also wrote to J. and Mrs. J., informing them that the premises would be sold if the overdraft was not paid. On Apr. 21, 1945, the bank was informed by J. and Mrs. J. that they were unable to repay the loan, and on Aug. 23, 1945, the bank issued a summons under the Courts (Emergency Powers) Act, 1943, for leave to sell the premises. Under the Courts (Emergency Powers) Rules, 1943, r. 20 (1) (iv), the Official Receiver, as Mrs. J.'s trustee in bankruptcy, was made sole respondent to the summons. The Official Receiver having written to the bank stating that he had no objection to the leave sought being given, the application was made *ex parte* under the proviso to r. 20 (1) (iv), and on Oct. 18, 1945, the leave was given. J. and Mrs. J. were thereupon informed of the fact and the sale was completed on Dec. 12, 1945. Mrs. J. had in the meantime died without having obtained her discharge from bankruptcy. In an action against the bank and the purchaser brought by J., as Mrs. J.'s executor and on his own behalf (as occupant of the premises and as the person jointly and severally liable for the bank overdraft), it was contended that the sale was invalid because (*a*) he and Mrs. J. should have been joined as respondents to the summons under the Courts (Emergency Powers) Act, 1943, or a statement should have been lodged in chambers pursuant to the Courts (Emergency Powers) Rules, 1943, r. 20 (3) stating that they were persons affected within the meaning of that rule; and (*b*) the purchase price was so low as to constitute a fraud on himself and on Mrs. J.'s estate. The bank and the purchaser took preliminary objection that the action was misconceived and there was no case to answer:—

Held: (i) upon the true construction of the Courts (Emergency Powers) Rules, 1943, r. 20 (2) and (3), in order to be a person affected within the meaning of the rule, one must have an interest in the mortgaged property, and "interest" as used in the rule, meant some legal or equitable interest which could be enforced in, or protected by, a court.

(ii) since the whole of Mrs. J.'s property passed to and vested in the Official Receiver, under the Bankruptcy Act, 1914, s. 53, when she was adjudicated bankrupt, she had no interest in the premises at the date of the application for leave to sell and, therefore, she was not entitled to be joined as a respondent under the Courts (Emergency Powers) Act, 1943, nor was she a person affected within the meaning of the Courts (Emergency Powers) Rules, 1943, r. 20.

(iii) as Mrs. J. was an undischarged bankrupt at the time of her death, her executor could not complain if the premises were sold at an undervalue.

(iv) since J. was in occupation of the premises only under a licence, he had no interest therein. Therefore he was not entitled to be heard on the application for leave to sell, nor could he complain if the sale were at an under-value.

(v) the fact that he was jointly and severally liable on the overdraft did not give J. any right to have the sale set aside (assuming that it was at an under-value) nor did it give him any right to be heard on the application for leave to sell, because the mortgage was of Mrs. J.'s property and was a transaction entirely between the bank and herself.

[**EDITORIAL NOTE.** When property has vested in a trustee in bankruptcy the bankrupt has no further interest in it other than a future interest in a possible surplus. Neither he nor his executor, therefore, has any title to complain that a mortgagee of the property has, exercising his power of sale, sold at an under-value. Nor is such bankrupt a person "interested" so as to be entitled to be made a respondent to a summons for leave to proceed under the Courts (Emergency Powers) Act.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 461; and FOR THE COURTS (EMERGENCY POWERS) RULES, 1943, see BUTTERWORTH'S EMERGENCY LEGISLATION [8] 214.]

Cases referred to:

*(1) *Re Leadbitter* (1878), 10 Ch.D. 388; 4 Digest 205, *1886*; 48 L.J.Ch. 242; 39 L.T. 286.

(2) *Bird* v. *Philpott*, [1900] 1 Ch. 822; 4 Digest 500, *4504*; 69 L.J.Ch. 487; 82 L.T. 110.

ACTIONS (i) claiming a declaration that no valid leave of the court under the Courts (Emergency Powers) Act, 1943, had been given entitling the defendants to effect a sale of certain property now in the occupation of the plaintiff; (ii) by the second defendant to the first action against the plaintiff in the first action, claiming possession of the property in question. A preliminary objection was taken by the defendants to the first action that the whole action was misconceived and that there was no case to answer. The facts are fully set out in the judgment.

Robert Fortune for Richard William Jarrett.

E. Milner Holland for Barclay's Bank, Ltd.

D. L. Jenkins, K.C., and *B. M. Cloutman, K.C.*, for Gerald Kimber Nash.

WYNN-PARRY, J.: I am concerned here with two actions. The first is an action in which Richard William Jarrett is suing on his own behalf and as executor of Emily Margaret Jarrett, his deceased wife, as the plaintiff, against Barclay's Bank, Ltd. and Gerald Kimber Nash; and claiming, in the dual capacity I have mentioned, against the defendants, first, a declaration that no valid notice under the Law of Property Act, 1925, s. 103, exists or has at any time existed, and that no valid leave of the court under the Courts (Emergency Powers) Act, 1943, has at any time been given, entitling the defendants to effect any sale of the dwelling-house and garage premises now in the occupation of the plaintiff at Niton Undercliff, Isle of Wight, and that the sum of £2,250 is not a proper price therefor, and rescission of the said sale. Secondly, he claims, as consequential relief, an injunction against the defendants from interfering with his occupation. The second action is by Nash, the second defendant to the first action, as plaintiff against Jarrett, the plaintiff in the first action, as defendant, in which Nash claims possession of the premises in question, the Undercliff Garage at Niton, Isle of Wight, and consequential relief. The same points of law are involved in both these actions. The case concerns the freehold premises to which I have referred, the Niton Undercliff Garage, at Niton in the Isle of Wight, of which Jarrett's wife was the owner. For purposes of convenience I shall refer to Jarrett as the plaintiff.

By a legal charge dated Apr. 26, 1939, Mrs. Jarrett charged the freehold premises to the bank to secure any balance of account due to the bank on the joint banking account of herself and the plaintiff, at the Ryde, Isle of Wight, branch of the bank. On May 15, 1940, Mrs. Jarrett was adjudicated bankrupt on her own petition, and the Official Receiver has throughout been her trustee in bankruptcy. He sold all the furniture, stock-in-trade and effects of the business, and on May 20, 1940, Sir Francis Pittis & Son, a firm of estate agents at Ventnor in the Isle of Wight, wrote to the plaintiff as follows:

Dear Sir, Undercliff Garage, Niton. We have to-day spoken to the Official Receiver and he gives you authority to open your business at once.

That letter, in my view, did no more than give the plaintiff a licence to remain in the garage premises and carry on the business there.

Certain letters passed between the plaintiff and the bank to which my attention has been drawn. On Jan. 10, 1941, the bank wrote to the plaintiff and his wife, saying:

> Dear Sir and Madam, Whilst the bank are fully aware of present circumstances they feel that you can hardly expect to be allowed to remain in occupation rent free. Will you kindly consider this and let me know what amount you can pay by weekly or monthly contributions.

On Mar. 9, 1943, (*i.e.*, some 2 years and 2 months later) the bank again referred to the matter in a letter to Jarrett in which they said:

> With reference to the borrowing on the joint account in the names of Mrs. Jarrett and yourself, the amount of the overdraft has now reached the figure of £2,229, and we must ask you to do all in your power to make some reduction in this figure.

Then they refer to the circumstance that Jarrett was carrying on a small tobacconist's business on the premises and was also in employment, and, they say that in view of that, they consider he is in a position to make some payment towards the interest on the overdraft. Then they say:

> You are in occupation of the premises charged to the bank and therefore it is thought that some contribution should be made, at least equivalent to a rental. Perhaps you will kindly consider this and let us know how much you can provide by weekly or monthly instalments.

On Mar. 17, 1943, Jarrett replied saying:

> It is utterly impossible at the moment for me to pay anything off the overdraft because it is hard enough to live these hard times.

He then dealt with his financial position in subsequent paragraphs. On June 12, 1943, the bank wrote to Jarrett:

> We shall be obliged if you will kindly inform us by return of post if your house has been damaged in any way through enemy action, if so it will be necessary for us to register our interest as mortgagees in the claim you will have to make.

I see nothing in any of those letters which operated to alter the plaintiff's position as licensee, and establish instead the relationship of landlord and tenant between the bank and himself. My attention has not been drawn to any document or other evidence which to my mind in any degree establishes that the plaintiff became a tenant of the bank or anyone else.

The bank, through Sir Francis Pittis & Son and their solicitors, negotiated at arms length a conditional contract for the sale of the property to the defendant Nash at a price of £2,250, the terms of which were agreed early in 1945, and one of the terms upon which the bank insisted was that they should not be required to give vacant possession. On Mar. 22, 1945, the bank sent letters to the Official Receiver, Mrs. Jarrett and the plaintiff, stating in effect that there was due from the plaintiff and Mrs. Jarrett the sum of £2,290 0s. 4d. on the joint account; and the letters to the Official Receiver and to Mrs. Jarrett were expressed to be written pursuant to the legal charge, which was not so in the case of the letter to the plaintiff. On Apr. 17, 1945, the bank's solicitors wrote to Mr. Wearing, who was then acting as the plaintiff's solicitor, as follows:

> Dear Sir, Niton Undercliff Garage. With further reference to your letter to us of Mar. 5, our clients have served the requisite notice under the terms of their security calling in the money. This notice was served upon the official receiver in the bankruptcy of Mrs. Jarrett and a similar notice was served upon her and Mr. Jarrett although in our opinion this was unnecessary. In the absence of compliance with the notice our clients are proposing to enter into a conditional contract for a sale of the property subject to the necessary consent to the exercising of their power of sale being obtained from the court. Before entering into this contract we write to say that our clients are still prepared to consider the acceptance from your clients or either of them of the amount due to our clients to clear the loan and interest thereon. Will you kindly let us know if your clients are interested in the matter and failing a notification from you to this effect within the next 7 days our clients will proceed with their proposed contract.

On Apr. 21, 1945, Mr. Wearing replied to that letter in these terms:

> With reference to your letter of Apr. 17 I have to inform you that Mr. and Mrs. Jarrett regret that they are not in a position to find the amount necessary to clear your clients' loan and interest.

On Aug. 23, 1945, the bank issued a summons under the Courts (Emergency Powers) Act, 1943, in the usual form, asking in effect that the bar created by that Act should be lifted. This summons was addressed to the trustee in bankruptcy of Mrs. Jarrett, the Official Receiver, as sole respondent. On the same day, Aug. 23, 1945, the bank's London solicitors wrote to the Official Receiver, calling attention first to the letter of Mar. 22, 1945, addressed to the Official Receiver, to which I have referred, giving notice of the amount required by the bank to discharge the joint indebtedness, stating that the bank had entered into a conditional contract for the sale of the premises for £2,250, pointing out that it was necessary for the bank to obtain the consent of the court under the Courts (Emergency Powers) Act, 1943, reminding the Official Receiver that under the provisions of the Courts (Emergency Powers) Rules, 1943, r. 20, he had been made a respondent to the application, but that under the proviso to r. 20 to (1) (iv), if the applicant obtained from the Official Receiver a written statement that he had no objection to the leave being given, the application could be made *ex parte*, with the consequent saving of expense and time, and suggesting that if the Official Receiver did not intend to oppose the application he might address to the solicitors a letter in a form which they suggested. On Sept. 4, 1945, the Official Receiver wrote a letter to the bank substantially in the form suggested, confirming that he had no objection to the leave sought under the Courts (Emergency Powers) Act, 1943, being given to the bank.

On Oct. 18, 1945, the application came before the master, who made an order in favour of the bank giving leave to sell the property, and, in view of the letter from the Official Receiver of Sept. 4, 1945, to which I have referred, dispensing with proof of service on the respondent. On Nov. 6, 1945, the bank's solicitors informed Mr. Wearing that the application had been made, and that leave to proceed under the Courts (Emergency Powers) Act, 1943, had been obtained. The sale and purchase was completed on Dec. 12, 1945, on the strength of that order.

As appears from what I have said, neither the plaintiff nor Mrs. Jarrett was made a respondent to the application, nor was any statement left in chambers giving the names of the plaintiff or Mrs. Jarrett as being persons affected, within the Courts (Emergency Powers) Act Rules, r. 20. Mrs. Jarrett never obtained her discharge from bankruptcy. Her assets amounted to about £10, and I am told that no dividend has been declared by the Official Receiver in her bankruptcy

In these circumstances the plaintiff, his wife having died in the meantime, commenced this action on Jan. 26, 1946. His case is that the sale by the bank to Nash of the freehold premises is invalid on two grounds. First, it is contended that the plaintiff and Mrs. Jarrett should have been joined as respondents to the summons under the Courts (Emergency Powers) Act, 1943, or that a statement should have been lodged in chambers pursuant to the Courts (Emergency Powers) Rules, 1943, r. 20 (3), stating that they were persons affected within the meaning of that rule. Secondly, it is contended that the bank effected the sale at a price so low as to constitute a fraud on the plaintiff and upon the estate of Mrs. Jarrett. At the end of the opening of the case for the plaintiff, counsel for the bank and for the defendant Nash took a preliminary point and submitted, upon the basis of the allegations in the statement of claim, that the whole action was misconceived and that there was no case to answer. As that submission, if well founded, would conclude the whole case, I considered it desirable to hear argument on that preliminary point before any witnesses were called. It was submitted that the action could not succeed upon either of the grounds put forward. In my view the preliminary objection is well founded as regards each ground.

I will take first the contention that the sale should be set aside on the ground that it was effected at an under-value. The plaintiff claims relief under one or more of three heads: (i) as the executor of Mrs. Jarrett; (ii) as occupant of the premises; and (iii) as the person jointly and severally liable for the bank overdraft. I will deal with the matter under each of these headings.

First, as executor of Mrs. Jarrett, his wife: Upon Mrs. Jarrett being adjudicated bankrupt the whole of her property passed to and vested in the Official Receiver under the Bankruptcy Act, 1914, s. 53. Thereafter it was only the trustee who could deal with the property; it was only he who could in any way effectively complain against the mortgagee, and it was only he who could settle accounts with the mortgagee. The bankrupt could not go behind the trustee. Authority which is illustrative of that proposition, though hardly necessary is to be found in *Re Leadbitter* (1). The headnote to that case is as follows:

> A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under A
> the Solicitors Act, 1843, s. 39 to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy. The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt.

BACON, V.-C., in the course of his judgment, said (10 Ch. D. 388, at p. 389):

> The fallacy of the argument is that this bill of costs was paid by the applicant's trustee. The applicant in effect says, "This money was paid by my trustee out of my property." But the statute has no application to the case of a trustee in bankruptcy. B
> The trustee in bankruptcy was not the applicant's trustee—the property was not the applicant's property. It was the property of his creditors; and the money was paid out of that which had been once, but had ceased to be, the applicant's estate. The applicant, at the time of payment, had no present interest in it, nor in any particle of it.

The case went to the Court of Appeal, where the decision of BACON, V.-C., was affirmed. In the course of his judgment SIR GEORGE JESSEL, said (*ibid*, at p. 391): C

> In the second place, the bankrupt is not "a person interested" in the property out of which the bill was paid. At the time when the bill was paid there was no surplus, but only a possibility of a surplus. A legacy might be left, or a reversion might fall in, but at most there was no more than a probability of a surplus. There was no surplus till all the debts had been paid in full; therefore, pending the bankruptcy, the bankrupt was not a person interested in the property. The probability of a surplus could not make him so.

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The mere fact that a bankrupt has a future interest in a possible surplus does not mean that he has a present interest, and there is, in my view, nothing but confirmation of this proposition to be found in *Bird* v. *Philpott* (2) which was cited by counsel for the plaintiff in favour of his argument. I am, therefore, of opinion that the plaintiff, as the executor of his wife, an undischarged bankrupt, has no *locus standi* to assert that the sale was made at an under-value.

I turn then to the plaintiff's contention that an occupier is entitled to complain that the sale was made at an under-value. Counsel for the plaintiff E endeavoured to argue that the plaintiff was a tenant at will, but as I have said, I have no evidence that he was ever a tenant of any description. In my view, on the evidence before me, he was no more than a mere licensee. He was in the premises on sufferance, and as such, in my judgment, he had no *locus standi* to complain of the price at which the property was sold.

I pass then to consider his position as a person jointly and severally liable F for the overdraft. This is an ordinary case of a joint and several liability to pay an overdraft. The bank took security from one of the debtors, namely Mrs. Jarrett, to secure her liability, and that was a transaction solely between her and the bank. Even assuming that the bank was under a duty to exercise care so as not to sell at an under-value, and that it did, in fact, sell at such an under-value as to constitute a breach of that duty—two large assumptions— G that in my judgment could not give the plaintiff, as a person jointly and severally liable for the overdraft, any right to have the sale set aside, for the property was not his, and he had no interest in it. Nor, as counsel for the purchaser pointed out, could he have any right to claim damages. He had paid nothing during his occupancy, and he had lost nothing, even if the sale was at an under-value. Doubtless, in the event of the bank suing him, the plaintiff might have met the bank by saying that the bank could have realised the H property at a higher figure, and that if it had done so he would have owed it less, or even nothing; and, assuming that he established that contention, he could have obtained a reduction or an elimination of the bank's claim accordingly. But with that aspect of the matter I am not concerned.

On the view which I have expressed on the question of sale at an under-value, there can, in my view, be nothing in the point taken under the Courts (Emergency Powers) Act, 1943, but as it has been argued I will deal with it. Sect. 4 (3) of that Act is as follows:

> Where an application is made by the mortgagee of any property for leave to exercise against the property any of the rights or remedies mentioned in sect. 1 (2) of this Act, being a right or remedy arising by virtue of a default in the payment of any mortgage money or a breach of any mortgage obligation, the appropriate court may, for the purposes of this Act, treat any person appearing to the court to be affected by the exercise of the right or remedy as if he were the person liable to pay the mortgage money or to perform the mortgage obligation or, as the context may require, as if he were the mortgagor, and may grant relief accordingly.

A That subsection is in very wide terms. It is, as regards the presence of persons upon an application under the Act, limited by the next subsection, which provides:

> (4) The last foregoing subsection shall not be taken as requiring all the persons so affected to be made parties to the application, and rules made under this Act shall make provision for the persons who are to be made parties to any such application, B and may provide that, in such cases as may be prescribed by the rules, and in particular in cases where the mortgagor has died and no person has taken out representation in respect of the property, the application may be made *ex parte*.

By sect. 7 (2), provision is made for making rules:

> . . . prescribing any matter which under any provision of this Act is to be prescribed by rules . . .

C Pursuant to that section, the Courts (Emergency Powers) Rules, 1943, were made and brought into operation. By r. 20 (1) it is provided that:

> Subject to the provisions of para. (2) of this Rule, the persons to be made respondents to an application by a mortgagee of property for leave to exercise against the property any right or remedy shall be as follows . . .

Then there are set out four sub-paragraphs, the fourth of which is relevant in this case. That says:

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> (iv) where the equity of redemption is vested in a trustee, the trustee: Provided that if the equity of redemption is vested in a trustee as trustee in bankruptcy and the applicant has before making the application obtained from such trustee a written statement that he has no objection to the leave sought being given, the application may be made *ex parte*.

Rule 20 (2) is as follows:

E

> In any application in which a person who is not a respondent to the summons under the provisions of para. (1) of this Rule would be affected by the exercise of any such right or remedy as aforesaid, the applicant shall, on applying at the chambers of the judge for an appointment to hear the application, leave at chambers with a copy of the summons a statement giving the name of such person and showing what his interest is in the mortgaged property, and the court or a judge may direct that such person, or any other person who the court or a judge may think would be affected by the granting of the application, be added as the respondent to the application.

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By r. 20 (3), provision is made for the case where the mortgagee is uncertain as to what persons would be affected by the grant of an application, in which event he:

> . . . may issue his application *ex parte*, and on applying for an appointment to hear the application leave at chambers a statement giving the names of all persons who he thinks may be affected and showing the interests of such persons, and the G court or judge may direct which, if any, of such persons are to be made respondents.

The scheme of those three paragraphs of r. 20 appears to me to be plain. Para. (1) provides who, in given circumstances, must be joined as respondents, but provision is made by para. (2) for the presence of persons not specified by para. (1), but who fall within the class circumscribed by the language of para. (2). That class, it appears to me, is clearly limited to persons who can be said to be affected by the exercise of any right or remedy mentioned in H the Rules, because he has an interest in the mortgaged property. Before any person can be said to fall within the class referred to in para. (2), it is in my view, as a matter of construction, essential that it should be capable of being demonstrated that he has an interest in the mortgaged property; and by "interest" is meant, in my view, some legal or equitable interest, some interest which can be enforced in, or protected by, a court. This scheme is extended by para. (3), which deals on exactly the same basis with the case where the mortgagee is in some doubt as to who should be included in the statement.

With that view of the relevant section and rule in mind, I proceed shortly to consider the position of the plaintiff under the same three heads. Treating him first as suing as executor of his wife, it is in my view quite plain that he is not entitled to any relief. His wife, at the relevant time, was alive, and she was an undischarged bankrupt. Express provision is made under r. 20 (1) (iv) for making the Official Receiver as her trustee in bankruptcy a respondent, a course which was adopted. If she was also to be entitled to be heard, it must be under r. 20 (2) or (3). In view of the earlier provision of r. 20 (1) (iv), it would, in my view, be startling to find that the applicant must bring in the bankrupt or his or her personal representative. To do so would, I think, be to increase many-fold the difficulties of administering the bankruptcy law, even if not to make it impossible. But there is, of course, a very good reason for not doing so, the reason being that, as appears from the authorities to which I have already referred, at the date of the application the bankrupt had no interest in the property, and therefore was not a person in respect of whom it could be specified in the statement referred to in r. 20 (2) and (3) what her interest was in the mortgaged property.

I then proceed to deal with the plaintiff's position as occupier. As counsel for the purchaser pointed out, there is a short answer under this heading. The bank did not apply for leave to take possession; they only applied for leave to sell, and therefore, whatever the nature of the plaintiff's occupancy, it could not be affected. But I desire to go further, and repeat what I said with regard to the first point, that the plaintiff's position as occupier was not such, in my judgment, as to give him any interest in the land.

Thirdly, regarding him as a person jointly and severally liable for the overdraft, it is, I think, important to emphasise that, while both the plaintiff and his wife were liable to the bank, the mortgage was by Mrs. Jarrett of her property, to secure her liability, a transaction entirely between her and the bank; and therefore that is not a transaction which could give the plaintiff any right against the bank as a joint and several debtor, much less any interest in the property. The plaintiff could only have become interested in the property in events which did not happen. The bank could have sued for the whole debt without realising its security. If they had recovered from the plaintiff, then he could have invoked the doctrine of subrogation so as to adjust matters between him and his wife, but in that event he could only have claimed to be subrogated in respect of one half of the debt. In fact, instead of suing the plaintiff, the bank proceeded against the property, and to that end they applied for leave to sell. It is impossible to regard the plaintiff, merely by reason of his joint and several liability, as a person affected by or interested in that realisation. As I have pointed out, the Rules are directed to persons having an interest in the property, and the plaintiff had none. The only effect of the realisation was that what the bank realised would reduce *pro tanto* his liability to the bank out of somebody else's property. It is pointed out with considerable force that the effect of the sale for £2,250 was the receipt of a sum sufficient to discharge the whole of the joint and several liability except to the extent of about £40, whereas, as between the plaintiff and the trustee in bankruptcy, he should have borne one half of the debt, there being no equity to throw the whole burden on his wife's estate. The plaintiff is, therefore, saying that he is affected because, in the result, he did not get a benefit to which he was never entitled, and there may indeed be a claim by the trustee in bankruptcy against him for contribution.

For those reasons I am of opinion that the preliminary points are well taken. The first action is misconceived and cannot succeed, whatever be the evidence led to support it, and I therefore propose to dismiss it with costs. It follows, I think, that the second action must succeed, and the relief claimed be granted, with costs.

The first action dismissed with costs. Judgment for the plaintiff with costs in the second action.

Solicitors: *Lake & Son*, agents for *Roach, Pittis & Co.*, Newport, Isle of Wight (for R. W. Jarrett); *Woolley & Whitfield*, agents for *John Robinson & Jarvis*, Ryde, Isle of Wight (for Barclay's Bank, Ltd.); *Warren & Warren*, agents for *Buckell & Drew*, Newport, Isle of Wight (for G. K. Nash).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

KENT TRUST LTD. *v.* COHEN AND ANOTHER

[Court of Appeal (Lord Greene, M.R., Morton and Tucker, L.JJ.), June 4, 1946.]

Moneylending—Memorandum—Sufficiency—Omission of reference to part of security—Borrower fully aware of terms of contract—Moneylenders Act, 1927 (*c.* 21), *s.* 6.

The respondents, who carried on the business of moneylenders, agreed to lend the appellants £1,000 on the security of a promissory note for that amount, five weekly post-dated cheques for £200 each and a sixth cheque for £150 which was to be security for the payment of interest. In the note or memorandum required by the Moneylenders Act, 1927, s. 6, no reference was made to the cheque for £150 :—

Held : in order to comply with the section, where security is given the memorandum must set out with accuracy what the security is ; the memorandum was clearly defective in that it omitted any mention at all of the cheque for £150, which formed an essential part of the security, and it was no answer to say that the borrower knew exactly what were the terms of the contract.

[**EDITORIAL NOTE.** The decision in the court below would appear to have been founded upon that portion of the judgment of Farwell, J., in *Re A Debtor* (1), where he remarks that an obvious error, such that the debtor appreciates the true position, will not affect the memorandum required by the Moneylenders Act, 1927, s. 6. But the deliberate omission of reference to a post-dated cheque given as security for interest is not such an error, and it is clear from another passage in the judgment of Farwell, J., that he held the view taken by the Court of Appeal in the case now reported, that the knowledge of the borrower of the terms is insufficient unless they are stated.

As to Requirements as to Form of Memorandum of Loan, see HALSBURY, Hailsham Edn., Vol. 23, p. 190, para. 280 ; and for Cases, see DIGEST, Supp., Money and Moneylending.]

Case referred to :

*(1) *Re A Debtor* (*No.* 18 *of* 1937), [1938] 2 All E.R. 759 ; [1938] Ch. 645 ; Digest Supp. ; 107 L.J.Ch. 403 ; 159 L.T. 284.

Appeal by the defendants from a decision of Cassels, J., dated Jan. 11, 1946. The facts are fully set out in the judgment of Tucker, L.J.

Phineas Quass for the appellants.

H. Vester for the respondents.

Lord Greene, M.R. : The first judgment will be delivered by Tucker, L.J.

Tucker, L.J. : This is an action brought by Kent Trust Ltd., who carry on the business of moneylenders, against the defendants, who are Andre Cohen and Andre Products Ltd. The action is brought claiming the balance of principal and interest due to them as the payees and holders of a joint and several promissory note dated Sept. 15, 1944, for £1,000 and interest thereon at the rate of 90 per cent per annum. The writ gave credit for certain sums paid on account and claimed the balance.

The defence which was set up was that the plaintiffs were disentitled to recover on the ground that the memorandum which had been entered into between the borrower and the moneylender was unenforceable by reason of non-compliance with the Moneylenders' Act, 1927, s. 6. That section provides :

(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract ; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act.

The memorandum which was entered into in this case is in these terms:

> We agree to borrow from you on Sept. 15, 1944, the sum of £1,000 with interest thereon at the rate of £90 per cent. per annum and upon the terms of a promissory note to be as follows:—£1,000 0*s*. 0*d*. We jointly and severally promise to pay Kent Trust, Ltd., or order at 29, Duke Street, Piccadilly, S.W.1. the sum of £1,000, value received, with interest thereon at the rate of £90 per cent. per annum by five consecutive weekly instalments of £200 each, commencing on the sixth week. In the event of default being made in payment of any instalment or part thereof then Kent Trust, Ltd., are to be at liberty at their option to demand payment of the whole of the balance of £1,000 principal remaining unpaid and interest at the rate aforesaid to the date of such demand and thereupon the whole of the said balance with interest as aforesaid (whether for principal or interest) shall bear simple interest on that sum at the rate of £90 per cent. per annum from the date of such demand until payment and until such demand any overdue instalment (whether for principal or interest) shall bear interest at the rate aforesaid from the due date until payment. As collateral security of the above promissory note we are depositing with you five weekly post-dated cheques for £200 each, commencing on Oct. 15, 1944, drawn by Andre (Manufacture) & Co., Ltd., signed by C. Andre for and on behalf of Andre (Manufacture) & Co., Ltd., payable to Kent Trust, Ltd., payable at Credit Lyonnais, 25-27, Charles II Street, Haymarket, S.W.1, which you are at liberty to present and credit our account with any monies received by you in respect thereof. [That is signed: Andre Cohen for and on behalf of Andre Products, Ltd.] As further collateral security we are depositing with you an agreement dated Feb. 23, 1944, between C. Bolsom and Andre Cohen relating to the transfer of the lease of property of 14, Half Moon Street, of the share of the benefit of Andre Cohen. (Signed) Andre Cohen for and on behalf of Andre Products, Ltd. Signed by us before the loan was made. (Signed) Andre Cohen, Director. Dated this 15th day of September, 1944. We acknowledge to have received a true copy of this memorandum. (Signed) Andre Cohen for and on behalf of Andre Products, Ltd. Andre Cohen, Director.

At the same time a promissory note was also signed by Andre Cohen on behalf of the company in the same terms as those set out in the memorandum which I have just read and which I need not repeat.

When the case was tried before CASSELS, J., under R.S.C. Ord. 14, Koski, the managing director of the plaintiff company, gave evidence on behalf of the plaintiffs. That evidence showed, as the judge in fact found in his judgment, that the agreement between the parties was that, in addition to the promissory note which was executed and handed over, certain post-dated cheques should be given as security: those cheques consisted of five cheques for £200 each and a sixth cheque for £150, which was to be security for the payment of interest. With regard to that, the judge says in terms:

> What the defendant company offered by way of collateral security was five cheques of £200 each dated at weekly dates in the future and then a final cheque, it being the sixth, which was to be £150 for the use of the money. Five cheques at £200 each equals £1,000, that being the principal. So far as the £150 was concerned, Koski took that as collateral security also against the interest, and I accept what Koski has said, that he agreed with Cohen that if the interest worked out on calculation of interest at 90 per cent. to more than the interest which was due, he, Koski, would give him back the difference.

That, in effect, is merely setting out the consequences in law of receiving that £150 by way of collateral security. Notwithstanding having found that that was the bargain, the judge later in his judgment said this:

> The terms of the loan in this case were very fully set out in the memorandum. The loan which was borrowed was £1,000. It was not contended that £1,000 did not pass. It was not one of those transactions where the borrower acknowledges that he has borrowed £1,000 in order to put his hands on £750. The interest was clearly set out as 90 per cent. per annum and in this memorandum referred to as collateral security. The cheques themselves have been set out—the cheques which were the collateral security to secure the loan; they were in fact five cheques of £200 each.

Then, in dealing with the submission made to him on behalf of the defendants that this memorandum was deficient and failed to comply with sect. 6 of the Act by reason of the fact that it contained no mention of the sixth cheque for £150 which had been given by way of security for the payment of the interest—and after referring to some authorities which had been cited to him—the judge said:

> The cases, of course, are very useful as a guide to the way in which this Act is to be administered, but I cannot help thinking that each case must depend upon its own

circumstances. Nobody knew better than Andre Cohen that he had given that cheque for £150 to be a further collateral security. No one knew better than he that he had given six cheques altogether, five for £200 each, which would make up £1,000, and one for £150 to be available to the moneylender for interest. I am quite satisfied that the arrangement between them was not that the moneylender should put the whole of the £150 for interest into his pocket if the terms of the contract had been complied with and the money paid back upon the due date, but that a calculation would have been made at 90 per cent. interest on the terms of the promissory note and that any balance would have been repayable to Andre Cohen.

The judge, therefore, came to the conclusion that in his view there had been a sufficient memorandum to comply with the requirements of the statute. I think that in so doing he was founding himself upon a sentence in the judgment of Farwell, J., in *Re a Debtor* (1) where the judge, dealing with the authorities and the effect of the authorities that had been cited to him, uses this language ([1938] 2 All E.R. 759, at p. 763) :

> If the memorandum does not disclose the true terms, so that the debtor is prejudiced, or so that his position is not so good as it appears to be, then the memorandum may not comply with the section. On the other hand, if the error is one which can be easily seen to be an obvious error, and which can be easily understood to be an error, so that the debtor will appreciate what the true position is, or that it is so trivial that it does not affect the position at all, the error will not be sufficient to affect the memorandum.

I think Cassels, J., in coming to the decision at which he arrived, was probably founding himself upon that statement and regarding this as an error and that he took the view that, provided the borrower had not, in fact, been prejudiced, he could no longer rely upon an insufficient memorandum. In my view, that is not the effect of what Farwell, J., was saying, nor do I think that the omission of all reference to the cheque for £150 in this case can possibly be regarded as an error, or, at any rate, the kind of error that Farwell, J., had in mind in reviewing the authorities which had been cited to him. Nor is there, in my view, any evidence that the omission to refer to this £150 was, in fact, due to any mistake on the part of Koski at all. There is some evidence that the transaction was carried through with some degree of haste, but all the evidence, in my view, is quite consistent, at any rate, with Koski having deliberately omitted to mention in the memorandum this cheque for £150.

It is not disputed—and the authorities which have been referred to make it clear—that, in order to comply with the section, where security is given the memorandum must set out with accuracy what the security is. I do not think it is necessary to refer further to the authorities on that point. In my view, in this case the memorandum was clearly defective in that it omitted any mention at all of this cheque for £150.

It has been contended by counsel for the plaintiffs, that this section should be construed differently according to the degree of education and intelligence possessed by the borrower. In my view, that is quite an impossible approach to the interpretation of this, or, I would add, any, Act of Parliament. On the clear interpretation of this particular section it was necessary that this cheque, which formed an essential part of the security, should be referred to.

Finally counsel for the plaintiffs adumbrated that the judgment of Cassels, J., might possibly be supported in some way on the ground of fraud on the part of the borrower. As has been pointed out by my Lord, at any rate two answers to that are these : firstly, that no such fraud was pleaded, and, secondly, that there was no evidence of any such fraud.

For these reasons, in my view, this appeal succeeds.

Morton, L.J. : I agree, and I shall only add a few words because I was a party to the decision in *Re a Debtor* (1).

Cassels, J., appears to have taken the view that the Moneylenders' Act, 1927, s. 6, need not be strictly complied with if the borrower in fact knows what are the terms of the contract. He says, in a passage which has already been read :

> Nobody knew better than Andre Cohen that he had given that cheque for £150 to be a further collateral security.

In *Re a Debtor* (1) Farwell, J., pointed out very clearly that that was no answer to a defence based upon the section. In that case the defect in the memorandum was that, whereas the debtor had given two promissory notes for £50 each, the memorandum referred to "*a* promissory note for £100." Farwell, J., said this ([1938] 2 All E.R. 759, at p. 763) :

> There is no doubt that the person who signed the memorandum was perfectly well aware that there were two promissory notes. It has not been suggested that he was not. None the less, the memorandum does not state the whole effect of the contract, because it states that the loan is secured by a promissory note, and there are in fact two promissory notes.

He then went on to point out how the position of the debtor might be worse because of the fact that two promissory notes were given. The statute lays down that the note or memorandum shall contain all the terms of the contract, and, in my view, it is no answer to say that the borrower knew exactly what the terms of the contract were.

I agree that the appeal must be allowed.

Lord Greene, M.R. : I entirely agree. All I wish to do is to state, in fairness to Koski, my understanding of one phrase which Tucker, L.J., used —and I am quite certain that he used it in the sense that I am going to mention—namely, that the evidence was consistent with Koski having "deliberately" left out any reference to this sixth cheque. I understand that as meaning—at any rate, this would be my own view—that it was certainly consistent with it having been done deliberately but without any implication of fraud or dishonesty on Koski's part, that it was consistent with his having left it out because he did not think it necessary to refer to it. I hope I am interpreting my brother Tucker, L.J.'s, meaning when I say that I did not take his suggestion that it was done "deliberately" as implying anything dishonest.

Tucker, L.J. : My Lord has quite correctly interpreted what I intended to imply.

Lord Greene, M.R. : The appeal is allowed with costs. The order will direct delivery up of the promissory notes and the cheques.

Appeal allowed with costs.

Solicitors : *Stone & Stone* (for the appellants) ; *Isadore Goldman & Son* (for the plaintiffs).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

VINER *v.* GOLDSTEIN.

[Court of Appeal (Morton and Asquith, L.JJ.), June 25, 1946.]

Practice—Leave to appeal—Interlocutory order of official referee—Right of appeal without leave—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*i*)—*Administration of Justice Act,* 1932 (c. 55), *s.* 1 (1)—*R.S.C., Ord.* 36, *rr.* 49, 50.

The Administration of Justice Act, 1932, s. 1 (1), which provides that "An appeal shall lie to the Court of Appeal from any decision of an official referee on a point of law," applies to interlocutory as well as final decisions and gives a right of appeal from interlocutory and final decisions of the official referee without leave. (*Conway* (*Theo.*), *Ltd.* v. *Henwood* (1) *applied*). R.S.C., Ord. 36, rr. 49 and 50, do not have the effect of making the official referee a judge and therefore the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*i*), whereby no appeal lies (except in certain immaterial cases) "without the leave of the judge or of the Court of Appeal from any interlocutory order or judgment made or given by a judge," does not apply to interlocutory decisions of the official referee.

[**EDITORIAL NOTE.** It is argued that an official referee is in effect a judge and that leave is therefore necessary for an appeal from interlocutory orders of a referee. This argument the court rejects.

As to Appeals from Official Referee, see HALSBURY, Hailsham Edn., Vol. 26, p. 113, note (*g*) ; and for Cases, see DIGEST, Supplement, Practice, *3816 a, b.* See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 627, note.

For the Administration of Justice Act, 1932, s. 1, see HALSBURY'S STATUTES, Vol. 25, p. 463.]

Case referred to :

*(1) *Conway* (*Theo.*), *Ltd.* v. *Henwood* (1934), 50 T.L.R. 474 ; Digest Supp.

PRELIMINARY ISSUE OF LAW on an interlocutory appeal by the defendant from an order of His Honour T. EASTHAM, K.C., Official Referee, dated May 27, 1946, ordering the defendant to deliver to the plaintiff particulars as asked within 14 days. Leave to appeal had not been obtained from the Official Referee or the Court of Appeal. The respondent took the preliminary objection A that, as the appeal was in an interlocutory matter, leave of the Official Referee or the Court of Appeal was necessary.

W. J. K. Diplock, for the appellant.

C. L. Hawser, for the respondent.

MORTON, L.J. : Counsel for the respondent took, *inter alia*, the preliminary point that, as the appeal was in an interlocutory matter, leave of the official referee or the Court of Appeal was necessary. Counsel referred us to the B Administration of Justice Act, 1932, s. 1, which is as follow :

> (1) As from the date on which this section comes into operation, the following provisions shall have effect with respect to appeals from decisions of official referees in causes, matters, questions and issues which have been ordered under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 . . . to be tried before an official referee : (*a*) An appeal shall lie to the Court of Appeal from any decision of an official referee on a point of law ; (*b*) subject as aforesaid no decision of an official referee shall be C called in question either by appeal . . .

At first sight that appears to be a general provision allowing appeals from decisions of an official referee on a point of law, but reliance was placed on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*i*), which provides :

> 31 (1) No appeal shall lie . . . (i) without the leave of the judge or of the Court of D Appeal from any interlocutory order or interlocutory judgment made or given by a judge, except in the following cases [which are not material here].

It was pointed out that the official referee is not a judge and that the prohibition has no application. Counsel for the respondent, however, referred to the provisions of R.S.C., Ord. 36, rr. 49 and 50, which are as follows :

> 49. Subject to any order to be made by the court or judge ordering the same, E evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by *subpoena*, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge. 50. Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court.

F Counsel for the respondent relied on these provisions for the proposition that the official referee was in the same position as a judge and the provision of the 1925 Act should be read as applying to official referees. I cannot assent to that argument. The Administration of Justice Act, 1932, s. 1, contains a plain general enactment that an appeal shall lie to the Court of Appeal from any decision of an official referee on a point of law ; this is an appeal on a point of law. It was held by the Court of Appeal in *Theo. Conway, Ltd.* v. *Hen-* G *wood* (1) that sect. 1 of the 1932 Act applies to interlocutory or final decisions, and there is no limitation to final decisions. Sect. 31 (1) of the Judicature Act, 1925, does not apply to the present case, since the official referee is not "a judge" within the meaning of that subsect., and the rules referred to have not the effect of making the official referee "a judge." There is, therefore, a right of appeal from interlocutory and final decisions of the official referee without leave.

H ASQUITH, L.J. agreed.

Preliminary objection overruled.

Solicitors : *Cripps, Harries, Hall & Co.* (for the appellant) ; *Manches & Co.*, agents for *J. H. Franks*, Manchester (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re ARNO, HEALEY AND ANOTHER *v.* ARNO AND OTHERS.

[Chancery Division (Roxburgh, J.), May 30, 31, June 6, 1946.]

Rentcharges and Annuities—Annuities given by will—To "be paid without deduction of income tax up to a maximum of 5s. in the £"—Reliefs and allowances—Principle of Re Pettit not applicable.

By his will the testator (who died in 1937) gave certain annuities and directed that they should "be paid without deduction of income tax up to a maximum of 5*s*. in the £." The question to be determined was whether the principle of *Re Pettit* (1) applied, with the result that an annuitant would not be able to retain any reliefs or allowances to which he might be entitled: —

Held: upon the true construction of the will, the form of the direction postulated freedom from income tax up to 5*s*. in the £ as a constant factor for the purposes of ascertaining the amount of the annual payment, and made the decision in *Re Pettit* (1) inapplicable. Each of the annuitants was, therefore, entitled to retain the benefit of any income tax reliefs or allowances to which he might be entitled.

Re Bates' Will Trusts (4) *distinguished.*

[EDITORIAL NOTE. This case closely resembles *Re Bates* (4) where annuities were given "clear of all death duties and income tax up to but not exceeding 5*s*. 6d. in the £ but not sur-tax." It was there held that the principle of *Re Pettit* (1) was applicable and that the annuitants were consequently liable to account to the residuary estate for reliefs and allowances to which they were entitled. The case now reported, however, is held to be distinguishable as being a direction for payment without deduction of tax rather than a gift clear of tax, and the annuitant is therefore held to be entitled to retain the benefit of reliefs and allowances. Roxburgh, J., compares the different considerations arising in the case of annuities partly free from tax with those arising where an annuity is altogether free from tax, and points out that in the former case a testator is rather concerned with what is to be paid by the trustees than with the sum to remain in the hands of the annuitant.

As to Tax-Free Annuities, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214—216, paras. 386—388, and Supplement; and for Cases, see DIGEST, Vol. 39, pp. 166—168, Nos, 572—593, and Supplement.]

Cases referred to:

*(1) *Re Pettit, Le Fevre* v. *Pettit*, [1922] 2 Ch. 765; 39 Digest 167, *587*; 91 L.J.Ch. 732; 127 L.T. 491.

(2) *Inland Revenue Commissioners* v. *Cook*, [1945] 2 All E.R. 377; [1946] A.C. 1; 114 L.J.P.C. 69; 173 L.T. 211.

(3) *Re Jones, Jones* v. *Jones*, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417.

*(4) *Re Bates' Will Trusts, Jenks* v. *Bates*, [1945] 2 All E.R. 688; [1946] Ch. 83; 174 L.T. 305.

(5) *Re Maclennan, Few* v. *Byrne*, [1939] 3 All E.R. 81; [1939] Ch. 750; Digest Supp.; 108 L.J.Ch. 364; 160 L.T. 612.

Adjourned Summons to determine questions arising under the will of Thomas Arno. The facts are fully set out in the judgment.

W. G. H. Cook for the plaintiffs.

J. Neville Gray, K.C., and *Wilfrid Hunt* for annuitants.

T. A. C. Burgess for another annuitant.

Cyril L. King, K.C., and L. M. Jopling for the residuary devisees and legatees.

Cur. adv. vult.

Roxburgh, J.: The testator, Thomas Arno, who died on May 30, 1937, by his will dated Mar. 31, 1937, gave certain annuities and directed that they should:

> . . . be paid without deduction of income tax up to a maximum of 5*s*. in the £.

It has been conceded, and accordingly I have already declared in answer to question 1 of the originating summons, that on the true construction of the will and of the Income Tax Act, 1918, so long as the standard rate of income tax does not fall below 5*s*. in the £, the amount of the annuity payable by the trustees of the will to each annuitant should be ascertained by calculating, first, the sum which after deduction therefrom of income tax at the rate of 5*s*. in the £ will leave the net amount of the annuity bequeathed, and, secondly, by deducting from the gross amount so arrived at income tax at the standard rate in force for the year in which the annuity became due. The first of these calculations is required to give effect to the directions of the testator and the second to give effect to the income tax legislation, and together they involve the following consequences: (i) the gross sum will be a constant figure, (ii) the amount actually paid to the annuitant by the trustees will always be less than the stated amount of the annuity so long as the standard rate of income tax exceeds 5*s.* in the £, (iii) the amount ultimately available in the hands of the annuitant will always fall short of the stated amount so long as his " effective rate " of income tax exceeds 5*s.* in the £. By his " effective rate " I mean this. When the income tax liability of an annuitant has been finally ascertained in respect of any financial year, after taking into account all appropriate reliefs and allowances, it is possible to predicate, by comparing the total amount of income tax suffered (by payment or deduction) with the total gross income from all sources, that the effective rate of tax borne by him has been at the rate of x shillings in the £. This rate (sur-tax apart) will be less than the standard rate, and it may be convenient to call it his " effective rate."

The case of an annuity which is altogether free of income tax is relatively simple. A gift of an annuity of a stated amount wholly free of income tax takes effect as a gift of a gross sum of such an amount as after deduction of income tax at a certain rate will leave the stated amount of the annuity bequeathed. But at what rate ? In the first instance the deduction must be at the standard rate, and this will result in a payment to the annuitant of the stated amount, neither more nor less. Accordingly, if the annuitant's effective rate of income tax is below the standard rate, the repayments or allowances in account, to which he is entitled, will enable him to receive in respect of the annuity a sum in excess of the stated amount. This anomaly is, in my judgment, the basis of the rule in *Re Pettit* (1) where ROMER, J., said ([1922] 2 Ch. 765, at p. 770):

> . . . I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it [*i.e.*, the tax], and not be handed back to the residuary legatees who have.

Accordingly the courts have, in the case of a wholly tax-free annuity, generally been able to hold that the excess should be repaid by the annuitant to the estate. The result of the adjustment is that the annuitant gets in the end exactly the stated sum, and the intention of the testator is carried out because the freedom from tax which the testator intends is :

> . . . freedom from the tax which would otherwise be payable by the particular annuitant.

See *Inland Revenue Commissioners* v. *Cook* (2) *per* LORD RUSSELL OF KILLOWEN ([1945] 2 All E.R. 377, at p. 387). But, as LORD RUSSELL OF KILLOWEN said (*ibid.*), the testator may show by particular words, as in *Re Jones* (3), that he intends " freedom from tax at the standard rate as a fixed deduction for the purpose of ascertaining the amount of the net annual payment," and then no adjustment falls to be made.

Different considerations arise in the case of annuities which are partly free of income tax. In the first place, the testator, when he states the amount of the annuity, cannot know what the annuitant will actually receive, because that will depend upon the annuitant's effective rate of income tax. Therefore, in stating the amount, the testator is more likely to have an eye on what is to be paid by the trustees than upon the sum to remain in the hands of the annuitant. This would not be so in the case of an annuity altogether free of tax. Secondly, the annuitant will never receive the stated amount of the annuity in full unless and until his effective rate of income tax falls to the figure at which the upper limit for freedom from income tax is fixed. Accordingly, the anomaly, against which the decision in *Re Pettit* (1) is directed, need not happen, and, indeed, is unlikely to happen. Thirdly, the gross sum involved in the calculation has to be ascertained in a different manner. In the present case, it is necessary to resort to the testator's direction to pay " without deduction of income tax up to a maximum of 5*s.* in the £ " in order to calculate that gross sum. It is not possible in the case of any annuity partly free of income tax to calculate the gross sum solely by reference to the standard rate and the stated amount.

These differences between annuities altogether free of income tax and annuities partly free of income tax justify, in my judgment, a different approach to the problem of construction. So far only one case dealing with an annuity of the latter class seems to have been reported. In *Re Bates* (4) ROMER, J., had to consider a gift of annuities :

> . . . clear of all death duties and income tax up to but not exceeding 5*s.* 6*d.* in the £ but not sur-tax.

He arrived at the conclusion that the principle of *Re Pettit* (1) applied. He held that it was reasonably clear that the testator intended to do no more than extend a partial indemnity to the annuitants, at the expense of his estate, against the income tax which was found ultimately to be payable in respect of their annuities.

The language which I have to consider is substantially different. In the first place, there is no reference to sur-tax in the will before me. The importance of such a reference in this connection is discussed by Lord Greene, M.R., ([1939] 3 All E.R. 81, at p. 87) in *Re Maclennan* (5). Secondly, I am not concerned with a gift of annuities clear of tax, but with a direction for payment without deduction of tax. In other words, the eye of the testator is on the trustees making the payment, and not on the annuitant receiving the annuity. He is, in my view, directing his trustees to make such a payment as will relieve the annuitant from income tax upon income from this source up to 5*s.* in the £, and leave him to bear whatever further tax may be payable. This result is achieved by making the calculations and payments which I indicated at the outset. Once this has been done the trustees are not, I think, intended to have any further concern with the annuitant's income-tax liabilities. This seems to me to be the natural meaning of the testator's direction and also the meaning which the circumstances demand. He seems to be looking forward to rises in income tax, and to a state of affairs in which the annuitant could not possibly get more than 20*s.* in the £ of the stated amount. He does not seem to be thinking of the incidence of tax on the annuitant, or of the actual sum which will remain in the annuitant's hands, but seems anxious to place a definite upper limit on the extent to which rising income tax can impose further liabilities on his estate. I cannot see any indication contrary to this. It is significant, I think, that the testator has not limited the liability of his estate by reference to a proportion of the income tax which the annuitant has to bear in respect of income from this source, but by reference to a fixed rate, so that, as the tax rises, the annuitant bears an increasingly large proportion. Finally, if in present circumstances the trustees are entitled to recover any part of the reliefs or allowances to which an annuitant is entitled, the estate will not in the result have relieved him of income tax to the full extent of 5*s.* in the £, and such a result would appear to me to conflict with the language which the testator has used. Accordingly, I hold that the form of the direction contained in this particular will postulates freedom from income tax up to 5*s.* in the £ as a constant factor for the purpose of ascertaining the amount of the annual payment, and makes the decision in *Re Pettit* (1) inapplicable.

In the view of the conclusion which I have reached on the construction of the will, I need not express any opinion on the powerful alternative argument of counsel for the annuitants. He submits that the principle underlying *Re Pettit* (1) does not call for any repayment to an estate when and so long as an annuitant receives in the result less than the stated amount of his annuity. In the case of a tax-free annuity (apart from statute) this can never happen. But if an annuity is tax free up to 5*s.* in the £, this will always happen unless and until the annuitant's effective rate of income tax falls to 5*s.* in the £. Until his effective rate falls so far (an unlikely contingency) the annuitant does not get 20*s.* in the £ of the stated amount, and accordingly counsel for the annuitants submits that the reasoning which I have quoted from the judgment of Romer, J., in *Re Pettit* (1) is inapplicable. Moreover (until the effective rate falls so far) if the trustees do recover anything from the annuitants, counsel for the annuitants submits that he will not have been relieved from income tax to the full extent of 5*s.* in the £ and, accordingly, the testator's direction will have been frustrated. As these alternative contentions are not material unless I have misconstrued the will, I shall say no more about them, except that they merit attention.

I shall declare that each of the annuitants is entitled to retain the benefit of any income tax reliefs or allowances to which he or she may be entitled.

Declaration accordingly.

Solicitors: *Eagleton & Sons* (for the plaintiffs and the residuary devisees and legatees); *Field, Roscoe & Co.*, agents for *Hillman, Burt & Warren*, Eastbourne (for the annuitants).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Re JONES, SOAMES *v.* H.M. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Roxburgh, J.), June 18, 1946.]

Estate Duty—Assessment of duty—Property passing on death—Gift of testator's residuary estate to F.J.—Date of vesting postponed until F.J. should attain the age of 25—Gift over in the event of F.J.'s death under the age of 25—F.J. entitled to income after attaining the age of 21*—Death of F.J. at age of* 23*—"Interest in possession"—Finance Act,* 1894 (*c.* 30), *ss.* 2 (1) (*b*), 5 (3)*—Trustee Act,* 1925 (*c.* 19), *s.* 31 (1) (ii).

The testatrix, who died on Feb. 6, 1936, directed that, subject to the payment of certain annuities, her residuary estate should be held on trust for her nephew, F.J., but that he should not acquire a vested interest therein until he attained the age of 25 years. There was a gift over in the event of F.J. dying under that age. F.J. attained the age of 21 years on Mar. 16, 1942, but died on June 15, 1944. The will contained no express disposition of the surplus income of the residuary estate during the period before F.J. attained the age of 25 and therefore F.J. was entitled, under the Trustee Act, 1925, s. 1 (ii), to receive the whole of the surplus income from when he attained the age of 21 until his death. The question to be determined was whether F.J. had an interest in the residuary estate ceasing on his death so that, under the Finance Act, 1894, s. 2 (1) (*b*), estate duty became payable on his death on the appropriate part of the residuary estate. It was contended by the trustees of the estate that, since F.J. had died before he had acquired a vested interest in the estate, he did not have an interest in possession and therefore, under sect. 5 (3) of the 1894 Act, estate duty was not payable on his death :—

HELD : since F.J. was entitled to the entire surplus income of the residuary estate from when he attained the age of 21 until his death, he had an interest in possession which ceased on his death and therefore, under the Finance Act, 1894, s. 2 (1) (*b*), estate duty became payable on his death on the appropriate part of the residuary estate.

[**EDITORIAL NOTE.** It is arguable, in the circumstances here reported, that the interest of the annuitant in the surplus income arises solely by virtue of the Trustee Act, 1925, s. 31 (1). The true view, however, appears to be that the income is receivable by the combined effect of the settlement and the Trustee Act, and is an interest ceasing on the death of the annuitant so as to attract duty.

AS TO PROPERTY PASSING ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-237, paras. 222-226, and Supplement ; and FOR CASES, see DIGEST, Vol. 21, pp. 7-10, Nos. 21-42.]

Cases referred to :

*(1) *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner*, [1936] 2 All E.R. 1435 ; [1937] Ch. 15 ; Digest Supp. ; 106 L.J.Ch. 58 ; 155 L.T. 266.

*(2) *A.-G.* v. *Power*, [1906] 1 I.R. 272 ; 21 Digest 14, *68i*.

ADJOURNED SUMMONS to determine whether estate duty became payable on the appropriate part of the residuary estate of Winifred Mary Oliver Jones by reason of the death of Francis John Oliver Jones, a beneficiary under her will. The facts are fully set out in the judgment.

Norman Armitage for the trustees.

J. H. Stamp for the Crown.

ROXBURGH, J. : The testatrix, Winifred Mary Oliver Jones, made her will on Jan. 31, 1934. She bequeathed two annuities, one by her will and the other by a codicil dated May 27, 1935, and made other dispositions not material to be stated. By the will she devised all her real and personal estate on trust for sale and directed her trustees to stand possessed of the proceeds of sale and any part of her estate for the time being unconverted (all of which she called "her residuary estate") in trust for her nephew Francis John Oliver Jones but so that he should not acquire a vested interest therein until he attained the age of 25 years. The testatrix then directed that if he should die without having attained that age her trustees should stand possessed of her residuary estate in trust for all his children or any his child who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or marry and if more than one in equal shares. She further directed that, in the event of the failure of the trusts in favour of him and his children, her residuary estate should be held in trust for such of three named cousins of hers as should be living at her death or at the death of Francis John Oliver Jones whichever should last happen and if more than one in equal shares. The testatrix died on Feb. 6, 1936. Francis John Oliver Jones was born on Mar. 16, 1921. He reached the age of 21 years but, unfortunately, not that of 25 years, because he died in action on June 15, 1944. He was unmarried.

The question which I have to determine is whether estate duty became payable on the appropriate part of the residuary estate by reason of the death of Francis John Oliver Jones. It will be noted that the will contains no express disposition of the surplus income of the residuary estate not required to answer the annuities during the period before he attained the age of 25 years and, accordingly, the disposition of that income fell to be regulated by the Trustee Act, 1925, s. 31 (1) which provides :

> Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property . . . (ii) if such person on attaining the age of 21 years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsect. 2 of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest.

Accordingly, during the period between Mar. 16, 1942—being the date on which Francis John Oliver Jones attained the age of 21 years—and June 15, 1944—the date of his death—he was entitled to receive the whole of the surplus income of the residuary estate. The trustees had no option in the matter. He was entitled to receive the whole of it and whether he actually did or did not receive the whole of it during his lifetime is immaterial.

That being so, the Crown contends that estate duty is payable under the Finance Act, 1894, s. 2 (1) (*b*), which provides :

> (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . .

The Crown contends that, as the surplus income was payable in its entirety to Francis John Oliver Jones until his death and ceased to be payable on his death, estate duty is *prima facie* payable. Counsel for the estate says that that may be so, but contends that the case falls within the exception in the Finance Act, 1894, s. 5 (3), which is as follows :

> In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

It seems to me that counsel for the estate is really on the horns of a dilemma. On the one hand it is possible to contend that the interest which Francis John Oliver Jones had in the residuary estate arose, not under the settlement, but under the Trustee Act, 1925, s. 31 (1). If, however, that contention be well founded, the Finance Act, 1894, s. 5 (3), has no application, because the interest which has ceased is not an interest "under the settlement," but an interest under the statute. On the other hand, it may be contended that the interest of Francis John Oliver Jones in the residuary estate was derived under the settlement, and that the particular sums of money which he became entitled to receive during his life were receivable under the settlement and the Trustee Act, 1925, in combination. If so, then it is impossible to say that his interest never became an interest in possession. Accordingly, the Crown's claim is well founded.

Counsel for the estate invited me to read the Trustee Act, 1925, s. 31 (1) (ii), as though it contained a provision that it should not alter the incidence of any duty. The ingenious process by which he suggested that I should arrive at that conclusion was as follows. First, he said, I am to look at *Re Turner's Will Trusts* (1), and I am to consider myself directed by that decision to look at the Law of Property Act, 1922. Pursuant to that direction I am to look at the Law of Property Act, 1922, s. 15, in which I find the following provision :

> (10) Nothing in this Act shall alter any duty payable in respect of land, or impose any new duty thereon, or affect the remedies of the said commissioners against any person other than a purchaser or a person deriving title under him.

He says that I am further directed by *Re Turner's Will Trusts* (1) to deem that that provision—which was, in fact incorporated in the Law of Property Act, 1925, s. 16 (4),—has also been incorporated in the Trustee Act, 1925, and that I am to consider that, when it refers to duties on land, it is to be construed as if it referred to all duties. By that process I am to reach the conclusion that no duty is payable in the present case. I do not feel able to steer that course. I am not sure how far counsel for the estate relied on *A.-G.* v. *Power* (2). The head-note in that case is as follows:

> Where, under a settlement, H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under 21, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, etc., and to accumulate the surplus upon trust, if he should attain his age, for him; but if he should die under age, for the persons who should ultimately become indefeasibly entitled; and H. dying under age, the defendants became indefeasibly entitled as tenants in common in fee of all the lands in the settlement, including H.'s share:—*Held*, that estate duty was not payable as on a property passing on H.'s death; that H.'s interest had not become a beneficial interest in possession in the lands at his death; and that, accordingly, the Finance Act, 1894, s. 5 (3), was applicable. *Held*, also, that the real nature of the transaction must be considered and not only the conveyancing form. *Semble*: That estate duty might be payable on the actual sums received by H. for maintenance, upon the analogy of the provision with regard to legacy duty, under 36 Geo. 3, c. 52, s. 11, and 54 Geo. 3, c. 92, s. 12 (Ir.).

I am not concerned in the present case with powers of maintenance by trustees during a minority. That is quite a different matter. I am concerned with a case where a person of full age was, under the statute, entitled to be paid the whole surplus income year by year until he attained the age of 25 years, when he would become entitled to the capital if he so long lived: and, on the whole, I think that *A.-G.* v. *Power* (2) is more in favour of the Crown than against it. I take that view because that case proceeds on admissions by the Crown which are set out by PALLES, C.B., in the following passage in his judgment ([1906] 2 I.R. 272, at p. 277):

> It has been admitted by the Crown, and, as I think, rightly, that although this proviso may not vest a legal estate in the trustees, it was sufficient in equity to effectually capture the rents and profits of Hubert's third share, from his father's death in 1892, to his own death in 1898, and to dedicate them to the trusts thereby declared . . .

Later PALLES, C.B., said (*ibid.*, at p. 280):

> Had Hubert . . . been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possession, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interest of the trustees, but as maintenance *eo nomine*, out of the express trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

In the present case, Francis John Oliver Jones was plainly entitled to the entire surplus income between Mar. 16, 1942 and June 15, 1944. Accordingly, there is nothing in *A.-G.* v. *Power* (2) which will save this estate from estate duty. The applicants will pay the Crown's costs as between party and party.

Declaration accordingly.

Solicitors: *Herbert Smith & Co.* (for the Trustees of the estate); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

SMITH'S POTATO ESTATES LTD. *v.* BOLLAND (INSPECTOR OF TAXES)

SMITH'S POTATO CRISPS (1929) LTD. *v.* INLAND REVENUE COMMISSIONERS

[King's Bench Division (Atkinson, J.), May 20, 21, 22, June 6, 1946.]

Income Tax—Deductions against profits—Cost of litigation—Expenses of ascertaining profits—Appeal vital to retain services of valuable employee—Whether outlay in order to earn profits or disbursement of profits earned—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases* I *and* II, *r.* 3 (*a*)—*Finance Act,* 1940 (*c.* 29), *s.* 32—*Finance Act,* 1941 (*c.* 30), *s.* 34.

Revenue—Excess profits tax—Deductions against profits—Cost of litigation—Expenses of ascertaining profits—Appeal vital to retain services of valuable employee—Whether outlay in order to earn profits or disbursement of profits earned—Income Tax Act, 1918 (*c.* 40), *Sched.* D, *Cases* I *and* II, *r.* 3 (*a*)—*Finance Act,* 1940 (*c.* 29), *s.* 32—*Finance Act,* 1941 (*c.* 30), *s.* 34.

To secure their own supply of potatoes for the purpose of their business, the second appellants formed and held all the shares in a subsidiary company (the first appellants) which, with the parent company's money, acquired a large estate, previously managed for many years by an experienced farmer, Y. In order to retain Y's valuable services an agreement was entered into as a result of which Y., in the accounting year ending Mar. 31, 1941, made an income of £6,486, which was included in the accounts of the subsidiary company. His income in the previous year, under a less satisfactory agreement had been £3,550. In computing the profits of the subsidiary company (which were thrown in with the parent company's profits) for assessment to excess profits tax for that chargeable accounting period, the Commissioners of Inland Revenue, acting under the Finance Act, 1940, s. 32, decided that no deduction should be allowed in respect of Y.'s remuneration in excess of £3,500, being the amount the Commissioners considered reasonable and necessary, having regard to the requirements of the trade or business and to the actual services rendered by Y. By virtue of the Finance Act, 1941, s. 34, the substantial additional taxation for which the parent company was liable, on that basis, would, in future years, be recoverable from Y. and as they had every reason to believe that that would be the basis for Y.'s future allowed remuneration, both companies appealed to the Board of Referees against this decision, and that Board held that £5,800 out of the sum of £6,486 was deductible. The subsidiary company incurred legal and accountancy costs of £622 in the preparation and prosecution of that appeal:—

Held: (i) the expenditure was an admissible deduction in computing the profits of the subsidiary company for assessment to excess profits tax and income tax. *Rushden Heel Co., Ltd.* v. *Keene* (*Inspector of Taxes*), *Rushden Heel Co., Ltd.* v. *Inland Revenue Commissioners* (1) *followed.*

(ii) the fact—as the Special Commissioners had found—that it was really vital for the companies to take the step of appealing for the purpose of retaining the goodwill and future services of Y. was, in itself, a sufficient ground for allowing the deduction.

[**EDITORIAL NOTE.** This case is decided on the same grounds as the *Rushden* case (p. 141, *ante*), namely, that the cost of the litigation in question was a necessary outlay in ascertaining profits. Atkinson, J., decides the further point, however, that an expense incurred in retaining the services of someone who is vital to the business is also a deductible expense.

For Expenses Wholly or Exclusively Expended for Purposes of Trade, see HALSBURY, Hailsham Edn., Vol. 17, p. 152, para. 312; and for Cases, see DIGEST, Vol. 28, pp. 42-44, Nos. 215-226.]

Case referred to:

*(1) *Rushden Heel Co., Ltd.* v. *Keene* (*Inspector of Taxes*), *Rushden Heel Co., Ltd.* v. *Inland Revenue Comrs.*, [1946] 2 All E.R. 141.

Cases Stated under the Finance (No.2) Act, 1939, s. 12 (2), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the

Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

F. Grant, K.C. and *A. G. Tribe* for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

ATKINSON, J.: This is an appeal on the same lines as The *Rushden Heel Co.* case (1). There are two appeals, the first by Smith's Potato Estates Ltd. and the second by Smith's Potato Crisps (1929) Ltd. The same questions with which I dealt in the *Rushden Heel Co.* case (1) arise, but there is also one further point with which I want to deal as shortly as I can. Smith's Potato Crisps (1929) Ltd. were very anxious to secure their own supply of potatoes for the purposes of their business. In order to do that they bought in 1936, a very big farm in Lincolnshire called the Nocton Estate, quite a famous farm and managed by a famous farmer called Young. They did not take the working of this farm over themselves, but they formed a subsidiary company, Smith's Potato Estates Ltd., in order to undertake the purchase of it. The parent company held all the shares in the estates company, which was therefore a subsidiary of the parent company. They purchased the estate in April, 1936, and paid £250,000 for it in cash, the parent company finding the money. Young had been the manager of this estate for many years. The parent company knew nothing at all about farming, and were very anxious to retain the services of Young. They entered into an agreement with him by which he received certain remuneration, including a share of profits, which was expected to be substantial. But, up to the year 1940, the anticipated profits were not realised. The firm's profits were barely sufficient to pay the debenture interest and overhead charges, and Young earned no commission under the agreement. There was no suggestion that he was in any way responsible for that, but the general conditions prevailing produced that result. So the company had a thoroughly dissatisfied manager, whom they might lose when his agreement came to an end. As a result of that a new agreement had to be negotiated. Negotiations were concluded and a new agreement was made. There were a number of variations of the old agreement, and the result of it was that, in the accounting year which ended Mar. 31, 1941, Young made an income of £6,486, which expenditure was included in the accounts of the Estates company. For the year 1942 he made again over £6,000, in 1943 over £5,000, in 1944, £5,700 odd and so on.

On Aug. 15, 1942, the Commissioners of Inland Revenue issued to the secretary of the Estates company a notice under sect. 32 of the Act of 1940, a section relating to excess profits tax. The section is in these terms:

> In computing the profits of any trade or business for any accounting period, no deduction shall be allowed in respect of expenses in excess of the amount which the Commissioners consider reasonable and necessary, having regard to the requirements of the trade or business, and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned.

Then it is provided that any person who is dissatisfied may appeal to the Board of Referees.

Under that section, for some reason, the Commissioners said they had decided that no deduction should be allowed in respect of Young's remuneration in excess of £3,500, the amount which the Commissioners considered "reasonable and necessary, having regard to the requirements of the trade or business" and "the actual services rendered" by Young. What they knew about the services he rendered, or the requirements of the trade or business, does not appear, but that was the view they took.

The appellant company were put, by this, in grave difficulty. The difficulty they were put in, as regards the first year, was one which, though not arising in that year, would apply to all subsequent years. It was a difficulty which arose under the Finance Act, 1941, s. 34, which provides:

> If, in computing the profits or loss of a trade or business for any accounting period beginning after the end of March nineteen hundred and forty-one, any expenses for directors' fees or other payments for services are disallowed under section thirty-two of the Finance Act, 1940, then, subject to the provisions of this section, any person who pays or bears any additional tax as a consequence of that disallowance shall be entitled to recover from the persons to whom the fees or payments were payable the full amount disallowed in relation to them respectively.

The directors of Smith's Potato Crisps were put in this very awkward position. Not merely were they being made to pay on this basis a sum of £2,500 or more extra in taxation, but they saw that, if they did not do something about it, they would have very little chance of getting that £3,500 raised in subsequent years. It would be taken as agreed that £3,500 was a reasonable remuneration, and they had very good ground for taking it for granted that that would be the basis of his future allowed remuneration. Then they would be in this difficulty. If they did their duty to the shareholders, they ought to recover under that section A any excess from Young. If they did, then they would lose Young, who would certainly go at the first opportunity he had. They would be breaking their bargain with him, to pay him certain commission. They were put in a dilemma. The Commissioners found that the Board had considered it vital to test the matter before the Board of Referees on that ground, because otherwise the company's future position might be seriously prejudiced by the loss of Young's goodwill and co-operation if the company exercised its right to recover the commission B disallowed in subsequent years. So they appealed and they won, and Young's remuneration was fixed at £5,800.

The costs incurred in that matter amounted to some £600 odd. The same question arises here as arose in the *Rushden Heel Co.* case (1), namely, were they entitled to have those costs allowed in the assessment for excess profits tax and in the assessment for income tax ? The excess profits tax fell upon the parent C company. The subsidiary company's profits are thrown in with the main company's profits, and, therefore, the parent company are the appellants with regard to the disallowance for the purposes of excess profits tax, and the Estates company, the subsidiary company, are the appellants in respect of the disallowance for the purpose of calculating income tax. The reasons I have given in the *Rushden Heel Co.* case (1) are just as applicable here, and are sufficient to lead to the allowing of these appeals. D

But I was further pressed with this point. It was said there was another ground, quite apart from the one I have referred to, which ought to prevail. It was contended, even if I dismissed the appeal on the first ground, that there was a finding of the Commissioners that it was really vital for the company to take the step of appealing for the purpose of retaining the goodwill and future services of Young, and that that was a sufficient ground for allowing this appeal. I think that is a well-founded argument. If an expense incurred for the purpose E of getting rid of a director who is troublesome—I think that was the word which was used in the case—is an allowable expenditure, surely an expenditure for the purpose of retaining somebody who is vital to the business is an expenditure which is proper to be incurred and which is, even on a narrow interpretation of the phrase, incurred for the purpose of earning profits. Therefore, on that ground too, I would allow the appeal, if I did not allow it on the other ground. Both appeals are allowed with costs. F

Appeals allowed with costs.

Solicitors: *Warren, Murton, Foster & Swan* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

ALSER v. GRINLING. ([1946] 2 All E.R. 287; 175 L.T. 204). *Affirmed.* H.L. .. [1948] 1 All E.R. 1

Observations of MORTON, L.J., at p. 291, *explained.* ROPPEL v. BENNETT. [1948] 2 All E.R. 627.

. GRINLING

GRINLING

Dicta of MORTON, L.J., at p. 290, *applied.* ARTILLERY MANSIONS, LTD. v. MACARTNEY. [1948] 2 All E.R. 875.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), July 15, 16, 30, 1946.]

Landlord and Tenant—Rent restriction—Lease of flat with "attendance"—Removal of refuse—Carrying of coal—Whether attendance substantial part of whole rent—Principles applicable—Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 10—*Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (2) (*b*). A

By an agreement dated Feb. 16, 1944, the appellant who owned a block of flats in London let one of the flats to the respondent for one year, from Mar. 25, 1944, at a rent of £175. At the expiration of that period the respondent continued in possession, claiming that; as the rateable value of the premises on Aug. 6, 1939, was £44, she was entitled to continue in B occupation as a statutory tenant under the Rent Restriction Acts. The question for determination was whether the flat was excluded from the operation of the Acts by sect. 3 (2) (*b*) of the 1939 Act and sect. 10 of the 1923 Act, on the ground that it was let at a rent which included payments in respect of attendance and the amount of rent fairly attributable to the attendance, regard being had to its value to the respondent, formed a sub- C stantial portion of the whole rent. The attendance relied upon by the appellant consisted in the main of the provision of a porter who received letters and tradesmen's parcels for delivery to the flat, removed refuse from and carried coal to the flat, the latter service having, in fact, been discontinued since the installation by the respondent of electric fires in the flat:—

HELD: (i) where the rent or rateable value of a dwelling-house is such D as to bring it *prima facie* within the operation of the Acts, the burden is on the landlord to satisfy the court that the house is let at a rent which includes payments in respect of attendance and that the amount of rent fairly attributable to the attendance, regard being had to its value to the tenant, forms a substantial portion of the whole rent.

(ii) (*a*) where the dwelling-house is one flat in a block of flats and the landlord supplies a staff of employees to look after the block it is not every E service rendered by those employees which comes within the meaning of the word "attendance." The removal of refuse from a tenant's flat and the carrying of coal to his flat are "attendance" (*Nye* v. *Davis* (2) *followed*). But keeping clean the main entrance hall and staircase of a block of flats is not "attendance" within the meaning of the section (*King* v. *Millen* (3) *followed*); nor is the supplying of hot water through a hot water system (*Wood* v. *Carwardine* (4) *followed*).

F [*per* ASQUITH, L.J.] whether the services of a porter in accepting delivery of letters and parcels for the tenant would qualify as "attendance" within the meaning of the section would depend on the circumstances of the case and the value to the tenant of such service.

(*b*) it is fair to assume that the landlord passes on to each tenant the cost of providing "attendance" to the flat occupied by him, and that its G cost is, therefore, reflected in the rent.

(*c*) in ascertaining the amount of the rent of any one flat which is fairly attributable to "attendance," it is necessary first to ascertain the total annual cost to the landlord of providing the necessary employees for the whole block of flats, and then how much of the advantage obtained by the tenants from the services of these employees is "attendance" within the meaning of the section. Any attendance to which the tenant H has no contractual right should be disregarded. Consideration should then be given to how far (if at all) the attendance is for the benefit of the landlord and how far for that of the tenant; to the size (or rent) of the flat as compared with others; to any special circumstances justifying an attribution to any individual tenant of either more or less than his proportion of the total cost to the landlord of providing attendance, in which connection the important point is what the parties had agreed and account should be taken only of the circumstances existing at the date of the lease. Finally, no deduction should be made from the rent of the amount attributable to rates payable by the landlord.

(iii) in deciding whether the amount arrived at forms a substantial portion of the whole rent, in the absence of special circumstances, 20 per cent. of the whole rent would be a substantial proportion, anything less than 15 per cent. would not be, and from 15 to 20 per cent. would be a "border line" case.

(iv) on the facts of the case, the only services which could be relied on as constituting "attendance" within the meaning of the section were A (*a*) the removal of refuse which was the respondent's responsibility under the Public Health Act, 1936, s. 72, and (*b*) the carrying of coal, because the respondent had failed to prove that she had told the appellant, when the terms of the lease were being arranged, that she would not require this service. The portion of rent attributable to these services did not, however, form a substantial portion of the whole rent, and the flat was, therefore, within the protection of the Acts. B

[**EDITORIAL NOTE.** This case considers in detail what is "attendance" for the purpose of sect. 10 of the Rent and Mortgage Interest Restrictions Act, 1923, and lays down a general guide in determining the question whether the sum attributable to attendance forms a substantial portion of the rent. It is to be observed that the cost of providing attendance at the time of the commencement of the lease is to be considered, disregarding subsequent fluctuations in the cost of labour: a similar C conclusion was reached with regard to the value of furniture, in *Property Holding Co., Ltd.* v. *Mischeff*, p. 294, *post.*

AS TO DWELLING-HOUSES LET AT RENT INCLUDING ATTENDANCE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 559, 560, Nos. 7068-7077.]

Cases referred to:

*(1) *Engvall* v. *Ideal Flats, Ltd.*, [1945] 1 All E.R. 230; [1945] 1 K.B. 205; 114 L.J.K.B. 249; 172 L.T. 134; *affg.* [1944] L.J.N.C.C.R. 184. D

*(2) *Nye* v. *Davis*, [1922] 2 K.B. 56; 31 Digest 560, *7072*; 91 L.J.K.B. 545; 126 L.T. 537.

*(3) *King* v. *Millen*, [1922] 2 K.B. 647; 31 Digest 560, *7074*; 92 L.J.K.B. 123; 128 L.T. 280.

*(4) *Wood* v. *Carwardine*, [1923] 2 K.B. 185; 31 Digest 560, *7075*; 129 L.T. 314; *sub nom. Carwardine* v. *Wood*, 92 L.J.K.B. 593.

*(5) *Mann* v. *Merrill*, [1945] 1 All E.R. 708; 114 L.J.K.B. 406; 173 L.T. 2. E

*(6) *Regent Estates, Co., Ltd.* v. *Kerner* (1944), Estates Gazette, Dec. 23, 1944, p. 575.

*(7) *Wilkes* v. *Goodwin*, [1923] 2 K.B. 86; 31 Digest 560, *7080*; 92 L.J.K.B. 580; 129 L.T. 44.

*(8) *Somershield* v. *Robin*, [1946] 1 All E.R. 218; [1946] K.B. 244; 115 L.J.K.B. 273; 174 L.T. 181.

*(9) *Maclay* v. *Dixon*, [1944] 1 All E.R. 22; 170 L.T. 49.

*(10) *Property Holding, Co., Ltd.* v. *Mischeff*, [1946] 2 All E.R. 294.

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APPEAL by the landlord from a decision of LORD GODDARD, L.C.J., given on Mar. 15, 1946, in favour of the tenant, in an action to recover possession of a flat. The facts are fully set out in the judgment of MORTON, L.J.

J. Scott Henderson, K.C., and *James MacMillan* for the appellant.

W. H. Cartwright Sharp, K.C., and *Alexander Karmel* for the respondent.

Cur. adv. vult.

MORTON, L.J.: By an agreement dated Feb. 16, 1944, the plaintiff (therein G called "the landlord") let to the defendant (therein called "the tenant") a flat containing a sittingroom, a bedroom, a kitchen, and a bathroom, on the fourth floor of a building known as Chantrey House, Eccleston Street, London, S.W.1:

> . . . together with the use in common with the landlord and persons authorised by her of the entrance hall, staircase, landings, and passages leading to the demised H premises and the passenger lift in the said building subject to the regulations in regard to such user set forth in the schedule hereto.

The premises were so let for a term of one year from Mar. 25, 1944, at a rent of £175. The defendant failed to deliver up possession of the flat to the plaintiff on Mar. 25, 1945. On Apr. 30, 1945, the plaintiff issued a writ claiming possession of the flat and mesne profits at the rate of £175 a year from Mar. 25, 1945, until delivery of possession. In her defence the defendant claims that the flat is a dwelling-house to which the Rent Restriction Acts apply, since the rateable value thereof on Apr. 6, 1939, was £44, and that the standard rent is £130 14*s.* 3*d.* She counterclaims for a sum of £88 14*s.* 6*d.* as rent paid by her to the plaintiff above the standard rent during a period of two years. By her reply the plaintiff claims that the flat is excluded from the operation of the Acts by reason of sect. 3 (2) (*b*) of the Act of 1939 and sect. 10 of the Act of 1923. The joint effect of these sections is to exclude from the operation of the Acts any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or the use of furniture, provided that the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. It was rightly conceded by counsel that sect. 10 of the 1923 Act applies to all dwelling-houses which would otherwise be brought within the scope of the Acts, whether by the 1939 Act or by any earlier Act.

It is not suggested in the present case that the flat in question was let at a rent which included payments in respect of board or use of furniture.

It was, therefore, necessary for the court to decide two questions: (i) was this flat *bona fide* let at a rent which included payments in respect of attendance? (ii) If so, did the amount of rent which was fairly attributable to the attendance, regard being had to the value of the same to the tenant, form a substantial portion of the whole rent? These are questions of fact, and, in my view, where the rent or the rateable value of a dwelling-house is such as to bring it *prima facie* within the operation of the Acts, the burden is on the landlord to satisfy the court that each of these two questions should be answered "Yes."

The case was tried by Lord Goddard, L.C.J., who came to the conclusion, after hearing evidence, that question (i) should be answered in the affirmative, but that the amount of rent fairly attributable to the attendance did not form a substantial portion of the whole rent. He, therefore, held that the defendant was protected by the Acts, and gave judgment for her in the action and on the counterclaim. From that decision the plaintiff appeals, and in the course of the hearing we were informed by counsel on both sides that county court judges all over the country have found great difficulty in applying the provisions of sect. 10 of the 1923 Act, and that they would welcome any expression of opinion by this court as to how that section should be applied.

As the question in each case is one of fact, it must of course be determined by the judge on the evidence before him, but, in view of counsel's request, I shall first state my views on certain questions arising on the construction of the section, and I shall then apply these views to the facts of the present case.

In my judgment:

(*a*) In a case such as the present, where the dwelling-house is one flat in a block of flats and where the landlord supplies a staff of employees to look after the block, it is not every service rendered by these employees which comes within the meaning of the word "attendance" as used in this section. In *Engvall* v. *Ideal Flats, Ltd.* (1), Lord Greene, M.R., said ([1945] 1 All E.R. 230, at p. 233):

> . . . in the present case a variety of services, to use a general expression, was provided for. Certain of them admittedly fall within the meaning of the word "attendance" in the 1923 Act, s. 10. Others admittedly fall outside the meaning of that word. To take an example, it is not suggested that the services which consisted in the provision of hot water and heating fall within the meaning of the word "attendance."

It is clear that the removal of refuse from a tenant's flat and the carrying of coal to his flat are "attendance": see, for instance, *Nye* v. *Davis* (2). That was a decision of a Divisional Court with which I entirely agree. On the other hand, in *King* v. *Millen* (3) it was held by a Divisional Court that keeping clean the main entrance hall and staircase of the block of flats was not "attendance" within the meaning of the section. In that case Bailhache, J., said ([1922] 2 K.B. 647, at p. 649):

> There is no demise of the hall and staircase to the tenant, but a mere easement is given to him, and, in my opinion, a mere contract to keep clean something which is not demised to the tenant does not amount to "attendance" within the section. There is nothing in the nature of personal service rendered to the tenant such as there was in *Nye* v. *Davis* (2).

That was a decision on the wording of sect. 12 (2), proviso (i), of the Act of 1920, but I think the reasoning of Bailhache, J., applies equally to sect. 10 of the Act of 1923. The decision in *King* v. *Millen* (3) is now 24 years old. I am not aware that it has ever been questioned, and the legislature must be presumed to have been aware of the decision when the word "attendance" was reproduced in the Act of 1923. I think that the decision was right, but, even if I felt some doubt on the matter, I should be slow to differ from it under these circumstances. In *Wood* v. *Carwardine* (4), McCardie, J., held that the supply of "a good and sufficient supply of hot water" for the flat "at all times of the day" did not constitute "attendance" within the section. I am not sure that I entirely agree with the judge's reasons for that view, but I concur with him in thinking A that in using the word "attendance" the legislature did not contemplate such a matter as the supplying of hot water through a hot water system.

(*b*) It is fair to assume that the landlord has passed on to each tenant the cost of providing "attendance" to the flat occupied by that tenant, and that this cost is therefore reflected in the rent.

Following upon these observations, I think that the following method of arriving at "the amount of rent which is fairly attributable to the attendance B . . . regard being had to the value of the same to the tenant" should produce a result which is fair to both parties, though, of course, the judge in each case is free to follow the method which he thinks most appropriate to the circumstances of that particular case.

1. Normally the attendance will take the form of the provision by the landlord of employees who are engaged in performing certain duties relating to the C whole of the flats in the block. The first step in ascertaining the amount of the rent of any one flat which is fairly attributable to this attendance is to ascertain the total annual cost to the landlord of providing these employees.

2. The judge must next ascertain how much of the advantage which the tenants obtain from the services of these employees can fairly be described as "attendance" within the meaning of sect. 10. I have already pointed out that there may be services which benefit the tenants but are not "attendance" D within that section, and I would add that the judge should, in my view, disregard any attendance to which the tenants have no contractual right.

3. The next stage is to consider how far (if at all) the attendance is for the benefit of the landlord and how far it is for the benefit of the tenants. As was said by Lord Greene, M.R. ([1945] 1 All E.R. 230, at p. 234), in *Engvall* v. *Ideal Flats, Ltd.* (1):

> What the tenant has paid for is that element in the advantage of the attendance E which goes beyond the landlord's own advantage.

4. Having got so far, the judge is in a position to say what portion of the annual cost is attributable to "attendance" upon the tenants. The problem then arises as to how that portion should be split up as between the individual tenants. For instance, if in a block of flats there are 24 flats, 8 of which are large, 8 of which are of moderate size, and 8 are small, ought this portion of the F annual cost to be divided equally among the 24 flats, or should it be divided in proportion to the size of the flats, or should it be divided in proportion to the respective rents paid by the tenants? This is a matter which may depend upon circumstances, but I am inclined to think that the fairest method would usually be to count the number of rooms, disregarding bathrooms, and (taking an example) to attribute twice as much to an eight-roomed flat as to a four-roomed flat. This is a rough and ready method, but I think it is fair to assume, in normal G cases, that the former flat is likely to produce twice as much refuse and to require twice as much fuel as the latter flat.

5. I think the judge must next consider whether there are any special circumstances providing grounds for attributing to the tenant of the particular flat in question either more or less than his proportion of the cost of providing attendance, arrived at in the above manner. For instance, suppose that part of the attendance provided is the carrying of coals to the flats by a man employed H by the landlord; is it right that a portion of the cost of this labour should be attributed to a tenant who chooses to instal electric fires in all his rooms? This is a matter which was much argued before us. My own view is that if the carrying of coals is a service which the landlord undertakes to provide for a tenant, then *prima facie* that service is of the same value to that tenant as it would be to any other tenant, and the burden is upon the tenant to satisfy the court that less than his arithmetical proportion of the cost should be attributed to him. For instance, the tenant might prove that when the terms of the lease

were being arranged, he told the landlord that he did not require this service, and that the landlord could make the appropriate alteration in the lease. If, in these circumstances, the landlord insisted on keeping to his common form of lease, which included this provision, the judge might well think that the amount of rent which was fairly attributable to that particular attendance was little or nothing.

In *Engvall's* case (1) LORD GREENE, M.R., said ([1945] 1 All E.R. 230, at p. 234) :

> With regard to No. 19—the provision of personal services of a caretaker for the purpose of carrying up wood, coals and so forth—the fact is that the tenant used electric fires and did not make use of those services, and had no need for them. The judge, accordingly, held (and I think he was fairly entitled to hold) that no value to the tenant must be attributed to that particular undertaking by the landlord.

I am sure LORD GREENE did not intend to lay down any general rule that, if a tenant in fact makes no use of a particular " attendance " which the landlord has contracted to give, no part of the rent must be attributed to that attendance. I think the important point is : What did the parties contemplate at the time when the lease was granted ? I observe that in *Engvall's* case (1) the county court judge said ([1944] L.J.N.C.C.R. 184, at pp. 195, 196) :

> In a case like this, where presumably there is a standard form of agreement for a number of flats, any one particular tenant may prove that the attendance indicated in the agreement is of no use whatever to him, and while it cannot be right that a tenant deliberately ceasing to avail himself of attendance in order to claim that it is of no value, can attract the protection of the Rent Acts ; nevertheless in my view, where the letting takes place in circumstances where certain things provided for could not be of value to the tenant, the mere fact that the landlord contracted to provide them cannot entitle him to ignore their uselessness in fact and claim that they are of value.

I emphasise the words " could not be of value," and, as I read the judgment, the county court judge held, as a fact, that both parties knew this fact at the date of the lease.

6. This last observation brings me to a somewhat difficult question. In considering the amount of rent which is fairly attributable to the attendance, should one consider the position as at the date when the lease was signed, or as at some later date ? The matter may be of great importance, as the cost of providing services may greatly increase during the period of the lease. In *Engvall's* case (1) the county court judge took the view ([1944] L.J.N.C.C.R. 184, at p. 196) that the circumstances existing at the date when the lease was signed must be considered, and that subsequent alterations in the cost of providing attendance did not enter into the matter. This matter is not expressly dealt with in the judgments of the Court of Appeal in that case, but LORD GREENE, M.R., said ([1945] 1 All E.R. 230, at pp. 233, 234) :

> The question whether or not the amount referable to items of attendance forms a substantial portion of the whole rent is eminently a question of fact and degree to be decided without appeal by the county court judge. The only way in which his decision could be attacked would be by saying that he had fallen into some error of law in applying his mind to the question. I cannot find that the judge in this case fell into any error of law.

It would appear, therefore, that the court must have approved the method which the county court judge adopted of taking into account only the circumstances existing at the date of the lease and I accept that method. It might possibly be contended that this view is inconsistent with the decision of this court in *Mann* v. *Merrill* (5), but I think that different considerations apply to the section which was considered by the Court of Appeal in that case.

Whatever method the judge employs, it seems to me that, having fully considered all the relevant circumstances, he must arrive at an actual figure in pounds shillings and pence as being :

> . . . the amount of rent . . . fairly attributable to the attendance . . . regard being had to the value of the same to the tenant.

His next task is to determine whether that amount of rent " forms a substantial portion of the whole rent." The whole rent is expressed in money, and, sooner or later, as it seems to me, the judge, having ascertained what portion of the whole rent is fairly attributable to the attendance, will have to consider whether

that portion is a substantial portion of the whole rent. The Act gives him no guidance in this, and I can imagine a wide difference of opinion among judges as to what is a substantial portion. For instance, if the whole rent is £100, is £15 a "substantial" portion of that rent? The legislature has not seen fit to lay down any particular percentage as being a substantial portion, and I have carefully considered whether it would or would not be of assistance to judges who have to determine this difficult question if I gave some indication of my own view as to what proportion of the rent forms a substantial portion of the A
"whole rent" within the meaning of sect. 10. We were invited by counsel for the defendant to give some indication of this kind, and, on the whole, I think it is right to do so now, but I do not think it would be right to fasten upon a particular percentage and say "This is a substantial portion, and any percentage below this is not a substantial portion." I am, however, prepared to say that, in my view, in the absence of special circumstances, 20 per cent. of the whole rent would be a substantial portion, any portion under 15 per cent. would B
not be a substantial portion, and any portion from 15 per cent. up to 20 per cent would be a "border line" case. I do not think it would be proper to go further than this, as the legislature obviously did not intend to lay down any hard and fast rule. Counsel for the plaintiff submitted that even as little as 5 per cent. of the total rent was "substantial," and he relied upon some observations of LORD CALDECOTE, L.C.J., in *Regent Estates Co., Ltd.* v. *Kerner* (6), which appears only to be reported in the ESTATES GAZETTE for Dec. 23, 1944. C
The decision in that case may have been justified, having regard to the very wide admission made as to the services which constituted "attendance"; but LORD CALDECOTE, L.C.J., is reported as saying:

> As to the meaning of "a substantial part of the rent," this could only be interpreted as meaning a real part and not a mere trifle. It could not mean half or a quarter or a third or anything of that sort; it meant something which could be recognised and D
> ascertained and quantified.

If these observations are correctly reported, I am unable to agree with them. I think that sect. 10 of the Act of 1923 was intended to make a marked alteration in the law as stated by BANKES and SCRUTTON, L.JJ., in *Wilkes* v. *Goodwin* (7), whereas LORD CALDECOTE, L.C.J., seems to have re-stated the law in substantially the same terms notwithstanding the passing of the Act of 1923.

I would add with all respect to judges who have thought otherwise that, in E
my judgment, it is wrong for the judge to deduct the rates from the rent—in cases where the rates are paid by the landlord—and then to compare the amount of rent fairly attributable to the attendance with the figure so arrived at. The section refers to the *whole* rent, and I think there is clear authority for the proposition that in ascertaining the whole rent it is not legitimate to make any deduction on account of rates. (See *Somershield* v. *Robin* (8)). In the present F
case, this point was ultimately conceded by counsel for the plaintiff. It is true that in *Maclay* v. *Dixon* (9), this court declined to interfere with the decision of a county court judge who had deducted rates amounting to £6 from a total rent of £80 and had then held that £13, the part of the rent attributable to the furniture, was a substantial portion of £74. This court did not, however, express any view that the county court judge was right in deducting the £6 for rates. As to the "substantial portion" point, the case was, in my view, a "border G
line" case and there were special circumstances which assisted the county court judge in arriving at his conclusion.

I now proceed, at long last, to apply the method suggested above to the facts of the case now before this court. The services relied on as being "attendance" within sect. 10 include certain matters which were held not to be "attendance" in *King* v. *Millen* (3) and *Wood* v. *Carwardine* (4), already cited. There remain only the carrying of coals and the removal of refuse. As to the former, the H
defendant did not, in my view, discharge the burden of proof mentioned in para. 5 above. In her examination-in-chief the defendant gave the following evidence:

> (Q) Do you receive any coal in the flat? (A) No.
> (Q) Have you in fact got electric fires? (A) Yes.

This evidence appears to relate to the position on the date of the hearing (Mar. 15, 1946) and is consistent with the defendant having had no electric fires on

Feb. 16, 1944, when the bargain was struck as to the rent. In her cross-examination the defendant said :

> I do not have any coal, I have electric fires.

This again appears to relate to the date of the hearing.

I think, therefore, that some part of the defendant's rent must be attributed to the carrying of coals, which is "attendance." I also think that some part of her rent must be attributed to the removal of refuse, and I feel difficulty in accepting the view of LORD GODDARD, L.C.J., that :

> . . . the removal of refuse is certainly as much to the advantage of the landlord, who must be responsible for seeing that the refuse from the flats is taken away and put out for the local authority to collect.

This would appear to be the tenant's responsibility. (See Public Health Act, 1936, s. 72).

However, taking the most favourable view for the plaintiff in regard to these two matters and in regard to the calculation of the cost of these services, it is clear on the figures (which I need not set out in detail) that the portion of the rent of £175 which is fairly attributable to these services cannot be more than the figure of £14 put forward by the plaintiff. In fact, if I applied the method of calculation set out above, it would be less than £14. However, I need not go further into that matter, for £14 is not, to my mind, a substantial portion of the whole rent of £175.

The result is that I agree with the conclusion of LORD GODDARD, L.C.J., that the action must be dismissed, and it was not contended by counsel for the plaintiff that, on this footing, the order on the counterclaim was incorrect.

This appeal must be dismissed with costs.

SOMERVELL, L.J. : I agree with the judgment that has just been delivered by MORTON, L.J., and only wish to add a few observations on one point, namely, the deduction in respect of the landlord's own advantage.

This is not an easy conception to apply and turn into a proportion. Some forms of attendance would be solely, so far as I can foresee, for the tenant's advantage. For example, if the landlord provided someone to clean boots and shoes. There may, however, be matters which it is of advantage to the landlord to have under his control and to prohibit the tenants from doing for themselves. The removal of refuse which arises in the present case is an example. The landlord may feel it would not be to his interest, considered as landlord of the whole block, to have tenants or their domestic servants carrying down tins of refuse at all hours. He, therefore, prohibits them doing this and arranges for one of his staff to do it. A tenant might say he was perfectly willing to do this himself and did not wish to pay anything for having it done for him. The landlord, however, is saying (as he is entitled to do) : "If you want to become my tenant, it is a condition that you should agree to having this done for you and you must pay for it." Accepting, as I do fully, the construction placed by my brother MORTON on "attendance," I think the statement he has quoted from the judgment of LORD GREENE, M.R., in *Engvall's* case (1) on the "landlord's advantage" comes to this. Where you find that what is *prima facie* attendance on the tenant is also of advantage to the landlord as landlord —in this class of case—of a whole block of flats, you are not to treat it for the purposes of the section as attendance on the tenant *simpliciter*. The attendant is serving the interests of two masters, and, in fixing the amount to be attributed to the attendance under the section, this should be taken into account. There are, of course, under the section a number of things which a landlord may provide over and above the unfurnished rooms, for the expense of which he will be recouped in the rent but which are disregarded in arriving at the proportion of the rent which has to be substantial if the premises are to be taken out of the Act. Central heating and the furnishing of the hall and staircase are examples which arise in the next case, *Property Holding Co., Ltd.* v. *Mischeff* (10). There is, therefore, no illogicality in treating as outside the section a proportion of the cost of "attendance" in circumstances such as those referred to above and dealt with in the passage cited from the judgment of LORD GREENE, M.R., in *Engvall's* case (1).

ASQUITH, L.J. [read by SOMERVELL, L.J.] : I would only add a sentence or two on a minor point which I think has not been dealt with in the judgment of my brethren.

It might be urged (and I think it was) that among the services which qualify as "attendance" there should be reckoned that of the porter in accepting delivery (on the ground floor) of letters and parcels for the tenant. (See general regulation 5). These services were, no doubt, intended to be covered by the figure of £14. If the tenant in question is provided with a goods lift in which such letters and parcels could be sent up to him or her, the service in question might qualify as "attendance." Even as to this I am doubtful, for "attendance" seems to me to imply not merely attending to some matter for the benefit of the tenant, but attending *on* the tenant, through the physical presence of the alleged attendant in or immediately outside the flat in question: see *Wood* v. *Carwardine* (4). But, assuming the service in question to be "attendance" where a goods lift is provided, it cannot, in my view, be "attendance" where such a lift is not provided. Moreover, in the absence of a lift, it could, even if "attendance," be of no particular value to the tenant, who might well prefer to have his letters and parcels delivered at his flat upstairs by the postman, rather than to have to go to the ground floor to claim them from the porter. This is a minor supplementary reason in support of judgments with which in other respects I wholly concur.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted on terms as to costs.

Solicitors: *Griffinhoofe & Brewster* (for the appellant); *Lipton & Jefferies* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

PROPERTY HOLDING CO., LTD. *v.* MISCHEFF.

[Court of Appeal (Morton, Somer
30, 1946.]

Landlord and Tenant—Rent restrict
"*Furniture*"—*Whether substantic*
and Mortgage Interest Restrictions
Interest Restrictions Act, 1939 (c. 7

Property Holding Co., Ltd. *v.* Mischeff. ([1946] 2 All E.R. 294; 175 L.T. 192).
Affirmed. H.L. .. .. [1948] 1 All E.R. 1

The appellant was sub-tenant of a flat in London until Sept. 29, 1944, when his underlease expired. Thereafter he continued in possession, claiming that, as the rateable value of the premises was less than £100, he was entitled to continue in occupation as a statutory tenant. The rent paid by the appellant was £275 a year. The question for determination was whether or not the premises were taken out of the operation of the Rent Restriction Acts, by reason of the provisions of sect. 3 (2) (*b*) of the 1939 Act and sect. 10 of the 1923 Act. The landlords relied on the fact that they provided both attendance and furniture. The attendance was of four kinds: the presence of hall porters, the removal of refuse, the cleaning and servicing of the halls, stairways and passages common to all tenants, and the provision of central heating and constant hot water. The furniture was of two categories—that which furnished the parts of the building common to all tenants, and articles of which the appellant had exclusive use within the flat. The flat was furnished by the landlords with linoleum and rubber floorcloth, a built-in kitchen cupboard, a refrigerator, a fitted medicine chest and two mirrors. The flat had been sub-let to the appellant with the use of these articles:—

Held: (i) none of the items relied on by the landlords constituted "attendance" within the meaning of sect. 10 of the 1923 Act.

(ii) no part of the rent paid by the appellant was attributable to the furniture in the parts of the building common to all tenants, because the appellant had no contractual right to the use of such furniture.

(iii) the articles included in the sub-lease were "furniture" within the meaning of sect. 10 of the 1923 Act, and the flat was, therefore, *bona fide* let at a rent which included payments in respect of the use of furniture.

(iv) in ascertaining the amount of rent which is fairly attributable to the use of the furniture, the judge should consider (*a*) the capital value of such furniture at the date when the lease was executed ; (*b*) what percentage of that capital value should be regarded as the amount of rent fairly attributable to the furniture ; (*c*) the value of the same to the tenant.

(v) in ascertaining what proportion of the total rent is attributable to the furniture, the amount attributable to rates should not first be deducted from the total rent.

(vi) assuming that £30 per annum was the amount of rent attributable to the furniture, such a sum was not a " substantial portion " of a rent of £275 within the meaning of sect. 10 of the 1923 Act. The premises, therefore, were not taken out of the operation of the Rent Restriction Acts by reason of sect. 3 (2) (*b*) of the 1939 Act and sect. 10 of the 1923 Act.

Decision of Henn Collins, J. ([1946] 1 All E.R. 406), *reversed.*

[**EDITORIAL NOTE.** The court in this case lays down the appropriate method of ascertaining the amount of rent attributable to the use of furniture let with the premises, and applies the rules laid down in *Palser* v. *Grinling*, p. 287 *ante*, for the purpose of ascertaining whether such amount forms a substantial portion of the rent. The value of the furniture at the time of the commencement of the lease is to be considered, in the same manner as attendance, dealt with in *Palser's* case.

As to Dwelling-Houses Let at Rent including Use of Furniture, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370 ; and for Cases, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Cases referred to :

*(1) *King* v. *Millen*, [1922] 2 K.B. 647 ; 31 Digest 560, *7074* ; 92 L.J.K.B. 123 ; 128 L.T. 280.
*(2) *Wood* v. *Carwardine*, [1923] 2 K.B. 185 ; 31 Digest 560, *7075* ; 129 L.T. 314.
*(3) *Brown* v. *Robins*, [1943] 1 All E.R. 548 ; 168 L.T. 340.
*(4) *Gray* v. *Fidler*, [1943] 2 All E.R. 289 ; [1943] 1 K.B. 694 ; 112 L.J.K.B. 627 ; 169 L.T. 193.
*(5) *Palser* v. *Grinling*, [1946] 2 All E.R. 287.
*(6) *Maddox Properties, Ltd.* v. *Klass*, [1946] 1 All E.R. 487.

Appeal by the tenant from a decision of Henn Collins, J., in favour of the landlord, given on Feb. 28, 1946, and reported ([1946] 1 All E.R. 406). The facts are fully set out in the judgment of Morton, L.J.

G. O. Slade, K.C., and *W. A. L. Raeburn* for the appellant.

J. Scott Henderson, K.C., and *R. Stock* for the respondents.

Cur. adv. vult.

Morton, L.J. : Asquith, L.J., has asked me to say that he has read the judgment which I am about to deliver, that he agrees with it, and also the judgment to be delivered by Somervell, L.J., and does not desire to add anything.

I will now proceed to read my own judgment.

By a lease dated Jan. 27, 1937, the plaintiffs demised to one Major Eric Trevor a flat, No. 19 Albion Gate, Hyde Park, London, W.2., together with the use of the following articles : (i) Linoleum in the three bedrooms, the kitchen and the maid's bathroom, and rubber floorcloth in the best bathroom and the lobby. (ii) A built-in kitchen cupboard, described in the evidence as follows :

> It is the ordinary cupboard for the purpose of keeping kitchen equipment in, and built round it are various other cupboards, going from floor to ceiling. It is a fairly comprehensive piece of furniture.

(iii) A refrigerator. (iv) A fitted medicine chest in the bathroom. (v) Two mirrors fastened to the wall, one being in the principal bathroom and the other in the cloakroom. The term of the lease was for 14 years, determinable as therein mentioned, and the rent was £275 a year.

On June 26, 1942, with the written consent of the plaintiffs, Major Trevor sub-let the flat and the use of the articles already mentioned to the defendant, the rent being £275 and the terms of the sub-lease being, in substance, identical with the terms of the head lease. On Sept. 29, 1944, the head lease came to an end under circumstances which it is unnecessary to describe. Thereupon the defendant claimed that he became a statutory tenant of the plaintiffs on the same terms as he held from Major Trevor. This claim was based on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), which is as follows :

> Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

On Oct. 9, 1944, the plaintiffs issued the writ in this action claiming possession of the flat and mesne profits from Sept. 29, 1944. The plaintiffs allege that, although the rateable value of the flat is such as to bring it within the operation of the Rent Restriction Acts, it is taken out of the Acts by the operation of sect. 3 (2) (*b*) of the Act of 1939 and sect. 10 of the Act of 1923. The joint effect of these sections (so far as material to the present case) is to exclude from the operation of the Acts any dwelling-house *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture, provided that the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

The action was tried by HENN COLLINS, J., who held: (*a*) That the flat was not *bona fide* let at a rent which included payments in respect of attendance. (*b*) That the flat was *bona fide* let at a rent which included payments in respect of the use of furniture. (*c*) That the amount of rent which was fairly attributable to the use of the furniture, regard being had to the value of the same to the tenant, formed a substantial portion of the whole rent. Accordingly, he held that the flat was excluded from the operation of the Acts, and that the plaintiffs were entitled to possession and to mesne profits as claimed.

I agree with the judge's decision on (*a*) and (*b*), but I disagree with his decision on (*c*). The result is that, in my view, the flat does come within the operation of the Rent Restriction Acts, the defendant has continued in lawful possession thereof as a statutory tenant of the plaintiffs, and the action ought to have been dismissed.

In dealing with point (*a*), I can adopt to a large extent the language of the judge, as I entirely agree with his reasoning and with his conclusion. He said ([1946] 1 All E.R. 406, at p. 407):

> The plaintiffs rely upon the fact that they provide both attendance and furniture. The attendance is of four kinds—the presence of hall porters, the removal of refuse, the cleaning and servicing of the halls, stairways and passages common to all tenants, and the provision of central heating and constant hot water.

The judge then said that the last two of these items had been held, by a decision binding upon him, not to constitute "attendance." He probably had in mind *King* v. *Millen* (1) and *Wood* v. *Carwardine* (2). He then proceeded (*ibid*):

> Taking next the presence of the hall porters, the plaintiffs undertake to use every precaution to employ no one but a competent and trustworthy person as resident porter, but beyond that their obligation does not go. Though the porter may, and no doubt does, make himself obliging to the tenants, he has no duty to perform for them, and I do not think that such attendance as he chooses to give can be said to be any part of that for which the tenant pays his rent. Much the same considerations apply to the removal of refuse. The receptacles are in practice removed from the back doors of the flats, by someone employed by the plaintiffs, to the point of collection by the local authority, but this service is not stipulated for in the lease, and the tenant would have no valid ground of complaint if he was left to make his own arrangements for this to be done. I do not think "attendance" can be extended to anything to which the tenant is not contractually entitled. I take the same view with regard to the servicing, including the lighting and heating, of the parts of the building common to all the tenants. These do not, in my judgment, constitute attendance within the meaning of the section . . .

I entirely agree with this passage.

The judge then went on to point (*b*), and proceeded as follows ([1946] 1 All E.R. 406, at p. 408):

> That brings me to the use of the furniture. This may be divided into two categories: that which furnishes the parts of the building common to all tenants, and things of which the tenant has the exclusive use within the flat.

He then held that the former category must be disregarded for the present purpose, and I agree with this view since the tenant had no contractual right to insist that the furniture in this category should be upon the premises. I express no concluded view upon the question whether the use of furniture in the hall and passages could be taken into account, if the tenant had such a contractual right, but I am inclined to think that the section is intended to refer only to furniture inside the " dwelling-house " which is let to the tenant, and this appears to have been the view of SCOTT, L.J., in *Brown* v. *Robins* (3) ([1943] 1 All E.R. 548, at p. 551). The court did not, however, have to consider in that case the position in regard to furniture in a portion of the premises through which the tenant had a right to pass.

HENN COLLINS, J., then held that all the articles included in the sub-lease were " furniture " within the meaning of sect. 10 of the Act of 1923. Here again I agree, in view of the decision of this court in *Gray* v. *Fidler* (4). In my view, the flat was *bona fide* let at a rent which included payments in respect of the use of furniture.

I must now state my views on this difficult question : When a flat is *bona fide* let at a rent which includes payments in respect of the use of furniture, how is a judge to ascertain " the amount of rent which is fairly attributable to the use of the furniture ? " The method may differ in different cases, but the following seems to me a useful method. He should first consider what, upon the evidence, was the capital value, at the date when the lease was executed, of the furniture included in the demise. I do not think that any attention should be paid to any rise or fall in the value of the furniture after that date. In the present case the relevant date is, in my view, June 26, 1942, when the sub-lease was executed. It is by virtue of the sub-lease that the defendant claims now to be a statutory tenant, and it was on that date that the rent was agreed between the defendant and Major Trevor. (See as to this my judgment just delivered in *Palser* v. *Grinling* (5)). He should then consider what percentage of that capital value should be regarded as the amount of rent fairly attributable to the furniture, taking into account such matters as the loss of interest by the landlord on his capital expenditure and the probability of depreciation and any other matters which he thinks it proper to take into account.

In *Maddox Properties, Ltd.* v. *Klass* (6) DENNING, J., said ([1946] 1 All E.R. 487, at p. 488) :

> I have had estimates given to me of its value on each side, and I think, on the whole, that 20 per cent. of the value of the ordinary furniture is quite a fair basis to assess rent for furniture, 10 per cent. for the fixed cupboards, and 15 per cent. for the refrigerator and cooker.

I entirely agree with that judge's view that all furniture should not be assessed on the same basis. One can well imagine that such articles as chairs are liable to much greater depreciation than such articles as, for instance, a cupboard which is fitted into a space in the wall. The figures arrived at by him seem to me high, but were no doubt justified on the evidence before him.

Next, the judge must have regard to " the value of the same to the tenant." These words raise difficult questions in some cases. In my view, if a dwelling-house is *bona fide* let to any tenant at a rent which includes payments in respect of certain articles of furniture, then *prima facie* those articles are of the same value to that tenant as they would be to any other tenant, and the burden lies upon the tenant to show that by reason of some special circumstances those articles should be treated as being worth less to him than they would be to any other tenant. (Compare my judgment in *Palser* v. *Grinling* (5)). No such circumstances were proved in the present case.

HENN COLLINS, J., after expressing the view that the articles in question in the case were " furniture," continued : " The cost of them to-day is somewhere about £200." I think that the judge must have intended to say : " The value of them in 1942 was somewhere about £200." The evidence in the case was directed, and rightly directed, to the value of the furniture in 1942, the date of the sub-lease to the defendant, and I think the judge was accepting in substance the evidence so given. I accept his figure of £200. The judge then continued ([1946] 1 All E.R. 406, at p. 408) :

> I find that 15 per cent. on that sum, namely £30 per annum, is fairly attributable to the use of them and of that value to the tenant. Of the total rent of £275, £73 is attributable to rates, leaving £202 as rent for the premises and furniture. Is £30 a substantial proportion of £202 ? I think it is, and I therefore hold that the premises in question are not controlled. It follows then that the plaintiffs are entitled to possession and to mesne profits as claimed.

I cannot agree with this conclusion. In the first place, I think that 15 per cent. is rather a high percentage for furniture of this type; it may be, however, that the judge felt bound to accept this figure on the evidence. In the second place, I do not think that the judge was right in deducting the £73 rates paid by the landlord. Thirdly, even if 15 per cent. is the correct figure, in my judgment £30 is not a "substantial portion" of a rent of £275 within the meaning of sect. 10 of the 1923 Act. As to the last two points, see my judgment just delivered in *Palser* v. *Grinling* (5). A

The result is that the appeal must be allowed, and the action dismissed. The plaintiffs must pay the defendant's costs of the action and of this appeal.

SOMERVELL, L.J.: I agree with the judgment of MORTON, L.J. I only wish to add this. The procedure which he has suggested the judge should follow is, as it seems to me, wholly right on evidence such as that in this case. I can imagine circumstances in which it might be sought to show by evidence that the B landlord ought not to be assumed to be getting the full economic return for the furniture in the premises. I do not think my brother intended to exclude the possibility of such evidence, and, with this footnote, I entirely agree with everything he has said.

Appeal allowed with costs.

Solicitors: *J. M. Menasse & Co.* (for the appellant); *Markby, Stewart & Wadesons* (for the respondents). C

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

D

Re SAGE'S SETTLEMENT TRUSTS, LLOYDS BANK, LTD. *v.* HOLLAND.

[CHANCERY DIVISION (Roxburgh, J.), June 24, 25, 26, 1946.] E

Settlements—Condition—Income of trust funds to be paid to T.S. after transfer by her of certain shares into settlor's name—Trust funds held on other trusts until execution of transfers and after T.S.'s death—Failure to execute transfers during settlor's lifetime—Whether transfer to settlor's executors sufficient compliance with conditions.

By a settlement dated Oct. 26, 1926, the settlor directed that the income F of certain funds should be paid to T.S. after the execution by her of transfers into the settlor's name of certain shares (all of which were marketable securities) which were then in the joint names of the settlor and herself. After the death of T.S., and during her life until she should execute the transfers, the trust funds were to be held on other trusts, but there was no resulting trust in favour of the settlor. The settlor died in 1942, and up to that date the transfers had not been executed. The question to be G determined was whether T.S. might now execute the transfers into the names of the settlor's executors. On behalf of the other beneficiaries it was contended that the transfer was intended to be personal to the settlor and the condition could not, therefore, be satisfied by a transfer to his executors:—

HELD: Upon the true construction of the settlement, the act of transfer was not intended to be personal to the settlor. A transfer to the settlor's H executors would have the effect which the settlor intended and would be a sufficient compliance with the condition in the settlement.

[**EDITORIAL NOTE.** In the absence of authority in cases relating to settlements this case is decided by applying the principle laid down by ROMER, J., in *Re Goodwin* (1) that a condition in a will may be complied with by executors after the time fixed by the testator, where time is not of the essence. Here the transfer in question was in no way personal to the settlor and it is held that it can properly be made to his executors.

AS TO TIME OF PERFORMANCE OF CONDITIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 119-120, para. 153; and FOR CASES, see DIGEST, Vol. 44, pp. 472-475, Nos. 2914-2934.]

Cases referred to:

*(1) *Re Goodwin, Ainslie* v. *Goodwin*, [1924] 2 Ch. 26; 44 Digest 474, *2933*; 93 L.J.Ch. 331; 130 L.T. 822.

(2) *Re Packard, Packard* v. *Waters*, [1920] 1 Ch. 596; 44 Digest 474, *2932*; 89 L.J.Ch. 301; 123 L.T. 401.

ADJOURNED SUMMONS by the trustees of a settlement to determine a question arising thereunder. The facts are fully set out in the judgment.

G. D. Johnston for the trustees.

E. Milner Holland for the defendant T. K. Sage.

Hector Hillaby and *I. G. H. Campbell* for other defendants.

ROXBURGH, J.: This is undoubtedly a case of difficulty. By a settlement dated Oct. 26, 1926, and made between Harold Savill Sage as settlor of the one part and Lloyds Bank, Ltd., as trustees of the other part, the settlor directed the trustees to stand possessed of certain stocks which had been transferred to them upon trust to pay the income thereof to Thelma Kathleen Sage from and after the date of the delivery and execution by her of transfers into the name of the settlor of the shares mentioned in the schedule thereto, which were then vested in the joint names of Thelma Kathleen Sage and the settlor. The income was payable to her without power of anticipation and subject to forfeiture in the event of attempted alienation. After the death of Thelma Kathleen Sage, and during her life until she should execute and deliver the said transfers, the trustees were directed to hold the trust funds on other trusts, but there was no resulting trust in favour of the settlor himself. The settlor died on Nov. 25, 1942, and up to that time Miss Sage had executed no transfer of the shares in question, which were all marketable securities. Miss Sage (who in 1927 changed her surname to "Holland") now desires to execute transfers of those shares into the names of the settlor's executors, or as they shall direct, if the transfer will have the effect of giving her a beneficial interest in the trust funds.

Counsel for the other beneficiaries under the settlement contends that a transfer to Harold Savill Sage personally was necessary, that the words relating to transfer must be literally interpreted, and that it is now too late to perform them by means of a transfer to his executors. As a matter of literal construction I agree that "the settlor" means "the settlor" and not "the settlor or his executors." But in my judgment that does not conclude the matter. The question is whether a literal compliance with the words in the settlement is necessary, or whether a transfer to the executors of H. S. Sage will be a sufficient compliance. I appear here to be approaching a point of some novelty. Counsel have not been able to find, nor have I myself found any case when a question of this kind has arisen under a settlement. But cognate questions have not infrequently arisen under wills. In *Re Goodwin* (1), the headnote of the case is as follows:

> A testator who died on Nov. 1, 1906, bequeathed an annuity of £500 to his wife to commence from the day of his death . . . and he declared that the annuity was intended to be in lieu of and in substitution for the annuity of £70 which he had covenanted by deed to pay to his wife, and that the bequest thereof should become and be absolutely void and of no effect unless his wife should within 6 calendar months after his death absolutely release and discharge his estate, effects and trustees from payment of the £70 annuity as from the date of his death. There was a gift of residue in the will but no gift over of the annuity on failure to comply with the condition. Owing to heavy incumbrances it remained doubtful during the life of the widow whether the estate would produce anything for the beneficiaries and she died on Feb. 10, 1921, without having done anything specifically during her life to comply with the condition. The trustees being now in a position to make payments to beneficiaries raised the question whether the annuity had not been forfeited by non-compliance with the condition:—*Held*, that the condition was not personal to the annuitant so as to be performed only by her, and that a present release by her executors, which would put all parties in the position intended by the testator, would be a sufficient compliance with the condition. *Re Packard* (2) adopted.

In *Re Goodwin* (1), there was a wide margin between the time prescribed by the testator and the time at which the condition was performed by the beneficiary. ROMER, J., first dealt with the question of time, and said ([1924] 2 Ch. 26, at pp. 30, 31):

> It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter. In determining that question the court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against; and if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition.

He then proceeded to consider whether the condition could be complied with by the executors of the wife, and held that a release by her executors complied with the condition.

In the absence, it appears, of any guidance from text books or authorities, I propose to approach the words in this settlement by the same route, and to consider whether the act of transfer was intended to be something personal to the transferee, or whether a transfer to the settlor's executors will put the parties in the position which the settlor intended them to occupy. It seems to me that the act which has to be done is in no sense personal to the settlor. All those securities are marketable securities. Counsel for the other beneficiaries suggested that they might be liable to great fluctuations in value. But as the settlor gave Miss Holland the whole period of his own life in which to execute the transfer he could not have been concerned about such fluctuations. He was intending to make it certain that Miss Holland should not keep these shares and at the same time obtain the benefit of the settlement. He was not acting from any personal motive. It is of course altogether for the benefit of his estate that Miss Holland should now execute these transfers, and thereby increase it. It is only the other beneficiaries under the settlement who would suffer. I think that the answer to them must be that it does not matter whether the settlor happens to be alive or not so long as Miss Holland does not retain the shares. Therefore, in my judgment, the effect of a transfer by Miss Holland to the executors of the settlor would place all parties beneficially interested in the position which the settlor intended them to occupy and would be a sufficient compliance. During the argument the point was raised by the executors that they ought not to be compelled to accept transfers because on some of the shares there was an uncalled liability. I agree that the executors ought not to be subject to any personal liability, but I cannot think that that circumstance ought to affect my decision in the matter. They have only to go into the market and sell the shares on which there is any liability and direct Miss Holland to transfer them to the purchaser.

Declaration accordingly.

Solicitors: *Beckingsales & Naylors* (for the trustees); *Stanley Evans & Co.* (for the defendant T. K. Sage); *Le Brasseur & Oakley* (for other defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

In the Estate of MACGILLIVRAY.

[COURT OF APPEAL (Scott, Somervell and Cohen, L.JJ.), June 4, 5, 25, 1946.]

Wills—Soldier's will—Lost will—Probate—Admissibility of secondary evidence—Statements by testator after execution of will—Cogency of evidence—Letter written after execution of will not a testamentary document.

M., a soldier on active service, made a soldier's will in his army service book between Nov. 13 and 22, 1942. The will was witnessed by R., and M. discussed with him its contents. R. did not read the will, but M. told him that it contained the following provisions: (*a*) that his fiancee, Miss S., and his son should be the beneficiaries; (*b*) that Miss S. should be amply provided for; (*c*) that Miss S. and his uncle should be trustees for the son until he came of age. On Dec. 2, 1942, M. wrote a letter to W., the managing director of a company in which M. had a substantial interest. The letter was mainly concerned with directions regarding the conduct of the business but it also contained the following paragraph: "In the event of my being killed in action I wish you to administer the business for my heirs, *i.e.*, my son and Miss S. . . . All my personal debts will be settled by you from the business. . . . My son's education will be Miss S.'s responsibility and will be paid for through the business." In Sept., 1943, M. was drowned at sea when the troopship on which he was travelling was sunk by enemy action, and his army service book was lost at the same time. W. and Miss S. applied to admit to probate as M.'s last will (*a*) the letter of Dec., 1942, or (*b*) the will made in the army service book and reproduced according to the recollection of R., together with the letter of Dec. 2, 1942. The application was resisted on behalf of M.'s infant daughter:—

HELD: (i) upon the true construction of the letter of Dec. 2, 1942, there was no testamentary intention because (*a*) M. had already executed his will; (*b*) the letter was purely a business letter and the paragraph itself was limited to giving instructions as to the administration of the business. The letter could not, therefore, be admitted to probate as a testamentary instrument.

In the Estate of Beech (2) *applied.*

(ii) statements made by M. to R. after the execution of the will were admissible to prove its contents.

Sugden v. *Lord St. Leonards* (1) *followed.*

(iii) [SCOTT, L.J., *dissenting*] the evidence of R., supplemented by the reference to Miss S. and the son as heirs in the letter of Dec. 2, 1942, did not afford sufficiently cogent evidence as to the contents of the will written in the army service book. The will could not, therefore, be admitted to probate.

Dictum of LORD HERSCHELL, L.C., *in Woodward* v. *Goulstone* (11 App. Cas. 469, at p. 475) *applied.*

[**EDITORIAL NOTE.** The importance of this case lies in the view expressed by SCOTT, L.J., in his dissenting judgment, that the principle underlying the action of the legislature in dispensing with technicalities in the case of service wills should be applied to the admission of secondary evidence of such wills. The majority of the court do not take this view, and, applying the ordinary test of extreme cogency laid down by LORD HERSCHELL in *Woodward* v. *Goulstone* (3) hold that the evidence in question was not sufficiently cogent to justify an order for probate based upon it.

AS TO SOLDIERS' WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328; and FOR CASES, see DIGEST, Vol. 39, pp. 333-339, Nos. 193-252, and Vol. 44, pp. 304, 305, Nos. 1354-1360.]

Cases referred to:

*(1) *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154; 44 Digest 356, *1884*; 45 L.J.P. 49; 34 L.T. 372.

*(2) *In the Estate of Beech, Beech* v. *Public Trustee,* [1923] P. 46; 44 Digest 305, *1359*; 92 L.J.P. 33; 128 L.T. 616.

*(3) *Woodward* v. *Goulstone* (1886), 11 App. Cas. 469; 23 Digest 107, *1016*; 56 L.J.P. 1; 55 L.T. 790.

APPEAL by the infant daughter of the deceased (appearing by her guardian *ad litem*) from an order of WALLINGTON, J., dated Feb. 27, 1946, admitting to probate as a testamentary instrument a paragraph in a letter written by the deceased on Dec. 2, 1942, while on active service. On the invitation of the Court of Appeal, the respondents submitted a notice of cross-appeal asking that the order of Wallington, J., be reversed in so far as it excluded from probate the contents of a will made by the deceased in his army service book between Nov. 13 and 22, 1942, as reproduced according to the recollection of a witness thereof, and that the said reproduction (as set out in the schedule thereto) together with the letter of the deceased of Dec. 2, 1942, be admitted to probate as the last will of the deceased. The facts are fully set out in the judgment of Cohen, L.J.

Michael J. Albery for the appellant, Joy Roberta MacGillivray (appearing by her guardian *ad litem*, Mercedes MacGillivray).

William Latey for the respondents, Frank Richard Watts and Thelma Patricia Snuggs.

Cur. adv. vult.

Scott, L.J.: This appeal raises questions about a "soldier's will," the validity of which, on the facts before us, depends on whether the court can give effect to the clearly proved testamentary intention of the deceased soldier. He was drowned at sea in Sept., 1943, when the troopship in which he was travelling was sunk by enemy action. He had, in Nov., 1942, made a will, valid as a soldier's will, in his record book, but that book was lost with him. Some secondary evidence of its contents was available, but the judge thought it insufficient to establish any testamentary contents. On the other hand he gave probate to a sentence in a letter written home a few days later (on Dec. 2, 1942), which reached its destination. On both issues I take the opposite view. As regards the book, the evidence certainly establishes the fact of it containing a written will, and I think that the secondary evidence of some at least of its contents is sufficient to enable the court to be sure about two definite provisions contained in it. Stated in *oratio recta* these were: (i) "I make my fiancée Miss Thelma Patricia Snuggs and my son Ian my beneficiaries"; (ii) "I appoint Miss Snuggs and my uncle trustees of my son Ian's share till he comes of age." His marriage with Miss Snuggs had been fixed for the very day he sailed—as shown by an extract from a newspaper. Those two provisions were definitely stated orally by the deceased to his friend Lieutenant Richards of the 1st Derbyshire Yeomanry, when they were both on a troopship on a voyage to North Africa on some date between Nov. 13 and 22, 1942, as being what he then intended to put in his will: see the affidavit of Richards of Apr. 29, 1945.

By a later affidavit (of Feb. 13, 1946) Richards supplied certain further information, *viz.*, (i) that he had witnessed the will written in the deceased's "record of service book 439" and, at the same time, had got the deceased to witness his own will in his own similar book: (ii) that, though the deceased did not invite him to read its contents, the deceased had then told him that the will in fact contained the two provisions which I have already mentioned. It is true that the deceased had also explained to him that "Miss Snuggs should be amply provided for": but I construe that statement by the deceased as merely explanatory of the provision whereby he had made her one of the two beneficiaries. If the will had been salved from the ship when sinking or from the bottom of the sea, and had been found to contain the two sentences in the *oratio recta* which I have just read out and nothing else, then, as a soldier's will wholly in the testator's handwriting, with or without the signature of Richards as a witness, it would clearly have been a testamentary document admissible to probate—just as much as if it had been executed and witnessed in the ordinary way in strict accord with the Wills Act, 1837. The interpretation of it when proved would have been for the court. It is irrelevant on the motion for probate, and equally so on the appeal before us, to consider whether those two provisions left any part of his estate undisposed of, except for the purpose of considering the question of a grant of administration with the will annexed: for probate of a lost will will be granted to the extent to which its contents are proved, see *Sugden* v. *Lord St. Leonards* (1), provided that there is nothing to indicate that the proved provisions were modified by other provisions in the lost will. On the issue of what the written contents of the lost will were, oral statements by the testator, either before or after it was made, are shown by the same authority to be admissible. For the same reasons, I cannot agree with the judge's view that there is no "reasonably clear testimony as to what was written in the book."

In one way the present case seems to me to have legal importance. Parliament, in making the provision it did for dispensing with all technicalities of form for soldiers' wills, undoubtedly had in mind the national importance of giving effect to the last wishes, however informally expressed, of those who in war give their lives for this country. The same principles ought to govern the tests to be applied to the secondary evidence of the contents of such a will when lost, as in the present case. The court ought to strive hard to give effect to the manifest intention of the deceased, and, therefore, to be very slow to conclude that what is proved of that intention is not enough to deserve probate. I think it is just there that the dividing line lies between my view about the evidence and that taken by my brethren. As I see it, we have a plain judicial duty to give effect to the two provisions which I have stated.

As the testator had already made his written will, and obviously knew it was valid as a soldier's will, his letter of Dec. 2, 1942, must be construed in the light of those circumstances. So construed the paragraph which was admitted to probate by the judge does not appear to me to be testamentary at all. It was written with the will, which he had made, in his mind, but it only constituted a business direction given to Watts, as the person who was managing the business of the company, by the writer, who had a substantial shareholding and evidently regarded himself (rightly or wrongly) as entitled to the control of that company. That letter was addressed to Watts purely as the manager of the business, and (as seen from Watts' affidavit) Watts regarded the deceased as his employer. The word "heirs" was not used in its legal sense but merely as the equivalent of the word "beneficiaries" which had been used by the testator in his two conversations with Richards. The rest of the paragraph may or may not have echoed provisions in the will; but they are too vague to enable us to say that they epitomise actual provisions of the will, so as to justify our treating them as secondary evidence of additional provisions.

In order to enable the court to do justice in the case, we invited counsel for the respondents to submit a notice of cross-appeal which he duly did. Under it I think we should grant probate of the lost will, first, as containing the two provisions which I have stated, *i.e.*, the first and third provisions set out in the schedule to the notice of cross-appeal, but not the second; and secondly, as intending to direct that the named trustees should also be the executors; but as my brethren do not agree, the order will be as directed by them. Speaking for myself, I should like to hear counsel on the question as to whether we ought to make a grant of administration with the will annexed, pursuant to the powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9.

SOMERVELL, L.J.: I have had an opportunity of discussing with COHEN, L.J., the judgment that he is about to deliver and it is to be regarded as the judgment of us both.

COHEN, L.J.: This is an appeal from an order of WALLINGTON, J., that probate be granted of the will of Duncan Baxter MacGillivray deceased, contained in a paragraph of a letter of Dec. 2, 1942, from the deceased to the respondent F. R. Watts.

The deceased was a lieutenant in the 1st Derbyshire Yeomanry and a director of D. B. MacGillivray, Ltd., hairdressers of Andover in the county of Hampshire and elsewhere. He had been married to one Mercedes MacGillivray against whom he obtained a decree absolute of divorce on Nov. 16, 1942. There were two children of the marriage, Ian D'Oyly, now aged 11 years, and Joy Roberta, now aged 9 years. The deceased was given custody of the son and his wife of the daughter. The deceased became engaged to Miss Thelma Patricia Snuggs and on Nov. 13, 1942, an announcement was made in THE ANDOVER ADVERTISER that the marriage would take place on Nov. 18, 1942. Unfortunately on Nov. 13, 1942, the deceased was ordered abroad on active service and the marriage could not take place. In pursuance of his duty he sailed on one of His Majesty's ships which was sunk by enemy action on Sept. 10, 1943, and it was officially recorded at the War Office that the deceased lost his life when the ship was sunk.

By the notice of motion by which these proceedings were originated, the respondents applied (i) for leave to swear that the deceased died on, or since Sept. 10, 1943, and (ii) to admit to probate, as a soldier's privileged will, any or all of three suggested testamentary documents as singly or together constituting the true last will of the deceased. We need not trouble with the first document, since, counsel for the respondent has abandoned the contention that it constitutes a testamentary document. The other two are as follows: (*a*) a statement of the deceased made on or about Nov. 19, 1942, and contained in para. 3 of what is sometimes called an affidavit, and at other times a statement on oath, of one of the deceased's brother officers, Lieutenant Lawrence Richards, sworn on Apr. 29, 1945; and (*b*) a letter of Dec. 2, 1942, to the respondent F. R. Watts. A

By the said statement on oath, Lieutenant Richards deposed that he had witnessed the deceased's signature to his will made in his officer's record of service army book 439 on board "The Strathallan," approximately on Nov. 19, 1942, but definitely between Nov. 13 and 22, 1942. Paras. 3 and 4 of the statement are in the following terms:

> That Lieutenant D. B. MacGillivray discussed the making of the will with me before it was made and stated that his intention was that his fiancee Miss Thelma Snuggs B and his son Ian should be the beneficiaries, in what proportion or by what methods were not settled, but with the intention that Miss Snuggs herself should be amply provided for and that some form of trusteeship should be created for his son Ian until the latter became of age. The trustees to be Miss Snuggs and Lieutenant D. B. MacGillivray's uncle, whose name I cannot remember. That I did not read the contents of the will, merely witnessing Lieutenant MacGillivray's signature, and therefore cannot swear if, or how far, the above intentions were executed. C

After the notice of motion was issued, Lieutenant Richards swore an affidavit of Feb. 13, 1946. By para. 2 of that affidavit he confirmed the former statement on oath and added certain particulars of which, for the purposes of the decision of this case, only para. 5 is material. It is in the following terms:

> Although D. B. MacGillivray, with whom I was on friendly terms and who was known to me as "Mac," did not ask me to read the contents of his will, he made it absolutely D clear to me that it was made on the following lines: His fiancee Miss Thelma Snuggs and his son Ian should be beneficiaries under his will, that Miss Snuggs should be amply provided for and that some form of trusteeship should be created for his son Ian until the latter became of age, the trustees to be Miss Snuggs and Lieutenant D. B. MacGillivray's uncle.

It is to be observed that the notice of motion does not refer to the second affidavit and does not ask for the admission to probate of the written will made E in the deceased's record of service army book 439, the statement and affidavit of Lieutenant Richards being treated as secondary evidence of the contents of that will, but it is clear from the judge's judgment that he dealt with the matter on the basis of the notice of motion being treated as including an application to admit the will, as written in the book, to probate. The judge admitted to probate the extract from the letter of Dec. 2, 1942, which is in these terms: F

> In the event of my being killed in action I wish you to administer the business for my heirs, *i.e.*, my son and Miss Snuggs. My uncle will be given the option to either leave the money in the company or withdraw it in cash. All my personal debts will be settled by you from the business and everything straightened out before you carry on with Miss Snuggs in charge. My son's education will be Miss Snuggs' responsibility and will be paid for through the business.

He rejected, however, the alternative contention, that either the statement or G the written will as proved by secondary evidence should be admitted to probate.

Dealing first with the letter, we are unable to agree with the conclusion which the judge reached. The principle to be applied in dealing with documents of this character, is laid down in *Re Beech* (2). It is summarised in a paragraph of the headnote as follows:

> A letter which may be otherwise admissible as a soldier's will must be testamentary H in character and intention. There is no difference in this respect between the will of a soldier and that of a civilian executed with the formalities of the Wills Act.

LORD STERNDALE, M.R., said of the documents in question in that case ([1923] P. 46, at p. 61):

> The only question for us to consider is: Are those documents one or either, or both of them, expressions of the testator's wishes as to what was to be done with his property? Were they documents by which he meant to express a wish as to the way in which his property should go after his death?

But though the question is easy to propound, the solution in this particular case is, as the judge said, difficult. Counsel for the appellant argued before him, as he argued before us, that, whether or not the writing in the army book was or is receivable as a will, it does not affect the fact that, on the testimony of the case, it is plain that the deceased thought that he had made a will and if he thought he had, it is very unlikely that he would have had the intention of writing a letter which would constitute another will. The judge rejected that A argument, because he found certain expressions in the extract from the letter which we have cited, which he considered indicated a testamentary intention. He relied particularly on the opening words of the extract. He stressed the use of the phrase :

> In the event of my being killed in action I wish you to administer the business for my heirs . . .

B He regarded that as being at least as consistent with a testamentary document as one could have.

Now we agree that, if we had nothing else except the letter to guide us as to the deceased's intention, the phrase to which we have directed attention might enable us to infer a testamentary intention, especially when read with the subsequent direction to settle the deceased's personal debts, but we must not regard the letter *in vacuo*. Looking at the evidence as a whole, we think there are cogent C reasons for rejecting the argument that this letter displayed a testamentary intention. In the first place, there is the fact to which we have already drawn attention, that the deceased had already made a written will, in which he had made his son and Miss Snuggs beneficiaries and by which he had appointed trustees for his son ; in the second place, this extract comes at the end of a letter giving directions to the managing director of his business as to the conduct of the business, and the extract itself is limited to giving instructions as to the D administration of the business and as to what is to be paid through the business. In our view, upon the true construction of the letter, there is no testamentary intention and what the deceased was doing, was asking his friend and colleague, Watts, to administer the business "for his heirs," the heirs having been constituted by another document.

The conclusion which we have reached on this point would have been sufficient to dispose of the appeal, but it was obviously in the interests of the parties that E we should decide the question whether there was sufficient secondary evidence to prove the contents of the will written in the army book 439. We therefore gave counsel for the respondents leave to serve a notice of cross-appeal. By it, he asks that (i) the order of WALLINGTON, J., be reversed in so far as it excluded from probate the contents of a will made by the deceased in his army book between Nov. 13 and 22, 1942, as reproduced according to the recollection of a F witness thereof, namely Lieutenant Lawrence Richards, and (ii) that the said reproduction as set out in the schedule thereto together with the letter of the deceased dated Dec. 2, 1942, be admitted to probate as the last will of the deceased. The schedule contained the following provisions :

> (i) My fiancee Miss Thelma Snuggs and my son Ian shall be the beneficiaries of this my will. (ii) Miss Snuggs shall be amply provided for. (iii) The trustees for my son Ian until he comes of age shall be Miss Snuggs and my uncle, Mr. Hutchins.

G The principles to be applied where it is sought to adduce secondary evidence of a last will are laid down in *Sugden* v. *Lord St. Leonards* (1). For the purposes of this case it is sufficient to refer to the following passages from the headnote :

> Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. When the contents H of a lost will are not completely proved probate will be granted to the extent to which they are proved.

In *Woodward* v. *Goulstone* (3) LORD HERSCHELL, L.C., expressed doubts (*a*) as to whether in all cases the court should grant probate of the residue upon evidence which left doubts as to the other parts of the will, and (*b*) as to whether post-testamentary declarations are admissible, but he approved the decision in *Sugden* v. *Lord St. Leonards* (1). He made it clear (11 App. Cas. 469, at p. 481) that he was not expressing a final opinion, but was merely leaving the questions on which he had expressed doubt open should they afterwards come before their Lordship's House. We agree, therefore, with the view expressed in MORTIMER ON PROBATE PRACTICE 2nd Edn., p. 269, note (*l*), that, as the law stands, this court is bound to hold that statements by the testator after the execution of the will are admissible to prove its contents.

LORD HERSCHELL, L.C., made a further observation which is of importance in the present case. He said (*ibid.*, at p. 475) :

> I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator. A

We have therefore to consider whether the evidence of Lieutenant Richards supplemented by the reference to the son and Miss Snuggs as heirs in the letter of Dec. 2, affords sufficiently cogent evidence as to the contents of the will written in army book 439. Para. 3 of Lieutenant Richards' statement on oath records a conversation before the will was made. He quotes the deceased as B saying that while his intention was that Miss Snuggs and his son should be the beneficiaries " in what proportion or by what methods was not settled." As we read this paragraph, Lieutenant Richards was not suggesting that the deceased intended to put these words in the will, but was stating that the deceased had not then made up his mind what provisions as to proportions and methods he would put into the will when he wrote it. He also says he did not read the will C and therefore could not swear " if and how far the above intentions were executed." In his second affidavit, however, we think that Lieutenant Richards is recording what the deceased told him that he had put in the will he had just signed. It is to be observed that, while the record is very similar to that deposed to in para. 3 of the earlier statement, the words " in what proportion or what methods were not settled " are omitted. From this we are prepared to infer that the will as written did contain the final dispositions of the deceased and D left nothing as regards proportions or methods to be settled thereafter. The question therefore is whether we can regard the concluding sentence of para. 5 of Lieutenant Richards' affidavit as containing a sufficiently accurate summary of the operative provisions of the deceased's will or whether we should regard it as a mere rough outline of a document which, in fact, contained an apportionment of the residue as between Miss Snuggs and the son and may well have contained other provisions as to what the deceased had called " methods." E

We should desire, if we could, to give effect to the deceased's manifest intention that the only beneficiaries should be Miss Snuggs and his son, but we cannot find the evidence sufficiently cogent to justify us in making the order for which counsel for the respondents asks. The earlier statement of Lieutenant Richards clearly indicates that the deceased had not made up his mind as to the proportions in which the two beneficiaries should take and the reference to " methods " suggests that he also had in mind some limitation in the interests which one or F both of the beneficiaries were to take. We do not think that the later statement justifies us in assuming that the deceased had abandoned this intention. The words attributed to him are quite consistent with the view that he had in fact carried out his original ideas, had apportioned the fund between the parties and possibly had given, for the sake of example, Miss Snuggs only a life interest, or an interest determinable if she married, or the son an interest G determinable of he died under the age of twenty-one. It seems to us clear that if the only evidence as to a will was that the deceased had stated that the beneficiaries under his will were his son, a named niece, his gardener and a hospital, it would be impossible for the court to accept this as sufficiently cogent evidence of the testator's intentions. The uncertainty here is within a narrower compass, but it seems to us impossible to assume that he left half of his estate absolutely to Miss Snuggs. H

The costs of all parties here and below must be paid out of the estate.

Appeal allowed, cross-appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors : *Palmer, Bull & Mant* (for the appellant) ; *Mackrell, Maton, Godlee & Quincey*, agents for *Talbot & Davies*, Andover (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Criticised. JAMIESON *v.* JAMIESON. [1952] 1 All E.R. 875.

MEACHER *v.* MEACHER.

[COURT OF APPEAL (Morton, Bucknill and Somervell, L.JJ.), July 26, 1946.]

Divorce—Cruelty—Petition for divorce based on cruelty—Refusal to obey unreasonable orders of husband—Violent assaults by husband—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 176—*Matrimonial Causes Act,* 1937 (*c.* 57), *ss.* 2, 6.

A A wife was severely assaulted by her husband on several occasions on account of her refusal to obey his order not to visit her sister. As a result, she had a nervous breakdown and left her husband. She presented a petition for divorce on the ground of cruelty, but the judge held that she was not entitled to a decree because the court would only intervene to protect parties from what they expected to happen, and not from what had already happened, and the wife could prevent further assaults by obeying her
B husband. The wife appealed :—

HELD : (i) under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, s. 2, a decree of divorce can be granted on the ground of cruelty already suffered by the petitioner.

(ii) the court is justified in intervening where a husband violently
C assaults his wife because she has disobeyed an unreasonable order given by him.

(iii) on the facts of the case, there was a sufficient degree of cruelty to entitle the wife to a decree of divorce.

[**EDITORIAL NOTE.** The logical conclusion from the decision of the court below is that a husband could assault his wife for disobedience and that she could not then obtain a decree *nisi* on the ground of cruelty since she would have it in her own power
D to prevent further assault by obedience. Such a conclusion proceeds from the assumption that the statute does not give a right to a decree in respect of past cruelty. It is held by the Court of Appeal that there is no ground for so limiting the words of sect. 176 of the 1925 Act.

AS TO DEFINITION OF CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 649, para. 954, and Supplement ; and FOR CASES, see DIGEST, Vol. 27, pp. 281-284, Nos. 2518-2554.

FOR THE MATRIMONIAL CAUSES ACT, 1937, see HALSBURY'S STATUTES, Vol. 30,
E p. 335.]

Case referred to :

*(1) *Russell* v. *Russell*, [1897] A.C. 395 ; 27 Digest 291, *2661* ; 66 L.J.P. 122 ; 77 L.T. 249 ; *affg.* [1895] P. 315.

APPEAL by the petitioner from a decision of HENN COLLINS, J., dated Apr. 12, 1946, dismissing a wife's undefended petition for divorce on the ground of
F cruelty. The facts are fully set out in the judgment of MORTON, L.J.

J. E. S. Simon for the appellant.

MORTON, L.J. : This is a poor person's appeal, and the court is indebted to counsel for the appellant for his able and helpful argument.

The parties were married on Nov. 27, 1937. In 1938 a child was born. In
G 1943 the wife presented a petition alleging cruelty. Evidence was given to the effect that in 1938 the husband kicked the wife and that the assault was not provoked. Subsequently, severe assaults have been committed by the husband against the wife occasioned by his objecting to the wife's visits to her sister. That happened several times. The final assault took place in June, 1939, when the wife visited her sister. Whilst she was sitting there with her baby on her lap, the husband came and knocked her on the floor and then he punched her in the
H face and stomach. The wife had a nervous breakdown after this assault ; she saw a doctor and stayed with her sister for several weeks and did not return to the respondent. At the end of 1939 the parties entered into a separation agreement.

There was plain evidence, to quote the words of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, s. 2, that :

> . . . the respondent has since the celebration of the marriage treated the petitioner with cruelty.

Cruelty was defined by this court in *Russell* v. *Russell* (1) where LOPES, L.J., said ([1895] P. 315, at p. 322) :

> There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty.

The matter was carried a little further by the definition given in the House of Lords by LORD DAVEY ([1897] A.C. 395, at pp. 467, 468) :

> The general idea which, I think, underlies all those decisions is that, while declining A to lay down any hard and fast definition of legal cruelty, the courts acted on the principle of giving protection to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health.

Here then was actual violence and physical ill-treatment, and I can find nothing in sect. 176 of the 1925 Act or in the authorities to justify the view that, if a wife has suffered assaults on her person, she is not entitled to a decree unless she can show that these assaults are likely to continue. According to the evidence B there was nothing against the character of the sister and she had, in fact, sometimes invited the respondent and he had visited her home ; no reason appeared for the husband's objections to his wife's visiting her sister but the husband's jealousy.

Delivering his judgment HENN COLLINS, J., said this:

> I do not think in this case that I should be justified in granting a decree. I should be very sorry if anything I said seemed to justify husbands in assaulting their wives ; C far from it, it has got nothing to do with that. But, after all, this court does intervene only to protect the parties from what they expect to happen, and what they expect to happen is founded upon what has already passed. In no sense is a suit for dissolution of marriage on the ground of cruelty one in respect of that cruelty. The cruelty that has already taken place is only relevant as an indication of what is likely to happen in the future, and if the past is likely to repeat itself. But, as I said, this court would intervene only if there is likely to be a repetition. If the wife has it in her own hands to D prevent the repetition of that of which she complains, it seems to me that this court is not justified in intervening even if the order which is given to her is, in her view, or even in the view of the court, in itself not reasonable. What is going to be the exact consequence of her disobedience to orders which she thinks unreasonable, or which even this court thinks unreasonable, I am not going to enter into at the moment. I am dealing with the case before me where the husband no doubt assaulted the wife only on occasions where she disobeyed his orders not to go and see her sister. Those are the circumstances, and I do not think that this case can stand on any other basis E than the one that I have mentioned, namely that the wife has got the remedy in her own hands and does not really require the assistance of this court. For these reasons, I dismiss the petition.

If this judgment is pushed to its logical extreme, if would seem to follow that a husband may issue unreasonable orders to his wife and beat her if she disobeys them ; and the wife cannot obtain a divorce on the ground of cruelty, however often this happens, because she can prevent any further beatings by obeying F her husband in all respects. I cannot and do not believe that that is the law and I think the judge misdirected himself in two respects. Neither my brethren nor I know of any authority for saying that the courts will only intervene to protect the parties from what they expect to happen. It seems to me, both on the wording of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, and on the observations in *Russell* v. *Russell* (1), that a divorce can be granted on the ground of cruelty already suffered by the petitioner. Secondly, G I cannot agree that this court is not justified in intervening where a wife is given an unreasonable order by her husband, disobeys it and the husband then violently assaults her. There were several such assaults and, in my view, there was nothing which amounted to provocation. It is therefore not necessary to discuss the question as to whether, and to what extent, provocation amounts to a defence against a charge of cruelty. H

On the facts of this case, as there was a sufficient degree of cruelty, a decree ought to be granted. This appeal will, therefore, be allowed.

BUCKNILL, L.J. : I agree that the appeal should be allowed and will only add this. The judge appears to have based his judgment on the proposition that a decree *nisi* for cruelty will not be granted in respect of acts of cruelty already committed unless there is also a reasonable fear that further acts of cruelty will be committed. This seems to me to impose a condition on the statutory right to a decree for cruelty which is not in the Act of 1937. Sect. 2

of the Act simply states that a decree shall be granted on the ground that since the celebration of the marriage the respondent has treated the petitioner with cruelty. Moreover, under sect. 6 of the Act, a spouse who had obtained a decree of judicial separation for cruelty, or a separation order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, for persistent cruelty, before the 1937 Act was passed, has the right to petition for a decree of divorce on the same facts as those proved in support of that decree or order. But once such a decree or order has been made there can be no reasonable fear of further acts of cruelty, because the wife is no longer bound to cohabit with her husband.

SOMERVELL, L.J. : I am of the same opinion, and though we are differing from the court below, I do not desire to add anything.

Appeal allowed. Decree nisi granted.

Solicitor: *Ninian R. Davies*, Law Society, Services Divorce Department (for the appellant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

tinguished. AMPHLETT *v.* DORRELL.
48] 2 All E.R. 674.

Followed. LINDOP *v.* QUAIFE. [1949]
1 All E.R. 456.

UPSONS LTD. *v.* HERNE.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), June 26, 27, July 16, 1946.]

Landlord and Tenant—Rent restriction—Standard rent—Apportionment—"Let"—"First let"—Flat originally in one lease of three separate premises—Subsequent separate letting of flat—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (1), (3).

By an agreement in writing dated Apr. 4, 1938, the respondents let a flat in London to the appellant for one year, commencing Apr. 11, 1938, and thereafter from year to year, at a yearly rent of £78. The flat was at all material times a dwelling-house to which the Rent Restrictions Acts applied. The whole building, including the appellant's flat, another flat and a shop, had previously been let to K. for a term of 21 years from Sept. 19, 1911, at a yearly rent of £150, and that lease was still subsisting on Aug. 3, 1914. The appellant's flat was first let separately in 1925 to C. at a yearly rent of £100. The three premises had at all times been wholly separate except that they had a common roof. The two flats were partly above the shop, but they were not internally connected in any way with the shop or with one another and each of the flats had a separate entrance of its own. In an action to recover possession of the appellant's flat the question for decision was whether the flat was "let" within the meaning of sect. 12 (1) of the 1920 Act, by reason of the fact that it was included in the lease to K., or whether it was "first let" in 1925 to C. It was contended on behalf of the respondents that there was no "letting" of the flat until 1925 and it was sought to distinguish *Sutton* v. *Begley* (1) on the ground that the flat in question had always been a separate dwelling:—

HELD: (i) the flat was "let" within the meaning of sect. 12 (1) of the 1920 Act by reason of the fact that it was included in the lease to K.; the fact that two other premises were included in the letting and the three were let in one lease at one rent instead of three separate leases at three separate rents did not prevent it from being "let" within the meaning of the Act; consequently, under sect. 12 (3) of the Act there must be an apportionment of the rent.

(ii) the words "of the property in which that dwelling-house is comprised" in sect. 12 (3) of the Act must either be read or implied as applying to "the rent."

[**EDITORIAL NOTE.** Previous decisions on apportionment of rent, under the Rent Restrictions Acts, have dealt with a single large building which has been subdivided into flats or rooms with a common means of communication. It is now decided that the apportionment provisions apply equally where several tenements are let together by the same lease at a single rent.

AS TO STANDARD RENT, see HALSBURY, Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

*(1) *Sutton* v. *Begley*, [1923] 2 K.B. 694; 31 Digest 571, *7195*; 92 L.J.K.B. 1086; 129 L.T. 773.

Applied. CAPITAL & PROVINCIAL PROPERTY TRUST, LTD. *v.* RICE. [1950] 2 All E.R. 174.

*(2) *Barrett* v. *Hardy Brothers* (*Alnwick*), *Ltd.*, [1925] 2 K.B. 220; 31 Digest 561, *7090*; 133 L.T. 249; 94 L.J.K.B. 665.

*(3) *Field* v. *Gover*, [1944] 1 All E.R. 151; [1944] K.B. 200; 113 L.J.K.B. 129; 170 L.T. 73.

APPEAL by the defendant from an order of His Honour JUDGE DONE, made at Barnet County Court and dated Feb. 26, 1946. The facts are fully set out in the judgment of MORTON, L.J.

The appellant appeared in person. A

Raymond Waters for the respondents.

Cur. adv. vult.

MORTON, L.J.: The appellant in this case was the defendant in the county court, and I shall find it convenient to refer to him as the defendant.

The facts are that the defendant lives in a flat at Golders Green, which is known as No. 2A Golders Way. That flat was let to him by the plaintiffs under an agreement in writing dated Apr. 4, 1938, for one year B commencing on Apr. 11, 1938, and thereafter from year to year, at the yearly rent of £78. It is admitted by the plaintiffs that the flat was at that time, and still is, a dwelling-house to which the Rent Restrictions Acts apply, since the rateable value thereof has at all material times been below the limit specified in these Acts. The defendant allowed the rent of £78 to get very greatly in arrear, and, about the end of 1944 or beginning of 1945 (the precise date was not before C us), the plaintiffs took possession in the county court for recovery of possession and for arrears of rent. These proceedings were resisted by the defendant and the case was heard in the Willesden County Court on Feb. 21, 1945, and Mar. 20, 1945. On the latter date the county court judge gave judgment for arrears of rent to Nov. 5, 1944, £246 6*s.* 8*d.*, and for possession in 28 days, "suspended on payment of current rent and £1 per month off arrears." The defendant appealed from that decision to this court. On June 14, 1945, this court allowed D the defendant's appeal and ordered that the judgment of the county court judge should be wholly set aside and that a new trial should be had between the parties, with fresh particulars of claim and defence, before another judge in the Barnet County Court. This court further ordered that the costs of the trial at Willesden County Court should be in the discretion of the judge at the new trial. Fresh particulars of claim and defence were delivered, and the new trial came on for hearing in the Barnet County Court. On Feb. 26, 1946, the county court E judge, having heard all the evidence, made an order in favour of the plaintiffs for recovery of possession and for £234 arrears of rent and for costs. He ordered, however, that the order for possession should be suspended so long as the defendant paid the current rent of £6 10*s.* 0*d.* a month and 10*s.* monthly in reduction of the arrears of rent and costs. Later, he wrote the following note:

> The above judgment was based on a finding that flat 2a was first let separately in F 1925 at a rent of £100 per annum and that £100 was, therefore, the standard rent. It appears, however, in the evidence that the whole building comprising flats 2a and 2b and a shop had been let for a term of 21 years from Sept. 19, 1911, at £150 per annum. My attention was not called to *Sutton* v. *Begley* (1) and I overlooked the question of apportionment.

That note was signed by the judge.

It will thus be apparent that nobody has ever asked the defendant to pay any G more rent than the £78 *per annum* which he agreed to pay in 1938, and that the proceedings against him started because he failed to pay that rent and contended (as he still contends) that he is not bound to pay that rent. It will further be observed that the defendant has succeeded in remaining in his flat until the present day, in spite of his allowing the agreed rent to get heavily in arrears; and that, even under the order from which he appeals, he can still remain in his flat if he pays the £78 a year by regular monthly instalments, and pays the H modest sum of 10*s.* monthly in reduction of arrears amounting to £234 and costs. However, the defendant has appealed from that order, and it is for this court to decide whether that order is or is not wrong in law.

The defendant puts forward four arguments in support of his appeal: (1) That the agreement to pay £78 a year rent was varied by an agreement between the plaintiffs and himself made in 1942. It is plain from the notes and order of the county court judge that he found against the defendant on this issue of fact, and there is no ground upon which that finding can be disturbed, as there was clearly material upon which he could so find. (2) That prior to Aug. 3, 1914, flat 2A had been let separately at a rent of £35 a year to a sub-tenant of one Klein, and this sub-tenancy was still subsisting on Aug. 3, 1914. If this were so, the standard rent would be £35, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1), which provides that :

> . . . (*a*) The expression " standard rent " means the rent at which the dwelling-house was let on the third day of August nineteen hundred and fourteen, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let . . .

However, the defendant failed to prove the facts upon which he sought to rely, and the judge held that flat 2A was first let separately in 1925 at a rent of £100 a year. There was evidence to support that finding of fact, the lessee in 1925 being one Curry, and it is, of course, fatal to the defendant's second point. (3) That the case came within sect. 6 of the Act of 1933, and, accordingly, the standard rent should be £45, having regard to the standard rent of similar dwelling-houses in the neighbourhood. Having regard to the judge's finding, just quoted, it is plain that this section does not apply to the present case. (4) That from 1911 till a date after 1914, flats 2A and 2B, together with a shop No. 12 Golders Green Road, were included in one lease to Klein at a single rent of £150. Accordingly, flat 2A was " let " to Klein on Aug. 3, 1914, and in order to ascertain its standard rent it is necessary to apportion the rent of £150 between the three premises comprised in the lease of 1911, this apportionment being carried out under sect. 12 (3) of the Act of 1920. This argument was first suggested by the note, which I have already read of the county court judge. The lease to Klein is admitted, and it was agreed at the hearing of this appeal that the three premises, flat 2A, flat 2B, and the shop, have at all times been wholly separate, except that one roof covers them. That roof also covers a number of other flats and shops, as the three premises in question form part of a terrace consisting of shops on the ground floor and flats above. Flats 2A and 2B are partly, but not wholly, above the shop No. 12. They are not internally connected in any way with the shop or with one another and each of the flats has a separate entrance of its own.

Thus a question of law arises : Was flat 2A " let " within the meaning of sect. 12 (1), of the Act of 1920 by reason of the fact that it was included in the lease to Klein ? If so, a case for apportionment arises ; if not, flat 2A was " first let " when it was let separately to Curry in 1925 and the standard rent is £100, so that the defendant still remains bound to pay his agreed rent of £78 a year.

In my view, the question which I have just stated must be answered in the affirmative.

Counsel for the plaintiffs contended that there was no " letting " of flat 2A till 1925, and he sought to distinguish *Sutton* v. *Begley* (1) on the ground that the flat in question in the present case has always been a separate dwelling. I agree that the present case differs in that respect from *Sutton* v. *Begley* (1), but in my judgment the only result of that difference is that whereas *Sutton* v. *Begley* (1) was a difficult case, this present case comes directly within the wording of sect. 12 (1) of the 1920 Act. This separate dwelling flat 2A was let to Woolf Klein in 1911 and it was still let to him on Aug. 3, 1914. True, two other premises were included in the letting and the three were let in one lease at one rent instead of in three separate leases at three separate rents, but I cannot see how that prevents flat 2A from being " let " within the meaning of the Act of 1920. Presumably, the three premises were let at a rent which was thought by lessor and lessee to be the fair aggregate annual rental for the three ; but, whether this is so or not, I see no escape from the view that if three properties A, B and C are let by X to Y under one and the same lease, then each one of them is let by X to Y.

This being so, in my view the present case comes within sect. 12 (3), of the Act of 1920, which provides that :

> Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the

court as to the amount to be apportioned to the dwelling-house shall be final and conclusive.

This appeal must be allowed, for these reasons, and, unless the parties can agree on an order here and now, the case must be remitted to the county court judge to make an apportionment, and to make such order as may be just on the basis of such apportionment. It may be that the payments of rent already made by the defendant will be found to equal or exceed the apportioned rent. If so, the action must be dismissed ; if not, the judge will have power to make an order for possession under sect. 3 (1), of the Act of 1933 and para. (*a*) of Sched. I to that Act, if he considers it reasonable to make such an order.

If the matter is remitted to the county court judge, the costs of the previous hearing before him, and of the further hearing before him, will be in his discretion.

Somervell, L.J. : I will not repeat the evidence and history of this case which have been fully stated by Morton, L.J. I agree with his view that it is, at any rate, difficult to regard a dwelling-house as not let in 1914 because its occupier took a lease which included, for example, the house next door. One has, however, to read the definition of standard rent with the apportionment section, and, unless the case of separate premises, such as those in question here, comes within that section, the appellant must fail. I agree with the conclusion to which Morton, L.J., has come, but I would like to deal in a little detail with sect. 12 (3), of the 1920 Act. It is, I think, somewhat loosely worded. It deals with rent and rateable value. There are express words dealing with the date in relation to which the standard rent is to be fixed, but no such words occur in reference to rateable value, though that may equally have to be determined as on a particular date. The corresponding provision in that case is left to be implied. The words " of the property in which that dwelling-house is comprised " follow rateable value, and the comma, which is not technically part of the statute, might suggest that these words only apply to rateable value. On the other hand, if so read, the words " the rent " are, as it seems to me, left in the air. I think, therefore, that one must either read the words " of the property in which that dwelling-house is comprised " as applying to " the rent," disregarding the comma, or imply them. The cases which have come before the High Court seem all to have been cases of rooms or flats out of a larger building with some common means of communication with other parts. In *Barrett* v. *Hardy Brothers (Alnwick) Ltd.* (2), though the building was a large one and included a restaurant, a shop, business offices, and residential flats, it was referred to as a single building, No. 61 Pall Mall, and it seems obvious that the second and upper floors with which the case was concerned must have had a staircase or staircases and passages used in common by the different occupiers. Do the words " the property in which the dwelling-house is comprised " predicate some unit in the physical sense, or do they mean the property the rent of which includes or comprises that apportionable to the dwelling-house ? I think in some contexts the former might be the proper meaning to give to them, but I am satisfied that in their context, namely, in an apportionment section, the latter is the proper meaning.

I have referred above to *Barrett's* Case (2). That case proceeded on the view that sect. 12 (3), may apply although the larger property, the rent of which is to be apportioned, is itself outside the Acts and contains premises other than " dwelling-houses." Our attention was drawn to a dictum by Scott, L.J., in *Field* v. *Gover* (3) ([1944] 1 All E.R. 151 at p. 153) in which he was inclined to the view that sect. 12 (3) of the 1920 Act only applied if both houses, the containing and the contained, were within the Acts. It does not appear that Scott, L.J.'s attention was drawn to *Barrett's* case (2) and the authorities there referred to, and I do not, speaking for myself, think that the dictum should be regarded as throwing doubt on the law as laid down in *Barrett's* case (2). It is worth noting that sect. 12 (3) of the 1920 Act has remained unamended during the 21 years that have elapsed since it was construed in the way I have stated.

I do not disagree with any of the reasoning in the judgment of Morton, L.J., but I wish to add, as I have done, some observations on the construction of sect. 12 (3) as it seems to me it is on the wording of that section that the basis, if any, of the contention of counsel for the respondents must rest.

Asquith, L.J. : For a time I have shared the doubts expressed by Somervell, L.J., as to the possibility of apportionment in this case having regard to the wording of sect. 12 (3) of the Act of 1920, mainly because the words "the property in which the dwelling-house is comprised" seem, at first sight, to imply a single physically self-contained unit (which would include flat 2A) and not a mere aggregate of three separate tenements unconnected with each other, save that they were covered by the same lease and let at a single rent; but, like SOMERVELL, L.J., I have been converted from that view and I agree that the appeal should be allowed.

MORTON, L.J.: I should like to add this, that I agree with the observations made by both of my brethren in regard to the true construction of sect. 12 (3) of the 1920 Act, and I also agree with the observations made by SOMERVELL, L.J., in regard to *Field* v. *Gover* (3).

The appeal succeeds. The respondents will pay the appellant's costs of the appeal and the order as to the costs below will be as I have indicated.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitor: *William Charles Crocker* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

COUNTY OF MONMOUTH *v.* COUNTY BOROUGH OF NEWPORT
COUNTY BOROUGH OF NEWPORT *v.* COUNTY OF MONMOUTH

[COURT OF APPEAL (Lord Greene, M.R., Morton and Tucker, L.JJ.), May 20, 21, 22, 23, 24, 27, 28, June 5, 1946.]

Local Government—Alteration of area—Extension of county borough to include part of county area—Loss to county ratepayers—Financial adjustments—Increased burden on county ratepayers—Amount of compensation—Method of assessing compensation—"Income"—Local Government Act, 1933 (*c.* 51), *s.* 152 (1) (*b*), *Sched.* V, *r.* 1—*Newport Extension Act,* 1934 (*c.* lvii), *s.* 58.

An adjustment was being made by an arbitrator between the County Borough of Newport and the Monmouthshire County Council on the occasion of the alteration of areas brought about by the Newport Extension Act, 1934, which detached certain areas from the county and transferred them to the county borough. On this adjustment provision had to be made for the increase of burden thrown on the ratepayers of the county pursuant to the Local Government Act, 1933, s. 152 (1) (b). Sched. V to the Act contains rules for determining the sum to be paid in respect of this increased burden. Rule 1 provides: "Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under the Local Government Act, 1929, s. 108 (1) (b), shall be taken into account." Rule 1 (a) in effect directs the arbitrator to have regard to the difference between the burden as it "will be" and the burden as it "would have been." The expenditure in the unreduced area was £745,942; percentages of the total rate income of the unreduced county referable to the added area and the reduced area respectively were 4.432 per cent. and 95.568 per cent.; and the savings in expenditure amounted to £8,385. If the whole of the expenditure of £745,942 had fallen to be borne by the ratepayers the result would have been as follows: "would have been" burden on the ratepayers in the area which subsequently became the "reduced area"—95.568 per cent. of £745,942; "will be" burden on the same ratepayers—£745,942 less £8,385, and the difference would have represented the increase of burden due to the alteration in area. The difficulty arose owing to the fact that the county council had a source of income from the General Exchequer Grant which had to be taken into account before the burden on the ratepayers could be ascertained, and the proviso to rule 1 requires that in arriving at the burden this grant is to be treated in an artificial way. It was common ground that in ascertaining the increase of burden a deduction from the expenditure, the cost of which would otherwise fall on the ratepayers, must be made in respect of the General Exchequer Grant, and that the sum to be deducted must be the same in calculating both the burden that "would have been" and the burden that "will be" thrown on the ratepayers. The dispute related to the manner in which these principles were to be applied in view of the terms of the proviso to rule 1. The method adopted by the county council was to ascertain, for A the "would have been" burden (1) the proportion (£15,767) of the Exchequer Grant (£355,774) referable to the added area and (2) the proportion (£17,293) of the rates leviable on the same area. These two sums (making together £33,060) were deducted from the total expenditure of £745,942. The resulting figure of £712,889 gave the slice of the total pre-alteration expenditure referable to what was to become the reduced area. The problem then was to find what the burden on the ratepayers in that area would B have been. This was ascertained by attributing to that area its proportion of the Exchequer Grant (*viz.* £355,744 less the £15,767, or £339,977) and deducting that proportion from the £712,889: the resulting figure £372,905 was the "would have been" burden on the ratepayers. The figure of £339,977 being the proportion of the Exchequer Grant referable to what became the reduced area was the crucial matter in the county council's C method of calculation which was based on the view that the burden that "would have been" and the burden that "will be" thrown on the ratepayers in the reduced area could only be ascertained by attributing to that area its due proportion of the Exchequer Grant which operated to relieve the ratepayers in that area. In their calculation of the "will be" burden they deducted the same figure of £339,977 from the expenditure of the reduced area (*viz.*, £745,942 less the saving of £8,385) leaving £397,580 as the "will D be" burden on the ratepayers in that area. The difference between that figure and £372,905, the figure of the "would have been" burden, was £24,675, and this was the annual increase of burden. The county borough proceeded on a different principle. Nowhere in its calculations did it arrive at a figure for the proportion of the General Exchequer Grant referable to the reduced area. It interpreted the proviso as forbidding the ascertainment of such a figure which, it said would be equivalent to treating the amount E of the grant as having been altered in consequence of the alteration of boundaries. The "income" referred to in the proviso was, it was argued, income of the county council, and the effect of the proviso was to require the whole of the pre-alteration grant to be treated as still the income of the county council, notwithstanding the alteration of areas. On this basis the amount of the grant available to relieve the burden on the ratepayers in the reduced area would be the whole of the pre-alteration grant, *viz.*, F £355,744. Accordingly, in dealing with the figures they proceeded as follows: In order to arrive at the "would have been" burden they treated the whole of the grant, *viz.*, £355,744 as referable to the unreduced area and accordingly deducted it from the £745,942 leaving £390,198 as the burden on the ratepayers for the unreduced area. They then deducted £17,293, *viz.*, 4.432 per cent. of the rate-borne slice of the £745,942 (*i.e.* G £745,942 less £355,744) and arrived at the same figure of £372,905 as the county council. This was inevitable as both sides deducted the whole of the £355,744. The county council, however, made this deduction in two slices and the difference in method explains the fundamental difference in the views of the parties. This difference stands out when the "will be" calculation of the county borough is examined. They started by taking the figure of reduced expenditure for the reduced area, *viz.*, £745,942 less H £8,385, giving £737,557 in the same way as the county council. They then deducted the £355,744 leaving £381,813 as the "will be" burden on the ratepayers in the reduced area. Deducting £372,905 from this £381,813 they arrived at the figure of £8,908 as the increase of burden. The fact that they deducted the whole of the pre-alteration grant reflected their argument that after the alteration the whole grant must be treated as referable to the reduced area, not, as in the argument of the county council, 95.568 per cent. of it:—

Held: (i) the method adopted by the county council was correct and that the method adopted by the county borough was founded on a misapprehension as to the true meaning of the proviso; all that the proviso prohibited was the taking into account of an "alteration of income in consequence of an apportionment under the regulations"; the method adopted by the county council did not involve the taking into account of any such alteration; the alteration of income of the county council "in consequence of an apportionment under the regulations" reduced the General Exchequer Grant for the county from £355,744 to £344,484; the county council's calculation had nothing to do with that reduced figure; their method of dealing with the amount of the grant was not an apportionment of the grant in any relevant sense; all that they did was to ascertain the proportion of the grant referable (in the "would have been" calculation) to what afterwards became the reduced area and (in the "will be" calculation) to what in fact becomes the reduced area; the figure, therefore, of £339,977 representing the 95.568 per cent. of the grant was an essential figure in the calculation since, without it, the amount by which 95.568 per cent. of the ratepayers are affected by the alteration of areas could not possibly be ascertained; the method adopted by the county borough never did arrive at this essential figure of £339,977, the reason being that it treated the whole of the grant of £355,744 as available for the relief of 95.568 per cent. of the ratepayers.

(ii) the Local Government Act, 1933, s. 151 (1), did not give the arbitrator power to award interest on any sum which he might award to the council in respect of the period between the appointed day and the date of the award; the language of the subsection was limited to the making of the adjustment itself and did not extend to the addition of a sum by way of compensation for any delay which might have taken place in arriving at the amount of the adjustment.

Swift & Co. v. *Board of Trade* (1) *applied.*

Decision of Atkinson, J. ([1946] 1 All E.R. 276), *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal affirm the court below, arriving at their decision by a somewhat different process of reasoning from that followed by Atkinson, J. The Master of the Rolls analyses the difficulties arising when the General Exchequer Grant has to be taken into account in estimating the increased burden on the ratepayers arising from an alteration in boundaries and arrives at the conclusion that the method adopted by the County Council rather than that adopted by the County Borough gives correct effect to the proviso to Sched V, r. 1 of the Local Government Act, 1933.

As to Financial Adjustments on Alteration of Areas, see HALSBURY, Hailsham Edn., Vol. 21, pp. 248-257, paras. 450-456; and for Cases, see DIGEST, Vol. 33, pp. 25-28, Nos. 113-132.]

Case referred to:

(1) *Swift & Co.* v. *Board of Trade*, [1925] A.C. 520; 25 Digest, 138, *558*; 94 L.J.K.B. 629; 133 L.T. 49.

Appeals from a decision of Atkinson, J., given on Dec. 19, 1945, and reported ([1946] 1 All E.R. 276). The facts are fully set out in the judgment of Lord Greene, M.R.

Rt. Hon. H. U. Willink, K.C., E. J. Rimmer, and *R. D. Stewart-Brown* for the County Borough of Newport.

Sidney G. Turner, K.C., Erskine Simes, K.C., and *Harold B. Williams* for the Monmouthshire County Council.

Cur. adv. vult.

Lord Greene, M.R.: The first of these appeals, that by the County Borough of Newport, raises a short point of construction under the Local Government Act, 1933. I need only refer to the facts and the statutory provisions which bear upon the question in a summary manner in this judgment. An adjustment is being made by the arbitrator between the County Borough of Newport and the Monmouthshire County Council on the occasion of the alteration of areas brought about by the Newport Extension Act, 1934, which detached certain areas from the County and transferred them to the county borough. On this adjustment provision has to be made for the increase of burden thrown on the ratepayers of the county pursuant to the Local Government Act, 1933, s. 152 (1) (b) which is in the following terms:

> Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions.

Sched. V to the Act contains what are described as "Rules for determining sum to be paid in respect of increase of burden on ratepayers" and those rules (so far as relevant to the present question) provide as follows:

> (1) Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under paragraph (*b*) of subsection (1) of section one hundred and eight of the Local Government Act, 1929, shall be taken into account.

The question depends immediately on the true construction of the proviso to rule 1, but in order to understand the proviso it is necessary to examine sect. 152 (1) (b) itself and the part of rule 1 which precedes the proviso.

Certain matters of construction of sect. 152 (1) (b) are reasonably clear and are not disputed. First, the payment is to be made by the county borough to the county council in respect of the increase of burden which will be thrown upon the ratepayers of the county. Secondly, the ratepayers who are to be considered are the ratepayers in the reduced area remaining to the county after the alteration of area takes place since it is they and they alone who will be affected by the increase of burden. Thirdly, the cost incurred by the county council in meeting which the increase of burden will be thrown on the ratepayers is the cost incurred in the reduced area. Fourthly, the burden thrown on the ratepayers is the burden imposed by means of precepts by the county council directed to the rating authorities in the reduced area.

Rule 1 (a) does not appear to add anything to what is implied in sect. 152 (1) (b) itself. Its language is infelicitous, but the phrase "burden on the ratepayers incurred by the local authority" must mean the same thing as the "burden thrown on the ratepayers" referred to in sect. 152 (1) (b). All that rule 1 (a) appears to do is to direct the arbitrator to have regard to the difference between the burden as it "will be" and the burden as it "would have been," a comparison already necessitated by the phrase "increase of burden" in sect. 152 (1) (b).

So far, therefore, the directions may be summarised as requiring a comparison between what would have been the rate burden on the ratepayers in what afterwards becomes the reduced area, if the alteration of areas had not taken place, and what will be the burden on the same ratepayers after the alteration.

The burden in each case will be the burden "properly thrown on the ratepayers . . . in meeting the cost incurred" by the county council in the discharge of its functions. I should add that we are only concerned with expenditure on general county purposes as there is no controversy as to the position in respect of special county purposes.

In carrying out these directions it would be necessary for the arbitrator, in default of agreement, to make certain estimates. He must arrive at a figure for the estimated expenditure since without it he cannot arrive at the burden on the ratepayers. He must also arrive at a figure showing the percentage of the total rate income of the county council from the unreduced area which is referable to the area transferred to the county borough (which I will call the "added area") or (what amounts to the same thing) the percentage referable to what afterwards becomes the reduced area. Without that figure he cannot arrive at what the burden on the ratepayers in what afterwards becomes the reduced area would have been. Similarly, he must find a figure representing the savings in expenditure caused by the loss of the added area. I think it necessary to state this for the following reason. In certain agreed statements which are annexed to the case the following figures are set out which would appear to be agreed between the parties as representing (1) the expenditure in the unreduced area £745,942, (2) percentages of the total rate income of the unreduced county referable to the added area and the reduced area respectively *viz.*, 4.432 and 95.568, (3) savings in expenditure, *viz.*, £8,385. Until a late stage in the case I was under the impression that these were the agreed figures which, as I have said, the arbitrator would in default of agreement have had to find himself. Counsel for the county borough, however, in his reply appeared to suggest that the agreement did not go so far. It is not necessary to go into this since the figures are for present purposes just as helpful whether they are regarded as agreed figures or merely as arithmetical illustrations of what might otherwise be expressed by algebraical symbols.

So far no particular difficulty of construction arises. If the whole of the expenditure of £745,942 had fallen to be borne by the ratepayers the result would have been as follows: "would have been" burden on the ratepayers in the area which subsequently becomes the "reduced area"—95.568 per cent. of £745,942; "will be" burden on the same ratepayers—£745,942 less £8,385, and the difference would have represented the increase of burden due to the alteration in area. But the difficulty arises owing to the fact that the county council has a source of income from the General Exchequer Grant which has to be taken into account before the burden on the ratepayers can be ascertained, and the proviso requires that in arriving at the burden this grant is to be treated in a quite artificial way. In order to understand the point it is necessary to give a word or two of explanation as to the nature of the General Exchequer Grant.

The General Exchequer Grant originated in the Local Government Act, 1929. Sect. 86 of that Act provided for the payment out of moneys provided by Parliament of an annual contribution towards local government expenses in counties and county boroughs to be called the "General Exchequer Contribution." It was made subject to periodical revisions at the end of fixed periods which are called "fixed grant periods." Sect. 88 provides for the apportionment of the General Exchequer Contribution among counties and county boroughs. During the first four fixed grant periods each county and county borough was to receive a diminishing percentage of what it had lost through what has come to be known as "derating" and through the discontinuance pursuant to the Act of certain grants which had formerly been paid; the balance and, after the first four fixed grant periods, the whole of the General Exchequer Grant is apportioned to counties and county boroughs in proportion to what is called their "weighted populations." The method of calculating "weighted population" is set out in rules contained in Pt. III of Sched. IV to the Act. Shortly stated those rules provide for a notional addition to the estimated population of the county or county borough by reference to (1) specially large number of children under 5; (2) specially low rateable value per head of the estimated population; (3) excessive unemployment; (4) specially large liabilities for road upkeep. The amounts apportioned to a county and a county borough respectively are called the "county apportionment" and the "county borough apportionment." By sect. 89 certain sums are payable out of a county apportionment to the councils of districts wholly or partially within the county; the residue is paid to the county council and is called the "General Exchequer Grant" of that council. By sect. 105 sums received by a county council by way of General Exchequer Grant are applicable to general county purposes and by the Local Government Act, 1933, s. 181:

> All receipts of a county council . . . for general . . . county purposes, shall be carried to the county fund, and all liabilities falling to be discharged by the council . . . for general . . . county purposes, shall be discharged out of that fund.

It is important to notice at once that, although the amount of a county's General Exchequer Grant is determined by reference to a number of special matters, the application of the grant when received is not in any way confined to or conditioned by such matters; it falls in to the county fund and is applicable for general county purposes and is not allocated to any particular service.

The General Exchequer Grant is admittedly "income" within the meaning of the proviso to rule 1 in Sched. V to the Local Government Act, 1933. It is, of course, income of the council, not of the ratepayers either individually or as a body. But the ratepayers benefit by the grant in a manner which must now be explained.

County councils are not rating authorities and have no power to levy rates themselves. By the Local Government Act, 1933, s. 185, a county council which requires money to meet general county purposes for which provision is not otherwise made is empowered to issue precepts for the levying of rates which must be levied on the whole of the county. The " provision otherwise made " will, of course, include the provision by way of General Exchequer Grant which under sect. 105 of the Act of 1929 is applicable for general county purposes. Assuming, therefore, that there is no other provision save the General Exchequer Grant (as for present purposes is the case here) the amount for which a precept may be issued will be the sum needed to meet the liabilities of the council for general county purposes less the available amount of the General Exchequer Grant.

The way in which this works in practice is best illustrated by a reference to the Rating and Valuation (Forms of Demand Note) Rules, 1930, made under the Rating and Valuation Act, 1925, s. 58. These rules superseded earlier rules and (as they recite) were necessitated by the coming into operation of the Local Government Act, 1929. Rule 7 requires the inclusion in every demand note of a statement in a specified form setting out (1) the equivalent in terms of a rate in the pound of the gross estimated expenditure and (2) the equivalent in terms of a rate in the pound of the exchequer grants under the Local Government Act, 1929. It is important to notice that the part of the statutory form headed " Statement of Rates " follows the language laid down by the Rules. The statement to which I would call particular attention is the following :

> The Government grants under the Act of 1929, being in aid of local government expenses generally, cannot be allocated to any particular service. They reduce by the amount shown the total rate which would otherwise be demanded.

It is clear, therefore, that the statutory method of describing the operation of the General Exchequer Grant is that it " reduces by the amount shown the total rate which would otherwise be demanded." The way in which this principle applies in the case of the individual ratepayer is shown in the statutory form. In the example annexed to the case the rate in the pound which would be required to meet general county purposes is 8*s.* 5¼*d.*, while the equivalent in terms of a rate in the pound of the General Exchequer Grant is 3*s.* 7*d.*, the rate actually called for being the difference between these two amounts, namely, 4*s.* 10¼*d.* This shows what is to my mind manifest, namely, that each individual ratepayer in relation to a stated figure of expenditure for general county purposes has his burden lightened by the appropriate fraction of the Exchequer Grant. The same point is illustrated by the statutory form of precept under the Rating and Valuation (Forms of Precept—County Councils) Rules, 1930, set out in RYDE ON RATING, 8th Edn., p. 1243.

I will now proceed to show the relevance of the matters which I have been explaining. When an alteration of boundaries between a county council and a county borough takes place under which an area is taken from the county and added to the county borough, it is necessary for a fresh apportionment to be made as a result of which their respective General Exchequer Grants will be varied in amount. This is recognised by the Local Government Act, 1929, which instituted the system of General Exchequer Grants, and by sect. 108 (1) (*b*) of that Act the Minister of Health is empowered to make regulations as to the manner in which the grants are to be adjusted in so far as an adjustment is required in consequence of an alteration of boundaries. These regulations are somewhat complicated in character and it is unnecessary to examine them in detail. It is sufficient to say that the adjustment is to be made by the Minister in accordance with the principles laid down in the regulations. The Local Government Act, 1933, s. 152 (1) (*a*), says that on an adjustment made under sect. 151 of the Act any adjustment of the General Exchequer Grants is to be carried out under the regulations to which I have just referred. This direction was perhaps unnecessary since the regulations themselves deal with the case. But it makes it quite clear that the question of the adjustment of the grants as between the two authorities is removed from the competence of the authorities themselves (and, consequently, of the arbitrator) and reserved to the Minister under his statutory powers.

It is, of course, common ground that the amount of the Exchequer Grant is one of the factors which has to be taken into account in arriving at the increase of burden resulting from the alteration of boundaries. One might have expected that the parties (if they were settling the matter by agreement) or the arbitrator (if the matter came to arbitration) would have been left at liberty to ascertain what alteration in the amount of the General Exchequer Grant to the county was in fact made by the Minister in consequence of the alteration of boundaries. Counsel were unable to suggest any reason why the Legislature should not only not have so provided but should have prohibited by the proviso to rule 1 in Sched. V the taking into account of any alteration of income in consequence of an apportionment made under the regulations. It may perhaps be that the Legislature was anxious to ensure that the settlement between the authorities concerned should not be delayed until after the Minister had made the new apportionment under the regulations, a task which might well take some time. But however this may be, the fact remains that the prohibition has been enacted by the Legislature and this inevitably results in the introduction of an element of artificiality in the calculation of the increase of burden.

This brings me to the heart of the present controversy. It is common ground that, in ascertaining the increase of burden, a deduction from the expenditure, the cost of which would otherwise fall upon the ratepayers, must be made in respect of the General Exchequer Grant. It is also common ground that the sum to be deducted must be the same in calculating both the burden that " would have been " and the burden that " will be " thrown on the ratepayers. The whole dispute relates to the manner in which these principles are to be applied in view of the terms of the proviso to rule 1.

A document was used to show, on the basis of the figures given above, how the contentions of the two parties work out. I will try to state the results as shortly as I can.

The method adopted by the county council is to ascertain, for the " would have been " burden (1) the proportion (£15,767) of the Exchequer Grant (£355,744) referable to the added area and (2) the proportion (£17,293) of the rates leviable on the same area. These two sums (making together £33,060) are deducted from the total expenditure of £745,942. The resulting figure of £712,889 gives the slice of the total pre-alteration expenditure referable to what is to become the reduced area. The problem then is to find what the burden on the ratepayers in that area would have been. This is ascertained by attributing to that area its proportion of the Exchequer Grant (namely £355,744 less the £15,767, or £339,977) and deducting that proportion from the £712,889; the resulting figure £372,905 is the " would have been " burden on the ratepayers.

It is important to realise that the figure of £339,977 being the proportion of the Exchequer Grant referable to what becomes the reduced area is really the crucial matter in the county council's method of calculation which is based on the view that the burden that " would have been " and the burden that " will be " thrown on the ratepayers in the reduced area can only be ascertained by attributing to that area its due proportion of the Exchequer Grant which operates to relieve the ratepayers in that area. In their calculation of the " will be " burden they deduct the same figure of £339,977 form the expenditure of the reduced area (*viz.*, £745,942 less the saving of £8,385) leaving £397,580 as the " will be " burden on the ratepayers in that area. The difference between that figure and £372,905, the figure of the " would have been " burden, is £24,675, and this is the annual increase of burden.

The county borough proceeds on a different principle. Nowhere in its calculations does it arrive at a figure for the proportion of the General Exchequer Grant referable to the reduced area. It interprets the proviso as forbidding the ascertainment of such a figure which, it says, would be equivalent to treating the amount of the grant as having been altered in consequence of the alteration of boundaries. The " income " referred to in the proviso is, it is argued, income of the county council, and the effect of the proviso is to require the whole of the pre-alteration grant to be treated as still the income of the county council, notwithstanding the alteration of areas. On this basis the amount of the grant available to relieve the burden on the ratepayers in the reduced area will be the whole of the pre-alteration grant, *viz.*, £355,744.

Accordingly, in dealing with the figures they proceed as follows. In order to arrive at the " would have been " burden they treat the whole of the grant *viz.*, £355,744 as referable to the unreduced area and accordingly deduct it from the £745,942 leaving £390,198 as the burden on the ratepayers for the unreduced area. They then deduct £17,293, namely, 4.432 per cent of the rateborne slice of the £745,942 (*i.e*,. £745,942 less £355,744) and arrive at the same figure of £372,905 as the county council. This, of course, is inevitable as both sides deduct the whole of the £355,744. The county council, however, makes this deduction in two slices and the difference in method explains the fundamental difference in the views of the parties. This difference stands out when the "will be" calculation of the county borough is examined. They start by taking the figure of reduced expenditure for the reduced area, *viz.*, £745,942 less £8,385, giving £737,557 in the same way as the county council. They then deduct the £355,744 leaving £381,813 as the "will be" burden on the ratepayers in the reduced area. Deducting £372,905 from this £381,813 they arrive at the figure of £8,908 as the increase of burden.

The fact that they deduct the whole of the pre-alteration grant reflects their argument that after the alteration the whole grant must be treated as referable to the reduced area, not, as in the argument of the county council, 95.568 per cent. of it.

I am of opinion that the argument of the county council is correct and that the case for the county borough is founded on a misapprehension as to the true meaning of the proviso. All that the proviso prohibits is the taking into account of an "alteration of income in consequence of an apportionment under the regulations." It is incorrect to say that the method adopted by the county council involves the taking into account of any such alteration. We know what was the alteration of income of the county council "in consequence of an apportionment under the regulations"; it reduced the General Exchequer Grant for the county from £355,744 to £344,484. The county council's calculation has nothing to do with that reduced figure: their method of dealing with the amount of the grant is not an apportionment of the grant in any relevant sense. All that they do is to ascertain the proportion of the grant referable (in the "would have been" calculation) to what afterwards becomes the reduced area and (in the "will be" calculation) to what in fact becomes the reduced area. It is clear that in both calculations the amount by which the burden on the ratepayers in the reduced area is to be regarded as lessened by the grant must be the same. It is necessary, therefore, in ascertaining the "would have been" burden to attribute to what afterwards becomes the reduced area its proper proportion of the grant. I say proper proportion advisedly since, as every ratepayer in the reduced area obtains a reduction of his rate burden amounting to the proportion of the grant which is referable to the rateable value of his hereditament, it must follow that 95.568 per cent. of the ratepayers (in rateable value) must obtain between them a corresponding reduction of their aggregate burden. The figure, therefore, of £339,977 representing the 95,568 per cent. of the grant is an essential figure in the calculation since without it the amount by which 95.568 per cent. of the ratepayers are affected by the alteration of areas cannot possibly be ascertained.

The method adopted by the county borough, as I have pointed out, never does arrive at this essential figure of £339,977, the reason being that it treats the whole of the grant of £355,744 as available for the relief of 95.568 per cent. of the ratepayers. Neither result can, of course, represent the true facts, the reason being that the proviso prohibits the taking into account of the real alteration in the grant effected by the Minister under the regulations. But the method of the county borough appears to me to be entirely illogical for this reason. In the "would have been" calculation it is necessary to treat what afterwards becomes the reduced area as notionally severed from the rest of the county area since it is the "would have been" burden on the ratepayers in that area which has to be ascertained. On the hypothesis stated in the rule, namely, "had no alteration of boundaries taken place," ratepayers in that area could not have had the benefit of more than their proper proportion of the grant, *viz.*, 95.568 per cent. But in their "will be" calculation the county borough gives to these same ratepayers a larger benefit by way of grant than they enjoyed before, and this destroys the whole basis of the comparison between the "would have been" burden and the "will be" burden which the rule directs to be made.

The judge decided in favour of the county council on different grounds. I hope that I shall not be thought disrespectful if I do not add to the length of this judgment by explaining why I cannot adopt his reasoning, which I venture to think approaches the problem from a wrong angle. What I have already said is, I think, sufficient to show why, with all respect, I feel constrained to take that view.

The appeal is dismissed.

A The second appeal, that by the county council, relates to a claim for interest as from the appointed day, Apr. 1, 1935, down to the date of the award on the amount which will be ultimately awarded by the arbitrator on the adjustment.

The question for our decision is as follows:

> Whether I have power to award interest on any sum or sums I may award to the county council—(a) in respect of the period between the appointed day and the date of
> B my award, or (b) in respect of any, and if so what, part of that period.

There is a further question as to how such interest, if it can be and is awarded, is to be treated in the case of the amount awarded in respect of increase of burden, in view of the limits in the amount which can be awarded under that head imposed by rule 2 of Sched. V to the Act of 1933. Since in my opinion the arbitrator has no power to award interest this further question does not arise.

C The claim for interest relates to the whole sum which may be awarded by way of adjustment in the arbitration and is not confined to the sum to be awarded in respect of increase of burden. It is important to notice that the claim has nothing to do with interest upon the amount of the award itself as from the date of the award: to such interest different considerations, of course, apply. It is a claim to interest as from a back date, namely, Apr. 1, 1935, and for a period during which *ex hypothesi* it could not be known (1) what sum the arbitrator
D would ultimately award (whether by way of a lump sum payable at once, or by instalments or by way of an annuity), or, (2) whether he would allow (assuming his power to do so) any interest at all on the whole or any part of the sum to be awarded, or, (3) what the rate of interest awarded would be.

In the present case the claim of the county council on capital account amounts to over £500,000, and interest on this at 4 per cent. for the 11 years which have already elapsed since the appointed day would amount to a sum in the neigh-
E bourhood of £250,000. To this would have to be added a further sum down to the date of the award whenever that may turn out to be.

It will be seen, therefore, that if the claim of the county council is accepted the liability of the county borough on account of interest may be very heavy indeed. This, of course, is in itself no reason at all for saying that the claim is not a good one. But in construing the language of the Local Government
F Act, 1933, on which the question falls to be decided it is I think very material to have in mind that whereas a public body is empowered by that Act to borrow money for the purpose of paying any capital sum required for the purpose of adjustment (sect. 151 (5)) there is no such power in the Act to borrow for the purpose of paying interest on that capital sum. Nor is there any such borrowing power in any other statute or under the general law. Counsel for the county council did indeed suggest that such a power was to be found in sect. 195 (c)
G of the Act of 1933, which, subject to certain consents, empowers a local authority to borrow sums required:

> for the execution of any permanent work, the provision of any plant, or the doing of any other thing which the local authority have power to execute, provide, or do, if, in the opinion of [the authority whose consent is required] the cost of carrying out that purpose ought to be spread over a term of years.

Counsel for the county council suggested that the payment of such interest
H as is now in question would be covered by the words " the doing of any other thing "; but in my opinion those words in the context obviously have a limited meaning and cannot possibly be construed in the manner suggested. It follows, therefore, that if there is power to award this back interest, and it is in fact awarded, the authority which has to pay could only raise the required sum by means of a rate, and if the sum were substantial this would be a heavy and might be an intolerable burden on the ratepayers. The delay which has taken place in the present case may indeed be abnormal and as to part of the time may be due to the war. But four and a half years from the appointed day

had elapsed when war broke out: the parties evidently negotiated for a long time without being able to come to an agreement, and it was not until June 7, 1943, that the submission to arbitration was signed. I merely refer to this as showing that the period which is likely to elapse between the appointed day and the settlement (either by agreement or by arbitration) of the sum to be paid may well run into several years, during the whole of which time the paying authority will not know whether any and what interest and at what rate will be payable on the unknown sum which in the end will be agreed upon or varied. A During the whole of this period a sum of unascertainable amount would be piling up against it and it would not be able to make any provision to meet it since it could not levy a rate for the purpose before the sum, if any, was ascertained. The consequence would be that the whole burden of the sum awarded for interest would have to be raised by a rate levied after and in consequence of the award. It is, I think, right to bear these facts in mind. If the Legislature had intended that interest might be awarded as from the appointed day on a B sum which *ex hypothesi* could not be known until after (and may be years after) the appointed day one would have expected to find some provision in the Act to meet the case. But, as it is, the borrowing powers are expressly limited to capital sums. These considerations, although very relevant, are not, of course, in any sense conclusive. If the statute on its true construction leads to such a result it must, of course, be given its proper effect.

C I will now turn to the actual language under which the question arises. Sect. 151 (1) of the Act of 1933 provides as follows:

> Any public bodies affected by any alteration of areas or authorities made by an order under this Part of this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement.

D It is pointed out that the words "any financial relations" are grammatically not governed by the words in brackets "(so far as affected by the alteration)." But the whole subsection is confined to public bodies "affected by any alteration of areas." The language of the Newport Extension Act, 1934, s. 58 (1) (which for present purposes governs) is more felicitous since it says "where in consequence of this Act any adjustment . . . is required." The two provisions in my opinion really mean the same thing and the power to make agree- E ments for the purpose of adjustment is limited to adjustments required in consequence of the Act (in the Newport case) or in consequence of an order (in the case of an order made under the Act of 1933). Under sect. 151 (3) adjustments may in default of agreement be referred to arbitration and the award "may provide for any matter for which an agreement might have provided."

F The point is a very short one. The county council say that, under sect. 151 (1), if the adjustment had been carried through by agreement the parties could have agreed for payment of interest on any capital sum agreed as from the appointed day down to the date of agreement: that what the parties could have done by agreement the arbitrator can do by his award: that an agreement for payment of such interest would be properly described as being part of an "adjustment of financial relations required in consequence of" the Newport G Extension Act, 1934.

The county borough, on the other hand, say that the payment of this interest cannot be regarded as anything "required in consequence of" the Act: the only thing so required is the adjustment itself which is an adjustment resulting in a capital sum (or an annuity as the case may be) which has nothing to do with interest: that an agreement or award for payment of interest if made would be referable to and required by the delay elapsing between the appointed H day and the date of agreement, which might be due to a number of causes, and in any case could not be said to be a consequence of the Act or of the alteration of areas effected by the Act.

In my opinion the argument of the county borough is correct. It appears to me to adhere more closely to the actual language used, which is limited to the making of the adjustment itself and does not appear to me to extend to the addition of a sum by way of compensation for any delay which may have taken place in arriving at the amount of the adjustment. It is to be noticed that the period between the Royal Assent to the Newport Act (July 12, 1934) and the appointed day (Apr. 1, 1935) gave the parties nine months in which to come to an agreement, and it may well be that the Legislature thought that this ought to be sufficient and therefore made no provision for interest.

The construction which I favour avoids the unfortunate consequences to which I referred earlier in this judgment. It is also, I think, consistent with the line of reasoning adopted by the House of Lords in *Swift & Co.* v. *The Board of Trade* (1). In that case certain goods had been requisitioned and the revelant regulation provided that " such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator." Great delay took place in bringing the question of compensation to arbitration and the arbitrator awarded interest as from the date of requisition, holding that unless interest was awarded the compensation would not be fair and full compensation. The House of Lords affirming the majority decision of this court held that the arbitrator was not entitled to award interest from a date anterior to the final award. VISCOUNT CAVE, L.C., put the point quite shortly as follows ([1925] A.C. 520, at pp. 532, 533) :

> The right of the owner of goods requisitioned under reg. 2F is to have compensation for the goods determined by arbitration and paid, and until the amount of the compensation has been so determined there is no sum certain payable to the owner upon which interest can run. To hold otherwise is to give compensation, not for the goods themselves, but for the time occupied in ascertaining their value in accordance with the law.

LORD SUMNER (*ibid.*, at p. 547) held that to award interest was to give compensation for a form of loss other than the loss of the requisitioned articles and (*ibid.*, p. 548) he said this :

> Unless the regulation itself authorises the allowance of interest none can be given. Now, not only is ' compensation ' the word used and not ' interest ' but there is nothing in the regulation to attach an allowance of interest to. There is no debt, for no final award has been made ; there has been no wrong done, for the requisitioning was legal and the goods became the minister's goods from the time of requisition. It is the regulation itself that prescribed arbitration, a proceeding which involves delay and causes the merchant to be out of his compensation for a substantial time, or rather postpones the date at which his compensation can be fixed and so becomes payable. To give interest is really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation.

By parity of reasoning in the present case the adjustment is to be made in respect only of a consequence of the alteration of boundaries, and to give interest by way of compensation for delay in fixing the amount of the adjustment would be to introduce a new subject-matter of compensation.

In conclusion I should add that on behalf of the county council it was argued that interest could be awarded on the principle on which it is awarded by courts of equity against purchasers who have gone into possession. This argument, in my opinion, cannot be supported. There is no analogy between a statutory transfer of an area from one authority to another (a thing which cannot be carried out contractually) and a contract of sale and purchase or a compulsory purchase under, for example, the Lands Clauses Act. Nor can the amount payable by way of adjustment be regarded as in any way analogous to purchase price. The transaction is purely statutory and cannot in its nature be otherwise : and the principles governing it are to be found in the relevant statutory provisions and nowhere else.

ATKINSON, J., came to the right conclusion and the appeal is dismissed.

MORTON, L.J. : I entirely agree with the judgment which has been just delivered. I had the privilege of reading it in advance and came to the conclusion that I could not usefully add to it and that publication of anything which I had written to the same effect would serve no useful purpose.

TUCKER, L.J. : I also agree with both judgments which have been delivered by LORD GREENE, M.R., in these two appeals, and I hope I shall not be thought lacking in respect for the arguments addressed to us or lacking in appreciation of the difficulty of the subject-matter of these appeals if I refrain from delivering a judgment in my own language. I refrain from doing so lest anything I say might tend to render obscure that which has been made so clear.

Appeals dismissed. Leave to appeal to the House of Lords.

Solicitors: *Rees & Freres*, agents for *S. M. T. Burpitt*, Town Clerk, Newport, Mon. (for the County Borough of Newport); *Torr & Co.*, agents for *Vernon Lawrence*, Newport, Mon. (for the Monmouthshire County Council).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law*.]

ATTORNEY-GENERAL *v.* NORTHWOOD ELECTRIC LIGHT AND POWER CO., LTD.

[King's Bench Division (Macnaghten, J.), July 18, 22, 1946.]

Revenue—Stamp duty—Electricity prepayment meter card—Entry by collector—Whether receipt—Stamp Act, 1891 (*c.* 39), *s.* 103 (1).

O, a consumer of electricity supplied by the defendant company, paid in advance for his supply by means of coins inserted in a prepayment meter. On Mar. 8, 1944, a collector employed by the company called at O's house, inspected the meter, took out the coins, and entered in the "amount due and collected" column of his prepayment collection sheet the sum of £2 7*s.* 11*d.*, which was the balance due to the company after deducting rebate and a small amount put back into the meter. In the final column of his prepayment collection sheet the collector wrote his initials. A carbon copy of the various entries made on the sheet appeared on a prepayment meter card which was left on O's premises. In a suit to recover a fine under the Stamp Act, 1891, s. 103 (1), for giving a receipt liable to duty and not duly stamped, it was stated in the case that the prepayment meter card remained throughout the property of the company:—

Held: on a true construction of the word "gives" in sect. 103 of the Act, which meant what it said, *viz.*, that the person to whom a receipt was given could keep it as his own, the company had not given to O. any receipt liable to duty and not duly stamped; consequently the claim failed and the company was entitled to judgment.

[**EDITORIAL NOTE.** This is an interesting decision upon which there is no previous authority. The word "give" in a popular sense implies the complete divesting of the ownership of the property given and it is held that this construction must be put upon the phrase "receipt given" in the Stamp Act. Unless the document given passes into the ownership of the debtor it is not a receipt which requires a stamp.

As to Offences in Relation to Stamps, see HALSBURY, Hailsham Edn., Vol. 28, pp. 437-439, paras. 945-947; and for Cases, see DIGEST, Vol. 39, pp. 296, 297, Nos. 764-768.]

Special Case Stated under R.S.C. Ord. 68, r. 2, and Ord. 34, r. 1, in a suit brought to recover a fine under the Stamp Act, 1891, s. 103 (1) for giving a receipt liable to duty and not duly stamped. The facts are fully set out in the judgment.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *J. H. Stamp* for the informant.

Sir Roland Burrows, K.C., and *Colin Pearson* for the defendants.

Cur. adv. vult.

Macnaghten, J.: This is a special case stated under R.S.C. Ord. 68, r. 2, and Ord. 34, r. 1, for the opinion of the court in a suit brought by the Attorney-General against the Northwood Electric Light and Power Co., Ltd. (hereinafter called "the company") to recover a fine of £10 under the Stamp Act, 1891, s. 103 (1). That section provides that any person who "gives" a receipt liable to duty and not duly stamped, shall incur a fine of £10; and the Attorney-General alleges that the company gave such a receipt to one Oliver of 4a Queen's Parade, Field End Road, Eastcote, on Mar. 8, 1944.

The company carries on the business of supplying electricity at Northwood, Ruislip and Eastcote, in the County of Middlesex. It is the authorised undertaker in those districts for the supply of electricity for the purposes of the Northwood and Ruislip Electric Lighting Orders of 1901 and 1913. The number of units of electricity supplied to each consumer is ascertained by means of an appropriate meter installed on the consumer's premises. The conditions of supply of electricity by the company to consumers are governed by the

"Consumer's Handbook and Conditions of Supply." In the case of some consumers the electricity is paid for in advance by means of coins inserted in the meter, and in such a case the "prepayment meter" referred to in condition 11 of the printed conditions of supply is used. Oliver was a consumer who paid for electricity in advance, and his consumption of electricity was measured by means of a prepayment meter. The coins inserted by him in the meter were of the denomination of one shilling. On Mar. 8, 1944, a collector employed by the company called at Oliver's premises, read the meter and took out the coins which Oliver had inserted in it. The collector brought with him a sheet called an "Electricity Prepayment Collection Sheet," and made a number of entries on the sheet. The sheet contains ruled columns, and at the head of each column the entry to be made therein by the collector is described, the date of his visit, the number and value of units used by the consumer, the amount of the fixed charge (if any) payable by the consumer, the amount of the rebate (if any) due to the consumer, the amount of money found in the meter and the amount (if any) left in the meter by the collector. The amount due from the consumer to the company and taken away by the collector was inserted in a column headed "Amount due and collected." On Mar. 8, 1944, the amount entered by the collector in that column was £2 7*s.* 11*d.*, and in the final column the collector wrote his initials. The collector, having completed his entries, took the collection sheet away with him and it was filed at the offices of the company.

The paper of the electricity prepayment collection sheet is such that, when it is placed over another sheet or card, the entries made by the collector on the sheet appear also on paper placed beneath. In the case of a consumer using a prepayment meter, an "Electricity Prepayment Meter Card," is supplied by the company to the occupier and is kept by him in an envelope, which is also supplied. This prepayment meter card is placed below the electricity prepayment collection sheet when the collector makes his entries on that sheet. The paper of the electricity prepayment collection sheet is such that the entries made by the collector on the sheet appear on the prepayment meter card, the prepayment meter card being ruled in columns corresponding with the columns on the electricity prepayment collection sheet.

The Stamp Act, 1891, s. 101, provides that for the purposes of that Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to £2 or upwards is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of £2 or upwards, is acknowledged to have been settled, satisfied, or discharged.

The case for the Crown is that this prepayment meter card, after the entries have been made upon it by the collector on the occasion of his visit, is a "receipt" within the meaning of that section. The Crown rely upon the entries in the column headed "Amount due and collected" as being such a receipt. The words "amount due" plainly mean the amount due from the consumer to the company for the electricity which the consumer had used, and the word "collected" must, I think, mean that the collector has collected and taken away the amount set out in that column. The fact that the entries so made by the collector bear his initials means, I think, necessarily that the collector has received the amount in that column and that he has received it on behalf of the company. Accordingly it is claimed by the Crown that this card, being a "receipt" within the meaning of the Stamp Act and being for an amount of more than £2, ought to be stamped in accordance with the Act.

To that claim the answer is made that the card is no more than a duplicate of the entry on the electricity prepayment collection sheet and that that is merely a memorandum made by the collector on behalf of the company for the purposes of the company. I do not think that this is an effective answer. It is true that the sheet remains in the possession of the collector throughout, but the card was on Oliver's premises when the collector arrived and remained on the premises after the collector had gone away. Therefore, if the company gave the card to Oliver, the requirements of sect. 103 would seem to be fulfilled. But was the card given to Oliver ? It was no doubt in his possession or care so long as it remained on his premises, but the case states that the card remained throughout the property of the defendant company. The company was entitled to take the card away if they pleased. Oliver had no right to retain the card.

In my opinion, the word "gives" in sect. 103 means what it says—that the person to whom it is given can keep it as his own. That the word "gives" in sect. 103 means "gives so that he may keep as his own" is borne out by the second subsection of sect. 103, which provides that any person who refuses to "give" a receipt duly stamped incurs a fine of £10. That cannot, I think, be held to mean that if a person hands to the person demanding the receipt an unstamped document and does not allow him to keep it, by so doing he discharges his obligation to give a receipt.

The question submitted for the opinion of the court is whether, upon the facts stated in the special case, the company has given a receipt liable to duty and not duly stamped. My answer to that question is that the company did not "give" to Oliver any receipt liable to duty and not duly stamped.

Judgment for the defendants with costs.

Solicitors: *Solicitor of Inland Revenue* (for the informant); *Sydney Morse & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

LEATHLEY *v.* JOHN FOWLER & CO., LTD.

[Court of Appeal (Scott, Somervell and Cohen, L.JJ.), May 31, June 3, 25, 1946.]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1).

In an action by the appellant against the respondents, his employers, for negligence and breach of statutory duty, it was found, as a fact, that the appellant had received weekly payments for a certain period and that he knew they were for workmen's compensation, but that at the time of the acceptance of the payments the appellant was ignorant of his rights at common law and was quite unaware that by accepting the payments he would prejudice any other right he might have. On the authority of *Young* v. *Bristol Aeroplane Co., Ltd.* (1), (an appeal from which was then pending to the House of Lords) and the earlier cases *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) and *Selwood* v. *Townley Coal & Fireclay Co., Ltd.* (3) the trial judge held that the claim was barred by the Workman's Compensation Act, 1925, s. 29. It was contended on behalf of the appellant that the opinions expressed on this point by the majority of the House of Lords on the appeal in *Young* v. *Bristol Aeroplane Co., Ltd.* (1) were merely *obiter*, leaving it open to argument that the law had not been altered, as it undoubtedly had been if the opinions expressed by the majority were to be taken as the decision of the House:—

Held: an appellate court, if all the members were of the opinion that the appeal failed on one or other of two grounds, might refrain from deciding as between those grounds; but in *Young* v. *Bristol Aeroplane Co., Ltd.* (1) the House of Lords clearly did not take this course; the majority laid down a principle, which involved overruling *Selwood* v. *Townley Coal & Fireclay Co., Ltd.* (3) and prevented a claim at common law being barred by acceptance of payments, whether claimed or not, known to be compensation under the Act, if the recipient was ignorant of the option conferred on him by sect. 29 of the Act.

[**EDITORIAL NOTE.** The Court of Appeal in this case examine the decision of the House of Lords in *Young* v. *Bristol Aeroplane Co.* (1) and come to the conclusion that in that case the intention was to lay down a principle in effect overruling *Selwood* v. *Townley Fire Co.* (3). It would appear, therefore, that the law is that a workman who has accepted compensation is not barred from suing for damages unless at the time of accepting compensation he was aware of the option given him by sect. 29 of the Workmen's Compensation Act, 1925.

As to Alternative Remedies, see HALSBURY, Hailsham Edn., Vol. 34, pp. 961-966, paras. 1318-1325; and for Cases, see DIGEST, Vol. 34, pp. 490-499, Nos. 4063-4117. See also Willis's Workmen's Compensation, 36th Edn. pp. 522-549.]

Cases referred to :

(1) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98 ; [1946] A.C. 163 ; 115 L.J.K.B. 63 ; 174 L.T. 39.

(2) *Perkins* v. *Stevenson (Hugh) & Sons Ltd.*, [1939] 3 All E.R. 697 ; [1940] 1 K.B. 56 ; Digest Supp. 109 L.J.K.B. 1 ; 161 L.T. 149.

(3) *Selwood* v. *Townley Coal & Fircelay Co., Ltd.*, [1939] 4 All E.R. 34 ; [1940] 1 K.B. 180 ; Digest Supp. ; 109 L.J.K.B. 8 ; 161 L.T. 323.

APPEAL by the plaintiff from a decision of OLIVER, J., dated Feb. 28, 1945. The facts are sufficiently set out in the judgment of the court delivered by SOMERVELL, L.J.

G. H. B. Streatfeild, K.C. and *Myles Archibald* for the appellant.

C. B. Fenwick, K.C. and *H. B. H. Hylton-Foster* for the respondents.

Cur. adv. vult.

SOMERVELL, L.J. [delivering the judgment of the court]: This is an appeal by the plaintiff from a decision of OLIVER, J. The plaintiff sues the defendants, his employers, for negligence and breach of statutory duty. The only issue with which this court is concerned is whether the claim was barred under the Workmen's Compensation Act, 1925, s. 29, by reason of the plaintiff's claiming and accepting payments of compensation under that Act. The relevant part of the section is as follows :

> (1) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

The case was tried in February 1945. At that time *Young* v. *Bristol Aeroplane Co., Ltd.* (1) had been decided by the Court of Appeal, but an appeal was pending to the House of Lords. OLIVER, J., found that the plaintiff had received weekly payments from Dec. 18, 1943 till May 13, 1944, and that he knew they were for workmen's compensation. On the law as laid down by this court in the case cited and in the earlier cases of *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) and *Selwood* v. *Townley Coal & Fireclay Co., Ltd.* (3) counsel for the plaintiff admitted before the judge that on this finding of fact the claim was barred. He formally submitted that the decision of this court in *Young's* case (1) was wrong and invited the judge to find, and he did find, on the evidence that at the time of the acceptance of the payments the plaintiff was ignorant of his rights at common law, and was quite unaware that by accepting the payments he would prejudice any other right he might have. He did this in case the House of Lords might lay down a different principle which might make this fact relevant.

The relevant facts as set out by the House of Lords in *Young's* case (1), can be shortly stated. (1) The accident occurred on Apr. 3, 1942. (2) The workman received weekly payments from Apr. 30 to Oct. 2, 1942, when he returned to work, knowing them to be made as compensation under the Act. (3) When he began to receive the payments he did not know that he had an option under the Workmen's Compensation Act, 1925, s. 29 to exercise an alternative remedy. (4) In or about July 1942 he became aware of this right.

On the law as previously laid down the fact set out in (2) was fatal to his claim. All the Lords agreed that on the facts as set out above the claim was barred. There is, however, a difference of opinion on the construction of the section. Counsel for the defendants invited the court to regard the views expressed by the majority, VISCOUNT SIMON, LORD RUSSELL and LORD PORTER as *obiter*, leaving it open to him to argue that the law had not been altered, as it undoubtedly had been if the opinions expressed by the majority are to be taken as the decision of the House.

In the opinion of the majority the plaintiff lost his rights only by the acceptance of the payments after July when he knew of the choice given him by the sub-section. The minority, LORD MACMILLAN and LORD SIMONDS held that the acceptance of the payments, knowing them to be compensation under the Act, barred the claim, irrespective of the plaintiff's knowledge of his option. No doubt an appellate court if all the members are of opinion that the appeal fails on one or other of two grounds, may refrain from deciding as between those grounds. In the present case the House of Lords, in our view, clearly did not take this course. Each opinion deals fully with the question of principle. Viscount Simon said ([1946] 1 All E.R. 98 at p. 100) :

> The present appeal, therefore, is in substance a submission that the decisions in *Perkins*' case (2) and *Selwood's* case (3) are wrong, or, at any rate, that they are not conclusive against the appellant's claim. The question involves the interpretation and application of the Workmen's Compensation Act, s. 29 (1)—a section which is in the same form as sect. 1 (2) (*b*) of the 1896 Act, and one which has given rise to many difficulties and to a multitude of decisions.

Lord Russell states the question in issue in the following words (*ibid.* at p. 103) :

> The question is whether the appellant workman having accepted from his employers (the respondents) payments of compensation under the Workmen's Compensation Act, 1925, knowing them to be payments under that Act, is debarred by reason of sect. 29 (1) of that Act from taking proceedings independently of that Act for the recovery of damages from his employers.

Lord Porter, in his review of the authorities, states (*ibid.* at p. 110) :

> In so far as *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) and *Selwood* v. *Townley Coal & Fireclay Co., Ltd.* (3) depart from these principles and decide that the mere acceptance of compensation as such, but in ignorance of the existence of an alternative remedy, is a fatal bar to a claim for damages, I think they are wrong.

Other passages could be cited, but these are sufficient.

In our opinion, therefore, the majority laid down a principle, and, whatever the technical position, we think that this court should give effect to that principle. It involves overruling *Selwood's* case (3) and this is expressly stated by Viscount Simon and Lord Porter. It prevents a claim being barred by acceptance of payments, whether claimed or not, known to be compensation under the Act if the recipient was ignorant of the option conferred on him by sect. 29. The relevant authorities are fully dealt with in the opinions referred to and it seems to us unnecessary to refer to them further in this judgment.

Counsel for the defendants submitted further that Oliver J., was wrong in holding that the plaintiff was ignorant of his rights at common law. He suggests, first, that the finding was not clear and might only apply to the first or anyhow to earlier payments. We cannot accept this view. The words used, in our opinion, clearly apply to the whole period during which payments were accepted. He also relied on a letter from the plaintiff's approved society of Feb. 17, 1944, purporting to claim, on his behalf, damages or compensation, and a letter from a solicitor of Mar. 30, informing the defendants that the plaintiff "does not elect to receive any payments from you pending my further investigations." After the date of this letter, six further payments were called for and collected by the plaintiff's wife and signed for as to five by the plaintiff. In his evidence the plaintiff, who had suffered a serious injury, said that he had no knowledge of the letter of Feb. 17. He was not questioned as to whether he himself had seen the solicitor, or as to whether he knew the contents of the letter of Mar. 30. Nor was there any explanation as to how it came about that payments were made after receipt of that letter.

In our opinion, no argument based on these letters justifies us in importing to the plaintiff knowledge of his alternative rights or throws doubt on the correctness of the judge's finding, based, as it was, on the evidence given by the plaintiff before him. In the result, in our opinion the appeal must be allowed. The judge found the defendants liable if the claim was not barred and assessed the damages at £806 17*s*. 8*d*. There must, therefore, be judgment for the plaintiff for £806 17*s*. 8*d*.

Appeal allowed.

Solicitors : *W. H. Thompson* (for the appellant) ; *Carpenters*, agents for *Willey Hargrave & Co.*, Leeds (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LEMON *v.* LARDEUR.

[Court of Appeal (Morton, Somervell and Asquith, L.JJ.), June 18, 19, 1946.]

Landlord and Tenant—Notice to quit—Periodic tenancy—Expiration at end of current period—Onus of proof—Notice by agent—General or particular authority.

The respondent was tenant of certain premises owned by the appellant. On July 20, 1945, the appellant's husband, by letter, purported to give the respondent a month's notice to quit the premises as from Aug. 1, 1945. In an action to recover possession of the premises no particulars were given as to the nature of the tenancy, but after hearing evidence the county court judge held that it was a four-weekly tenancy. No evidence was given as to the date of commencement of the tenancy :—

Held : (i) in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period.

Queen's Club Garden Estates Ltd. v. *Bicknell* (3) *approved ; Simmons* v. *Crossley* (1) *overruled.*

(ii) having pleaded that the tenancy had been determined by notice, it was for the appellant to establish that the notice was a valid notice.

(iii) no evidence having been called to show that the date when the notice actually expired was in fact the end of a period of tenancy, the appellant had failed to establish that the notice was a valid notice and that the tenancy had been determined.

(iv) there was no evidence that the husband had any general authority to deal with the appellant's property and if he had only had a particular authority to deal with this particular matter, the notice was invalid because it ought to have been given expressly on behalf of the appellant, who ought to have been either named or sufficiently identified.

(v) on the facts, there was not sufficient evidence of any anterior or subsequent agreement to treat or accept the notice as a good notice ; and, even if there were, there was no consideration for such an agreement.

[**EDITORIAL NOTE.** There has hitherto been a conflict of judicial opinion as to whether, in the case of a monthly or weekly tenancy, notice to quit must expire at the end of the current period. A Divisional Court consisting of Swift and Acton, JJ., decided in *Simmons* v. *Crossley* (1) that notice need not expire at the end of the period, basing their decision upon two Irish cases. In *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (3), however, Lush, J., examines this view in detail and rejects it as incorrect, and in the case now reported the *Queen's Club* case (3) is held to represent the true view. It may be noted that in *Doe d. Finlayson* v. *Bayley* (2) the court declined to give effect to a notice to determine a weekly tenancy on a certain day of the week in the absence of evidence that the weekly term expired on that day. This case was before the court in the *Queen's Club* case (3), but not in *Simmons* v. *Crossley* (1).

As to Date of Expiration of Notice in Periodic Tenancies, see HALSBURY, Hailsham Edn., Vol. 20, p. 145, para. 157 ; and for Cases, see DIGEST, Vol. 31, pp. 440—445, Nos. 5858—5917.

As to Notice to Quit by Agents, see HALSBURY, Hailsham Edn., Vol. 20, p. 139, para. 149 ; and for Cases, see DIGEST, Vol. 1, pp. 327, 328, Nos. 432—444.]

Cases referred to :

*(1) *Simmons* v. *Crossley*, [1922] 2 K.B. 95 ; 31 Digest 438, *5843* ; 91 L.J.K.B. 643 ; 127 L.T. 337.

*(2) *Doe d. Finlayson* v. *Bayley* (1831), 5 C. & P. 67 ; 31 Digest 441, *5883*.

*(3) *Queen's Club Garden Estates Ltd.* v. *Bignell*, [1924] 1 K.B. 117 ; 31 Digest 447, *5932* ; 93 L.J.K.B. 107 ; 130 L.T. 26.

*(4) *Precious* v. *Reedie*, [1924] 2 K.B. 149 ; 31 Digest 438, *5844* ; 93 L.J.K.B. 800 ; 131 L.T. 568.

*(5) *Savory* v. *Bayley* (1922), 38 T.L.R. 619 ; 31 Digest 441, *5867*.

Appeal by the defendant from an order of His Honour Judge Archer, K.C., made at Chichester County Court and dated Feb. 8, 1946. The facts are fully set out in the judgment of Morton, L.J.

Martin Jukes for the appellant.

Victor Ruston for the respondent.

Morton, L.J. : The plaintiff in this case by her particulars of claim stated that she was the owner of premises situate at and known as " Stella Maris," Burnham Avenue, Bognor Regis, in the County of Sussex, and she pleaded that the defendant's term of tenancy of the premises was terminated by serving her with one month's notice to quit. The plaintiff further pleaded that the defendant remained wrongfully in possession. By her defence, the defendant did not admit that the plaintiff was the owner of the premises; she denied that she held the said premises under any tenancy agreement with the plaintiff, and, alternatively, if there was a tenancy agreement between the parties, she denied that it had been determined by any or any valid notice to quit. It is to be noted that the particulars of claim do not give particulars as to when the tenancy began or A what was the nature of the tenancy. However, these omissions could have been rectified by evidence. The county court judge heard the evidence and held that it was a four-weekly tenancy. He made an order for possession, and the defendant appeals from that order.

Counsel for the defendant contended before the county court judge and before this court that the notice was ineffective. The notice, which is dated July 20, 1945, is as follows: B

> Further to Miss Morrissey's call on you recently, this is to confirm that I wish to give you a month's notice, as from Aug. 1, 1945, to vacate "Stella Maris." As I believe she explained to you, my wife and I are at present living here in property owned by St. John's College and they definitely require the house for their own staff by Sept. 29 next, so that we must move into "Stella Maris" by that date. I appreciate that it may be difficult for you to find other accommodation in Bognor, but hope that you will be able to make suitable arrangements by the end of August, or early in September C at the latest. If it would be of any help to you, I will write to the local council at Bognor supporting any application you make for accommodation and explain the circumstances to them. Perhaps you will let me know if you wish me to do this. In any case, I shall be grateful if you will acknowledge this formal notice.

The notice there given is a month's notice as from Aug. 1, 1945. No evidence at all was given as to the date of commencement of the four-weekly tenancy, and, therefore, the court has no information before it as to when any particular D period of four weeks would end.

There has been a conflict of judicial authority as to whether, in the case of every periodic tenancy, the notice to quit must expire at the end of a current period. It is plainly established by authority that that is so in the case of a yearly or a quarterly tenancy, but there has been a certain conflict as regards monthly and weekly tenancies. In *Simmons* v. *Crossley* (1) a divisional court held that in the case of a monthly tenancy it was not necessary for a notice to quit to expire at the end E of a current period of the tenancy. It is to be observed that in that case there was not cited to the court *Doe d. Finlayson* v. *Bayley* (2). In *Queen's Club Garden Estates Ltd.* v. *Bignell* (3), where the tenancy was a weekly one, a divisional court declined to follow *Simmons* v. *Crossley* (1) and LUSH, J., said ([1924] 1 K.B. 117, at p. 124):

> I think the true view is that in any periodic tenancy, whether it be yearly, quarterly, monthly, or weekly, the notice to quit must expire at the end of the current F period.

For my part I am satisfied that the decision in *Queen's Club Garden Estates Ltd.* v. *Bignell* (3) was correct. I entirely agree with the reasoning of LUSH, J., and with the view expressed by BAILHACHE, J. in *Precious* v. *Reedie* (4) ([1924] 2 K.B. 149, at p. 151). In my view, *Simmons* v. *Crossley* (1) can no longer be regarded as good law. I may add that after the decision in *Simmons* v. *Crossley* G (1) there was decided *Savory* v. *Bayley* (5). The tenancy in *Savory* v. *Bayley* (5) as in the present case, was a four-weekly one. BAILHACHE, J., although *Simmons* v. *Crossley* (1) was cited to him, did not follow it and came to the conclusion that the notice to quit in that case was invalid because the notice to quit was not such as would bring the tenancy to an end at the end of a four-weeks period.

This court does not know whether the notice to quit which was given in the present case did or did not expire at the end of a four-weeks period because the H evidence does not show when any period of four weeks began or ended. It was suggested in argument that it was for the defendant to establish that the notice did not expire at the proper date, but I do not agree with that suggestion. The plaintiff has pleaded that the defendant was her tenant; she has pleaded that the tenancy has been determined by a notice and it is for her to establish that the notice was a valid notice. That view of the law is supported by the case to which I have referred in passing, *Doe d. Finlayson* v. *Bayley* (2). The result is that on this ground the notice to quit is invalid.

Counsel for the defendant submitted that the notice to quit was invalid also upon another ground, and, as the matter has been fully argued, I shall express my view on it. Counsel submitted that there was no evidence that the husband of the owner had a general authority to deal with her property, and that if he only had a particular authority to deal with this particular matter, the notice was invalid because it ought to have been given expressly on behalf of the landlord who ought to have been either named or sufficiently identified. In my view, that contention is well founded. The notice purports to be given by Mr. Lemon himself. There is no evidence that he had a general authority on behalf of his wife and the notice was invalid on that ground also. The law is correctly stated in WOODFALL ON LANDLORD AND TENANT, 24th Edn., p. 964, where the author says :

> But when a notice to quit is given by a particular agent having a limited authority only, such notice should be given in the name of the principal or expressly on his behalf.

It follows from what I have said that the tenancy was never lawfully determined, unless in some way the defect in the notice was cured by something which occurred after the notice had been given. The county court judge's note says :

> Defendant knew who landlord was and accepted notice as given in correspondence and in her evidence time was allowed her on that footing.

I can find no evidence at all, either in the correspondence or in the oral evidence, that the defendant knew at the time when she received the notice who the landlord was. On the contrary, right up to that time, according to the defendant's evidence, she thought that Miss Morrissey, the sister of the actual owner, was her landlord. The judge obviously placed reliance upon the defendant's evidence because he described her in complimentary terms in his judgment. That finding by the judge, if it relates to the period before the notice was given, must be due to an oversight or some imperfect recollection of the evidence. At all events, there appears to be no evidence upon which the county court judge could find that the defendant knew who the landlord was at the time when she received the notice. There is evidence that after the defendant received the notice she asked a Mrs. Barter, who lived next door and collected the rent, about the notice and that Mrs. Barter said she always sent on the rent to Mrs. Lemon, the plaintiff.

It was suggested by counsel for the plaintiff that there was some agreement which prevents the defendant from relying upon the invalidity of the notice. Counsel for the defendant contended that we should not allow this point to be raised at all. He pointed out, truly, that no such agreement was pleaded, although the validity of the notice was challenged in the defence ; that it was not made part of the plaintiff's case at the hearing ; that it was never suggested by the plaintiff's husband in evidence ; and that it was not mentioned in the oral judgment of the judge, although in his subsequent written judgment given three weeks afterwards there occurred the passage which I have read. We were reluctant, however, to shut out the argument on these grounds and we heard counsel for the plaintiff upon it. For my part, I think that on the materials before us it is quite impossible to come to the conclusion that there was such an agreement. Counsel for the plaintiff said that the agreement amounted to the creation of a new tenancy which was to expire on Sep. 25, 1945. Alternatively, he put it that there was an agreement between Miss Morrissey, as agent for the plaintiff, and the defendant shortly before the notice to quit was given. There was a further alternative that an agreement was made, after the notice had been given, that that particular notice should be taken as ending the tenancy. There are at least two answers to that argument. In the first place, I cannot for myself find any sufficient evidence of any such agreement. In the second place, I am unable to discover what the consideration was for the agreement if it was made. That being so, I think it is no discourtesy to the able argument presented to us if I refrain from going into the facts in full detail.

In my view, this action ought to have been dismissed and the appeal should be allowed.

SOMERVELL, L.J. : I agree with the judgment which has been delivered, but, as we are differing from the decision of the county court judge, I will add a few observations on the three main points in the case.

The first point that was taken on behalf of the defendant was that the notice to quit was invalid because it did not expire at the end of the current tenancy. I will not refer to the authorities, which have already been referred to, but I would like to say that I agree with everything that has been said about them. In this case there was no evidence as to the date in the material month or months from which the tenancy ran. As it seems to me, it was for the plaintiff, who in her pleading alleges that the defendant had a tenancy, to call evidence to show that that tenancy had been terminated according to law. No evidence being called A by her to show that the date when the notice actually expired was in fact the end of a period of the tenancy, it seems to me that she fails on this point to establish that the notice was a good one and that the tenancy which she admits existed had come to an end. Therefore, that point fails on the ground that she had not shown that she had given a valid notice to quit.

There was a second point taken, namely, that the notice here was not given by the landlord but by her husband. Counsel for the plaintiff submitted that we B ought to find on the evidence that the husband was the general agent of the wife. But it seems to me quite impossible to come to that conclusion on the evidence before us. For one reason, Mrs. Barter, whose name was referred to in the evidence more than once, obviously had a considerable authority in dealing with the matter of this house. It is also, I think, to be observed that in this case at the time when the notice was received, according to the defendant's evidence (and the county court judge clearly regarded her as a reliable witness) she did not C know who the owner was.

Thirdly, proceeding on the basis that the notice was invalid, counsel for the plaintiff said that still there was an agreement, or, possibly, an estoppel which precluded the defendant from relying on these defects. He, first of all, submitted that we should find an anterior agreement, made at an interview between the plaintiff's sister, Miss Morrissey, and the defendant shortly before July 16 D (the date of the first letter in the correspondence) that the notice to quit which would follow should be accepted as terminating the existing tenancy. There was some evidence given with regard to the interview between the defendant and Miss Morrissey. The defendant said that at that interview she said that she would give up the house if she could find something else. That evidence is in direct conflict with the agreement that counsel for the plaintiff submitted we should find ; and, so far as the judge's note is concerned, it is, I think, clear E that there was no cross-examination on that particular piece of evidence. It, therefore, seems to me that the submission as to an anterior agreement fails, assuming that counsel is entitled to raise it in this court.

He then submitted that we should find that, on the correspondence, subsequent to the notice being sent, there was an agreement to treat it or accept it as a good notice. It is perfectly true that in that correspondence neither the defendant nor her solicitors took the point that the notice was invalid. It, no doubt, F frequently happens that, when disputes arise, points are not taken which are subsequently taken when the matter comes into the hands of solicitors or counsel. But I cannot find anything in that correspondence which precludes the defendant from relying on the defects to which I have already referred or which amounts to any estoppel which would prevent her from contending that the tenancy has not been brought to an end. G

For these reasons, I agree that the appeal should be allowed.

Asquith, L.J.: I agree. There are three grounds of appeal in this case, the first one being that the notice to quit was bad. If that ground should succeed, clearly the other two do not arise. I agree that it does succeed. It is contended by the defendant, that the notice is bad on two distinct grounds ; first, as not having been proved by the plaintiff to expire at the end of the stated period of the H tenancy—in this case a four-weeks tenancy—and, secondly, unless the husband was the wife's general agent, as not being expressed to be given on the part of the actual landlord. There is no evidence of general agency on the part of the husband. The notice is, therefore, bad and doubly bad. In these circumstances, counsel for the plaintiff sought to rely on a contention, neither pleaded nor argued below, that there was a special agreement, as to which I will say, first, that I agree that he ought not to be allowed to raise it here, but that, as he has done so the agreement upon which he relies seems to me to be one which cannot be spelled out of the correspondence or deduced from the other evidence, and, if it were so deducible, it would have to be supported by a note or memorandum, which is not there.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Beaumont, Son & Rigden* (for the appellant); *Ravenscroft, Woodward & Co.*, agents for *Staffurth & Bray*, Bognor Regis (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DABORN *v.* BATH TRAMWAYS MOTOR CO., LTD. AND TREVOR SMITHEY.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), July 11, 12, 1946.]

Negligence—Highways—Collision of motor vehicles—Ambulance with left-hand drive—Warning notice on back—Back of ambulance shut in—Ambulance driver unable to see cars close behind—Ambulance driver turning to right when motor omnibus close behind—Correct hand signals given by ambulance driver—Negligence of omnibus driver—Whether ambulance driver guilty of contributory negligence.

On Apr. 5, 1943, D. was driving an ambulance with a left-hand drive and with one driving mirror on the left-hand side attached to the windscreen. The ambulance was completely shut in at the back so that D. was unable to see anything close behind her. On the back of the ambulance a large warning notice was painted: "Caution—Left hand drive—No signals." Unaware of the fact that a motor omnibus was close behind her and that its driver was trying to overtake her, D., wishing to turn into a lane on the off-side of the road, started to edge from the near side of the road towards the right and made a signal with her left hand that she was going to turn right. As she was turning to the right, a collision occurred between the ambulance and the motor bus, and D. sustained severe injuries. In an action for damages for negligence brought by D. against the driver of the motor bus and his employers, it was contended by the defendants that D. was guilty of negligence in that she had omitted to make certain that there was no vehicle behind her before turning to the right:—

HELD: (i) upon the facts of the case, the driver of the motor omnibus was guilty of negligence.

(ii) there was no negligence on the part of D., because she had given the correct hand signals before starting to turn and there was a warning notice on the back of the ambulance that it was a left-hand drive vehicle and that no signals could be given.

(iii) (*per* ASQUITH, L.J.) in considering whether reasonable care had been observed, it was necessary to balance the risk against the consequences of not assuming that risk. In view of (*a*) the necessity in time of national emergency of employing all available transport resources, and (*b*) the inherent limitations of the ambulance in question, D. had done all that she could reasonably do in the circumstances.

[**EDITORIAL NOTE.** This case contains an interesting discussion of the standard of care required from the driver of a vehicle with a left-hand drive. The points referred to by ASQUITH, L.J., are more particularly applicable to the conditions of the recent war, when large numbers of vehicles with a left-hand drive were in use in England but the decision is of permanent value in view of the use of foreign cars with left-hand drive brought into England by visitors.

AS TO NEGLIGENCE ON THE HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-904; and FOR CASES, see DIGEST, Vol. 36, pp. 59-62, Nos. 366-389.]

APPEAL by the defendants from a judgment of CROOM-JOHNSON, J., dated Mar. 12, 1946. The facts are fully set out in the judgment of MORTON, L.J.

N. R. Fox-Andrews, K.C., and *C. H. Grundy* (for *Humfrey Edmunds*) for the appellants.

Montague L. Berryman, K.C., and *John Bassett* for the respondent.

Morton, L.J.: At about 12.40 p.m. on Apr. 5, 1943, the plaintiff in this case, Miss Daborn, was driving a motor ambulance. She had had a good deal of experience in the driving of motor ambulances, and on the morning in question she was driving a 30 h.p. Chevrolet ambulance, weighing $2\frac{1}{2}$ tons, with left-hand drive and with one driving mirror on the left-hand side attached to the windscreen. The ambulance was completely shut in at the back, so that it was impossible for the plaintiff to look back and see what was close behind her on the road. The mirror on the left-hand side only enabled her to see a car which A was a considerable number of yards behind her. On the back of the car there was painted in large white letters "Caution—Left hand drive—No signals," by way of warning to any cars which might be coming up behind. On this particular day it was the duty of the plaintiff to take some blankets from a reception station in Spring Lane and to drop them at a military inspection room in another lane called Hudswell Lane. In order to do that she had to emerge from Spring Lane into a road leading from Box to Corsham, a road B which was some 20 ft. wide. She had to emerge into that road, then turn round and go along towards Corsham for about 100 yds. and then turn right again into Hudswell Lane. The position as regards Hudswell Lane was that at this time there was a good deal of traffic which went down the lane, sometimes ambulances and sometimes military vehicles, so that it was quite a common thing for vehicles going along towards Corsham to turn off down Hudswell Lane. C

When the plaintiff was emerging from Spring Lane into the Box-Corsham road she looked to the left. She also looked to the right. She saw nothing coming from either direction, so she turned right in the Box-Corsham road, which is known as Park Lane. In fact, although the plaintiff saw nothing when she looked to the left, a bus or coach driven by the second defendant, a driver in the employ of the first defendant, the Bath Tramways Motor Co., Ltd., must have been very nearly in sight, because the bus driver observed the plaintiff D coming out of Spring Lane and probably he came into view just after she had turned to the right, and therefore had her eyes turned towards the right. The plaintiff drove along Spring Lane and then when she was coming up towards Hudswell Lane she did this, to quote her own words:

> When I got to within about 30 yds. of the turning Hudswell Lane I started to edge towards my right hand side and slow down, and within about 20 yds. of Hudswell Lane I made a signal with my left hand that I was going to turn right. E

By this time the bus driven by the second defendant, Smithey, was close behind the ambulance, but the plaintiff was quite unaware of that fact. As the ambulance was turning right to go into Hudswell Lane, it was struck by the front of the motor bus at a point near the rear off-side of the ambulance. The ambulance appears to have swayed dangerously, still proceeding on two wheels for some distance; it then fell over on its near side, at the entrance to Hudswell Lane. The plaintiff F was thrown out and she sustained very severe injuries.

The judge, Croom-Johnson, J., awarded a substantial sum by way of damages, and there is no appeal before us as to the amount of damages. The only question before us is the question of liability. For my part I entirely agree, both with the reasoning and with the conclusions of the judge. Nevertheless, I think it is only right to deal in my own words with the principal point raised by counsel for the appellant defendants. He described this, I think, as the pith G and kernel of the case. He said that, whatever might be the difficulties of the plaintiff in intimating to a vehicle behind that she was about to turn, she did, in fact, something which was dangerous. He relied, in the first place, upon a passage in the judgment where the judge said this:

> In those circumstances it is quite plain that had this been the case of a vehicle with a right-hand drive the plaintiff could not recover. She had given no signal on the off-side, she was executing a manoeuvre of turning from the near side into a side turning on her H off-side. That is a manoeuvre which always demands care on the part of any driver, and of course demands that the driver should be satisfied by looking in his off-side mirror, or by turning round if he has not got one, or looking down the side of his vehicle —or whatever is the proper step—that it is safe for him to do so.

Counsel for the defendants says that what the plaintiff did would have been a dangerous act in the case of a vehicle with a right-hand drive, and it was still a dangerous act in the case of a vehicle such as that which was being driven by the plaintiff. He contends that, however difficult it might have been for her, she ought to have done more to prevent an accident, and not having done more she was negligent. It is, I think, plain that, if this had been a vehicle with a right-hand drive, what the plaintiff did would have been dangerous, because in that case there would have been no notice on the back drawing the attention of those behind her to the fact that this was a left-hand drive vehicle and that no signals could be given. Under those circumstances, if she had turned to the right without giving any signal by hand or indicator, of course she would have been doing a dangerous act. On the other hand, it does not follow that when she was driving a left-hand drive vehicle, with the notice which I have described on the back, she was doing a dangerous act in doing just what she did.

In this connection there is a most important passage in the defendant driver's own evidence:

> (Q) You have seen hundreds of these American vehicles with these caution signs on the back? (A) Yes, a lot.
>
> (Q) If you were driving behind one of those vehicles, and both that vehicle and your vehicle were approaching a turning on the off-side, you would not know whether that other driver was going to turn to the right or not? (A) Well, if he was an experienced driver he would certainly get over on to the off-side of the road.

I pause there to say that is exactly what the plaintiff did and, furthermore, that the defendant driver had been driving buses along that road for a considerable time. He knew perfectly well that he was approaching a turning to the right, Hudswell Lane, which, according to the evidence, was quite a busy lane at this time, and he got the very signal that he would have expected in the case of a vehicle with a left-hand drive. He had seen the lettering on the back of the vehicle, so he knew just what to expect. He knew he was behind a vehicle with a left-hand drive which could not give the orthodox signal. Then:

> (Q) On to the wrong side of the road? (A) As he came near the turning he would get over towards the off-side of the road.
>
> (Q) Do you mean you would expect an experienced driver approaching a turning on his off-side, with a left-hand drive vehicle, to get over on to his wrong side of the road? (A) Not on to his wrong side, but to ease over towards the centre.

That is exactly what the plaintiff did, and exactly what was, according to the defendant driver's own evidence, the correct thing for her to do.

> (Q) Do you agree that if you are following a vehicle with that caution sign on it, and you know you are coming to a turning on the off side, the safe thing for you to do is to keep well behind the other vehicle in case it turns to the right? (A) Yes.
>
> (Q) You do agree with that? (A) Yes.
>
> (Q) And would you agree that the safe thing to do is to drive at such a distance behind it that if it does turn to the right you can ease over to your left and go behind it, or alternatively stop; that would be the safe thing to do? (A) Yes.

It seems to me that this series of answers establishes two things: (i) that the plaintiff was not negligent, and (ii) that as the defendant driver drove into the car in front of him, in spite of getting the correct signals, he must have failed to do "the safe thing."

I do not think I need develop the question of this defendant's negligence, because the judge has dealt with it very fully. I would only say this: he was approaching a turning which he knew to be quite a busy turning off to the right. He was driving behind a vehicle which he knew had a left-hand drive. He got from that vehicle the signals which he would expect. He has admitted himself that the safe thing to do under those circumstances was to drive at such a distance behind the vehicle that, if it did turn to the right, he could go over to his left and go behind it or, alternatively, stop. That, he himself says, was the safe thing to do. Well, he did not do it. He ran into the vehicle in front of him, having had all these warnings. I would add this. I entirely agree with the judge that if this man was intending to overtake, as I think he was and as he admitted shortly after the accident to one of the witnesses, there was no excuse at all for him not sounding his horn.

There is one other suggestion I ought to mention. Counsel for the defendants suggested that the only safe thing for the plaintiff to do was to pull in to the near side of the road, stop, slide along from her left-hand driving seat and look down the road, and then get back into the driving seat, start up again and turn round down Hudswell Lane. I am by no means satisfied, in all the circumstances, that, having regard to the traffic on this road, that course of action would have been any safer than what she did, but I do not think I need pursue that matter further, because for my part I am satisfied that she gave the proper signals, which were thoroughly understood, and that she was not guilty of any negligence at all.

There is one further point which I intended to mention earlier. The defendant driver was asked this interrogatory :

> Where was your coach in relation to the plaintiff's ambulance when you first became aware that the plaintiff intended to turn to the right and what was the distance then between the two vehicles ?

The answer was :

> (*a*) When I first became aware that the plaintiff intended to turn to the right my coach was behind the plaintiff's ambulance. (*b*) It is impossible for me to answer the second part of the interrogatory in terms of feet or yards and to swear that such answer is accurate, but to the best of my ability, knowledge and belief I estimate the distance at about 30 ft., more or less.

That answer makes it clear that the defendant driver did have notice and became aware that the plaintiff was about to turn to the right and that he so became aware when he was at a distance from the vehicle in front which he estimates at about 30 ft. more or less. In those circumstances, it seems to me the collision would not have occurred unless he was speeding up to a dangerous extent, when approaching the turning into Hudswell Lane, for the purpose of overtaking the vehicle in front. I think that, having become aware that the plaintiff intended to turn to the right, he could have stopped or eased over to the left had he been travelling at a speed which was safe.

The result is that in my view this appeal should be dismissed.

Tucker, L.J. : I have asked **Asquith, L.J.**, if he will be so kind as to deliver judgment before I do in this case.

Asquith, L.J. : I agree with the judgment which has been just delivered and, speaking purely for myself, I think that the judgment of Croom-Johnson, J., could be supported on an additional ground. In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk. The relevance of this applied to the present case is this : during the war which was, at the material time, in progress, it was necessary for many highly important operations to be carried out by means of motor vehicles with left-hand drives, no others being available. So far as this was the case, it was impossible for the drivers of such cars to give the warning signals which could otherwise be properly demanded of them. Meanwhile, it was essential that the ambulance service should be maintained. It seems to me, in those circumstances, it would be demanding too high and an unreasonable standard of care from the drivers of such cars to say to them : " Either you must give signals which the structure of your vehicle renders impossible or you must not drive at all." It was urged by counsel for the defendants that these alternatives were not exhaustive, since the driver of such a car should, before executing a turn, stop his car, move to the right-hand seat and look backwards to see if another car was attempting to overtake him and then start up again. Counsel for the plaintiff has satisfied me that such a procedure, besides involving possible delay, might be wholly ineffective. I think the plaintiff did all that in the circumstances she could reasonably be required to do if you include in those circumstances, as I think you should : (i) the necessity in time of national emergency of employing all transport resources which were available, and (ii) the inherent limitations and incapacities of this particular form of transport. In considering whether reasonable care has been observed, one must balance the risk against the consequences of not assuming that risk, and in the present instance this calculation seems to me to work out in favour of the plaintiff. I agree with Morton, L.J., that this appeal should be dismissed.

TUCKER, L.J.: I think, and have thought from an early stage in this appeal, that it was quite clear that the driver of the defendants' omnibus was guilty of negligence. My difficulty has been as to whether or not, on the evidence given, the plaintiff was guilty of contributory negligence by reason of the fact that she turned to the right at a time when the motor omnibus was very close behind her and was going at a speed rather more than her own with a view to overtaking, and was in fact, as the judge held, on the point or in the process A of overtaking her. If she had known that that vehicle was in that position, I am sure she would never have turned to the right. It would have been a negligent thing to do with a motor car in that position, even if she had an indicator on the right-hand side, and even with a right-hand drive.

Then I ask myself whether she is in any better condition, in those circumstances, because she was driving a vehicle so constructed that it was impossible for her to know that the motor bus was there. I have asked myself whether, if this B case had arisen after the Law Reform (Contributory Negligence) Act, 1945, had become effective, it would have been possible to avoid the conclusion that this was a case in which the damages would have to be apportioned in proportion to the blame attaching to both parties. But having heard the judgments which have been delivered by my brethren, my doubts, if not entirely resolved, are not sufficient to justify me in expressing a different view from those at which they have arrived.

C

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Stanley & Co.* (for the appellants); *William Charles Crocker* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

D

E

NOTE

WILKINSON *v.* BARCLAY.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), July 2, 3, 1946.]

The decision of ATKINSON, J., dated Feb. 1, 1946, and reported in [1946] F 1 All E.R. 387 was reversed on the grounds that, on the true construction of the contract, the intention of the parties was not that there should be a sale of the timber lots at a price per cubic foot according to the actual amount of timber in each lot (which was the construction which was adopted by ATKINSON, J.) but that there should be an out and out sale of each lot at a price per cubic foot on the estimated quantity of timber, and that it was not intended that there should be any allowance on either side if, on the subsequent measurement G of the timber, it turned out that there was either more or less than the estimated quantity.

T. F. Davis for the appellant.

F. Hallis for the respondent.

Solicitors: *Sidney Pearlman* (for the appellant); *Tarlo, Lyons & Co.* (for the respondent).

APLEY ESTATES CO. AND OTHERS *v.* DE BERNALES AND OTHERS

[Chancery Division (Evershed, J.), July 25, 30, 1946.]

Tort—Joint tortfeasors—Release—Conspiracy to defraud—Arrangement with one joint tortfeasor after action started—Covenant not to continue proceedings against him in consideration of the payment of £25,000—Agreement not to "operate as a release," and rights against other joint tortfeasors reserved—Whether arrangement operated as an accord and satisfaction—Other joint tortfeasors not released from liability.

After an action against 35 defendants alleging *inter alia* that they, or certain of them, had conspired together to defraud members of the British public in regard to gold mines in Australia had started, an arrangement was arrived at between the plaintiffs and G.B. Co., one of the defendants accused of conspiracy. Since the action involved serious questions of fraud, an order of a judge was obtained confirming the arrangement made and staying the proceedings against G.B. Co. By the terms of the agreement the plaintiffs covenanted not to continue to sue G.B. Co. in respect of the matters in question in consideration of the payment of £25,000. The agreement expressly stated that it should not be construed or operate as a release of any cause of action of the plaintiffs against the defendants or any of them; and the rights of the plaintiffs against the defendants other than G.B. Co. were expressly reserved. It was contended by the other defendants that the agreement had the effect of releasing all the defendants who had been joined as joint tortfeasors with G.B. Co. in respect of the conspiracy claim, because (*a*) the real substance of the agreement, in spite of its language, was the acceptance by the plaintiffs of the sum of £25,000 in accord and satisfaction of the claim, and (*b*) since the action had already started before the arrangement was made, a covenant of such a kind must operate as an accord and satisfaction:—

Held: as a matter of law and as a matter of construction of the agreement, the arrangement in question did not operate as a release or an accord and satisfaction so as to result in a release of any of the defendants who had been joined as joint tortfeasors with G.B. Co. in respect of the conspiracy claim.

Duck v. *Mayeu* (2) and *Rice* v. *Reed* (3) *applied.*

[**EDITORIAL NOTE.** An agreement not to sue one of several joint tortfeasors will not amount to a discharge of the others where it is not the intention of the agreement that an accord and satisfaction should emerge. The agreement in *Duck* v. *Mayeu* (2) was made before action brought, but Evershed, J., holds that this fact was not material to the decision.]

As to Position of Joint Tortfeasors, see HALSBURY, Hailsham Edn., Vol. 32, pp. 187-189, paras. 280-282; and for Cases, see DIGEST, Vol. 42, pp. 977-979, Nos. 84-94.]

Cases referred to:

(1) *Beadon* v. *Capital Syndicate, Ltd.* (1912), 28 T.L.R. 527; Digest Practice 494, *1710*.

(2) *Duck* v. *Mayeu*, [1892] 2 Q.B. 511; 42 Digest 978, *93*; 62 L.J.Q.B. 69; 67 L.T. 547.

(3) *Rice* v. *Reed*, [1900] 1 Q.B. 54; 42 Digest 977, *86*; 69 L.J.Q.B. 33; 81 L.T. 410.

Procedure Summons by certain of the defendants applying for leave under R.S.C. Ord. 24, r. 2, to put in a new matter of defence, and a further summons asking that, on the basis that the new defence is put in, the points of law raised thereby should be set down for hearing and disposed of forthwith. By consent, the matter was treated as though the defendants had obtained leave to deliver the further defence, and the points of law raised thereby were then dealt with. The facts are fully set out in the judgment.

G. O. Slade, K.C. and *B. J. M. MacKenna* for the applicants (the defendants in the action).

D. J. Jenkins, K.C. and *J. F. Bowyer* for the respondents (the plaintiffs in the action).

Evershed, J.: These applications arise in an action of a somewhat peculiar nature, the substance of the action being claims against a number of persons, of whom the one most referred to is the first defendant, Claude Albo de Bernales, for a number of causes of action which include a claim that some or all of the defendants conspired together to defraud members of the British public in regard to alleged gold mines in Western Australia. In the action in which the present applications are made, 309 members of the British public are joined as co-plaintiffs. The effect, I observe, is that there are joined together for convenience in one proceeding not less than 309 causes of action. In saying that, it must be clearly understood that in so far as any individual plaintiff alleges conspiracy against all or some of the defendants, that cause of action is one single and indivisible cause of action.

In those circumstances, after the action had proceeded upon its course for some time, terms were come to between the solicitors acting on behalf of the plaintiffs and one of the defendants accused of conspiracy, namely, Great Boulder Proprietary Gold Mines, Ltd. The arrangement made is recorded in an agreement scheduled to an order to which I will refer in a moment, and the substance of it was that a sum of £25,000 was paid by Great Boulder Proprietary Gold Mines, Ltd., in order that they, at any rate, might not be pursued further in the proceedings.

As the action involved serious questions of fraud, according to the practice of this Division it required the sanction of a judge's order to confirm the arrangement and to make the necessary order staying the proceedings. That order was made on Jan. 16, 1946, by myself. The order recites, following the practice common in this Division, that the plaintiffs and the defendants stating that they have agreed to the terms set forth in the schedule and consenting to the order, the court orders that all further proceedings in the action against Great Boulder Gold Mines, Ltd., be stayed, except for the purpose of carrying the terms into effect, and liberty to apply, for that purpose, was given. I think it is desirable that I should read the terms :

> In consideration of the payment of £25,000 by the Great Boulder Proprietary Gold Mines, Ltd. to . . . the solicitors for the plaintiffs for and on behalf of the plaintiffs in the . . . actions [the receipt of which is acknowledged] the plaintiffs . . . will not nor will any of them sue or continue to sue the said defendants in respect of any of the matters the subject matter of the said actions or either of them or in respect of their respective claims in respect of such matters or any of them but this agreement shall not be construed or operate as a release of any cause of action of the plaintiffs or any of them against the defendants or any of them in the said actions or either of them and shall not prejudice or affect the rights of the plaintiffs therein to proceed with their claims therein against the defendants other than the defendants the Great Boulder Proprietary Gold Mines, Ltd.

Then both parties agreed to the making of the order.

That having been done on Jan. 16, 1946, certain of the defendants—and I take it that these applications are representative of others—applied by summons for leave under R.S.C. Ord. 24, r. 2, to put in a new matter of defence in the form annexed, and there is a further summons asking that, on the basis that the new defence is put in, the points of law raised by the last two paragraphs should be set down for hearing and disposed of forthwith. The defence and points of law raised by it are briefly these : that however the agreement, and the order giving effect to it, were framed, the effect in law was to put an end altogether to so much of the claims which the plaintiffs or any of them have against the defendants as joint tortfeasors, one of the alleged joint tortfeasors being Great Boulder Co. That point of law rests upon the view, that by the common law of this country (subject only to the revision made by the Law Reform (Married Women and Tortfeasors Act), 1935), a tort such as conspiracy is a single cause of action so that the release of one tortfeasor, or the acceptance of a sum of money paid in or towards accord or satisfaction, by one tortfeasor, releases all of the tortfeasors.

The first question, which is one of the construction and effect of the agreement, is whether the real substance of what was arranged was the acceptance by the plaintiffs of £25,000 in accord and satisfaction of the claim against the Great Boulder Co. In my judgment, upon its terms plainly the agreement was not intended to have, and did not have, that effect. I venture to think the argument of counsel for the defendants carried him somewhat too far when he said that although he doubted not the legal advisers of the parties intended to prevent an accord and satisfaction emerging from the transaction, nevertheless, in spite of their language, such was the result. He was driven further to say that when one reads the language, the real arrangement must be something other than the language which they used—in other words something other than the words mean and than those using the words intended. Upon a fair construction of the language which I have already read, it is, in my judgment, quite plain as a matter of construction that the bargain was that, in consideration of £25,000 paid to the plaintiffs' solicitors, the plaintiffs, through their solicitors, covenanted not to sue or to continue to sue Great Boulder Co. in respect of this particular matter. Nor in my view did the language conceal any different bargain.

That leaves the further point, which is this. Since the matter has reached the stage of an action having been started, certain rights (it is said) have intervened so that one cannot effectively, or by any form of words, make a covenant of that sort which will not have the effect either of an accord and satisfaction or, treating the matter as procedural, as though there had been a payment into court of £25,000 under R.S.C., Ord. 22, followed by a taking out of that payment in. Looking at the matter free from authority, I do not think that that is the right conclusion. I see no reason why persons should not make a bargain, as they made here, having the effect that it was intended to have according to its face, just as well after action brought as before action brought. Nor do I agree with counsel for the defendants that the effect of the transaction is the same as payment into court. By the Rules, if you pay a sum of money into court, you pay it towards satisfaction of the claim, and if you take it out, then you must take out the sum in satisfaction of the claim in respect of which it is paid in. I so understand the decision in *Beadon* v. *Capital Syndicate* (1) to which counsel for the defendants referred. But the matter is not wholly free from authority, because *Duck* v. *Mayeu* (2), in the Court of Appeal, decided that before action brought an arrangement which, so far as is material, was in other respects on all fours with this arrangement, did not have the effect of releasing the tortfeasors other than the tortfeasor with whom the arrangement was made. It is true that that decision was given in regard to a claim where no action had been brought, but it seems to me from the judgments, as I read them, that that fact was not a material circumstance which underlaid the decision, and I think that that view is supported by the language of VAUGHAN WILLIAMS, L.J., in *Rice* v. *Reed* (3).

I hold therefore, as a matter of law and as a matter of construction of the agreement, that the arrangement made, which was incorporated in the order of Jan. 16, 1946, does not operate as a release or an accord and satisfaction so as to result in a release of any of the defendants who have been joined as joint tortfeasors with Great Boulder Co. in respect of the conspiracy claim.

I wish, however, to add this. As I have indicated, the peculiar characteristic of this action is that a large number of representatives of the British public are joined together as plaintiffs, and the question does arise how, between them, the £25,000 should be appropriated or ought to be treated as appropriated ? I think that is, or may be, a matter of substance, because it is of the essence of a claim for tort that the plaintiffs should have suffered damage, and it may be that as regards some of the plaintiffs in this action the defendants could show, when regard is had to their share of the £25,000, that from the date of its receipt they cannot say that they have suffered any damage. It does not seem to me that I have to express any further view about that on this occasion because I do not think it affects the proposition with which I am concerned, namely, whether or no the arrangement made released the co-defendants of the Great Boulder Co. It seems to me to be a separate question, albeit a question of some difficulty. I only mention it in order to indicate that I have not omitted to notice it and also to indicate my view, that it has no real bearing upon, and does not affect, the questions raised on these summonses.

With the consent of counsel, the matter has been treated as though the defendants in question had obtained leave to deliver this further defence ; that is to say, as though they had received a favourable answer to their first application and as though the second application had been thus far successful, that " forthwith " was treated as the next minute. We have, therefore, by consent, treated the matter as having been set down and dealt with as a separate point of law. So far as drawing up the orders are concerned, therefore, care must be taken to see that on the first summons liberty is given, or treated as having been given, to the defendants, to deliver the defence and as though by consent on the second summons the points of law indicated in the two paragraphs were set down and heard. That course has been taken so that the disappointed party may with the least delay and expense take the matter to a higher court to test the validity of my view.

Order accordingly. Leave to appeal granted.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the applicants, the defendants in the action); *Nordon & Co.* (for the respondents, the plaintiffs in the action).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re DOUGHTY, BURRIDGE *v.* DOUGHTY

[CHANCERY DIVISION (Roxburgh, J.), July 3, 11, 1946.]

Wills—Gift of "net income" of residuary trust funds—Trust funds including shares in company—Capital distribution by company, in respect of shares, out of realised capital profits—Whether sum distributed capital or income.

Companies—Capital distribution out of realised capital profits—Sums payable in respect of shares forming part of testator's residuary trust funds—Whether capital or income of trust funds.

By his will the testator gave "the net income" of his residuary trust funds, which included shares in a certain company, to his widow during her life with remainders over. Art. 102 of the company's articles dealt with the dividend rights of the different classes of shareholders and the proportion in which any further profits should be divisible. Art. 104A, which was adopted between the date of the will and the date of the testator's death (Mar. 7, 1941), enabled the company, "for the purpose of carrying out" its "obligations under art. 102," to divide among its members "by way of capital distribution" "any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets of the company or represented by shares or other property received as consideration or part consideration for the sale or realisation of any capital assets of the company or any investments representing any such surplus moneys as aforesaid." On Feb. 26, 1946, the company passed a resolution "pursuant to" arts. 102 and 104A, for the distribution, out of realised capital profits, of £99,100 as "an additional dividend or distribution" "in respect of the year ended Dec. 31, 1945." As a result of this resolution certain sums became payable in respect of the shares included in the testator's residuary trust funds. The question to be determined was whether these sums were part of "the net income" of the trust funds or accretions to the capital thereof. On behalf of the widow it was contended that the sums in question must be treated as income because (*a*) the form of the resolution showed that the company had not purported to make a capital distribution, and (*b*) the company had no power to make such a distribution:—

HELD: (i) upon the true construction of the resolution of Feb. 26, 1946, the company had purported to make a capital distribution out of realised profits.

(ii) the article authorising a capital distribution was effective, and the payments made pursuant thereto were not part of "the net income" of the trust funds, but were accretions to the capital thereof.

Re Ward, Ringland v. *Ward* (3) *followed.*

[**EDITORIAL NOTE.** It is held in this case that the resolution of the company, although referring to the distribution out of realised capital profits as an "additional dividend or distribution" intended to make a capital distribution and the sums were therefore accretions to capital within the decision in *Re Ward* (3).

AS TO EFFECT OF CAPITALISATION, see HALSBURY, Hailsham Edn., Vol. 29, pp. 648-650, para. 930; and FOR CASES, see DIGEST, Vol. 40, pp. 664-666, Nos. 2020-2042. and Supplement.]

Cases referred to:

(1) *Bouch* v. *Sproule* (1887), 12 App. Cas. 385; 40 Digest 665, *2035*; 56 L.J.Ch. 1037; 57 L.T. 345.

(2) *Hill (R.A.)* v. *Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; Digest Supp.; 144 L.T. 65.

(3) *Re Bates, Mountain* v. *Bates*, [1928] Ch. 682; Digest Supp.; 97 L.J.Ch. 240; 139 L.T. 162.

(4) *Re Ward's Will Trusts, Ringland* v. *Ward*, [1936] 2 All E.R. 773; [1936] Ch. 704; Digest Supp.; 105 L.J.Ch. 315; 155 L.T. 346. A

ADJOURNED SUMMONS to determine a question arising under the will of Wilfrid Vere Doughty. The facts are fully set out in the judgment.

Cecil Turner for the trustees.

J. Neville Gray, K.C., and *A. C. Nesbitt* for the widow.

Wilfrid Hunt for persons entitled in remainder.

H. O. Danckwerts for infant remaindermen. B

Cur. adv. vult.

ROXBURGH, J.: The residuary trust funds held upon the trusts of the will of Wilfrid Vere Doughty deceased, who died on Mar. 7, 1941, include 148 management shares of £1 each and 13,636 ordinary shares of £1 each in Consolidated Fisheries, Ltd. These trust funds are held upon trust to pay "the net income therefrom" to the defendant Miriam Maud Doughty, the testator's widow, during her life, with divers remainders over. The relevant articles of C Consolidated Fisheries, Ltd., are as follows:

> Art. 102. The company shall in respect of the calendar year 1937 and in respect of each subsequent calendar year pay out of the profits of the company or out of moneys standing to the credit of any reserve fund or funds available for the purpose: (A) To the management shareholders by way of a non-cumulative dividend or distribution for such year in priority to any payment to the ordinary shareholders such sum or sums as after the appropriate deduction of income tax (if any) at the standard rate D current at the time of payment will leave or amount to £14,865 per annum such payment to be divided rateably in proportion to the management shares held by such shareholders respectively. For the period Jan. 1, 1937, to Sept. 30, 1937, the payment shall be made on or before Dec. 31, 1937, and either in one sum or by instalments as the directors may determine and for the period subsequent to Sept. 30, 1937, the payments shall be regularly made on the first day of every calendar month in every year. (B) Subject as aforesaid: To the ordinary shareholders by way of a non-cumulative dividend or E distribution for such year such sum or sums as after the appropriate deduction of income tax (if any) at the like standard rate will leave or amount to £4,955 per annum such sum to be paid at such time or times as the directors may determine and to be divided rateably in proportion to the ordinary shares held by such ordinary shareholders respectively. Subject as aforesaid any further profits which shall hereafter be determined to be distributed shall be divisible as to three fourths thereof among the management shareholders rateably in proportion to the number of management shares held by them respectively and as to one fourth thereof among the ordinary shareholders F rateably in proportion to the number of ordinary shares held by them respectively.

I will now read the second part of art. 104A:

> The company in general meeting or the directors for the purpose of carrying out the obligations of the company under art. 102 may from time to time and at any time pass a resolution to the effect that any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets of the G company or received in respect of any capital assets or represented by shares or other property received as consideration or part consideration for the sale or realisation of any capital assets of the company or any investments representing any such surplus moneys as aforesaid shall be divided amongst the members of the company by way of capital distribution in proportion to their rights and interests in the distributable profits of the company and any such resolution shall be effective and shall be carried into effect by the directors accordingly.

H

Art. 104A was adopted between the date of the testator's will and the date of his death.

On Feb. 26, 1946, the company in general meeting resolved as follows:

> That pursuant to cll. 102 and 104A of the company's articles of association there be and there is hereby declared out of realised capital profits for payment forthwith and to be divided amongst the members in proportion to their rights and interests in the distributable profits of the company, an additional dividend or distribution to management and ordinary shareholders of £99,100 in respect of the year ended Dec. 31, 1945.

By virtue of such resolution £12,222 6s. 8d. became payable in respect of the 148 management shares and £3,409 in respect of the ordinary shares, and the question which I have to decide is whether these sums are part of the net income of the residuary trust funds or part of the capital thereof.

First I must determine whether, if the company had power to make a capital distribution out of realised capital profits, it purported to do so. Counsel for the widow has argued that the form of the resolution, with its reference to art. 102 and to "additional dividend . . . in respect of the year ended Dec. 31, 1945," shows that it did not. But in my judgment I must hold that it did, because whereas the reference to art. 102 is necessary, or at any rate desirable, to indicate the proportions in which the sum of £99,100 was to be divided, the reference to art. 104A would be wholly out of place unless the company was purporting to make a distribution of the character there indicated. I acknowledge that the concluding words "in respect of the year ended Dec. 31, 1945" seem to indicate confusion of thought, but they are not in my view strong enough to lead to any other conclusion.

The next question which I have to determine is whether the company has power to make any such distribution. Counsel for the widow submits that it has not, and he refers me to Lord Herschell's speech (12 App. Cas. 385, at pp. 397, 398) in *Bouch* v. *Sproule* (1):

> I quite agree with the court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Fry, L.J.: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital." And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such.

Now, I adopt what Lord Russell of Killowen said about *Bouch* v. *Sproule* (1) in *Hill* v. *Permanent Trustee Co. of New South Wales* (2) ([1930] A.C. 720, at p. 732):

> Inasmuch as much consideration was given by the High Court of Australia and before their Lordships' Board to the decision of the House of Lords in *Bouch* v. *Sproule* (1), it is advisable to consider what was the decision in that case and what was the basis upon which it rested. It is not, in their Lordships' view, an authority for the proposition that the company's statement of intention determines as between tenant for life and remainderman whether a sum paid away by the company to a shareholder who is a trustee is income or corpus of his trust estate. In *Bouch* v. *Sproule* (1) no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders.

I would add that I do not think that Lord Herschell, in using the words upon which counsel for the widow relies, had in mind such a case as the present.

Counsel for the widow then prayed in aid *Re Bates* (3) and *Hill* v. *Permanent Trustees Co. of New South Wales* (2). The relevant article in *Re Bates* (3) was:

> No dividend shall be paid except out of the profits of the company . . .

The payments in question were made out of a suspense account representing realised profit on the sale of assets, and were accompanied by statements that they were neither dividends nor bonuses but capital distributions. There was no article authorising capital distribution, and Eve, J., said ([1928] Ch. 682, at p. 688):

> . . . . in my opinion no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalised surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit derived, not from the trading of the company, but from a fortunate appreciation in value of some or other of its capital assets, and in the hands of those who received it it retained the same characteristics.

The correctness of that decision is not challenged in the present case, but Eve, J.,
did introduce a reference to *Bouch* v. *Sproule* (1) which would have caused me
difficulty but for the later cases.

Hill v. *Permanent Trustee Co. of New South Wales* (2) resembled *Re Bates* (3)
closely. The relevant articles were :

> Art. 122. No dividend shall be payable except out of the profits of the company,
> and no dividend shall carry interest. Art. 124. The directors may from time to time
> pay to the members . . . such interim dividends as in their judgment the position of the A
> company justifies.

The resolution was :

> That out of the profits of the company a cash dividend of 9*s*. 6*d*. in respect of each
> fully paid share in the company be declared and to be payable as soon as funds are
> available.

The payments were accompanied by the following statement from the secretary B
or some official of the company :

> I have been instructed by the directors to advise that at a meeting held on the 11th
> instant it was decided to pay out of the profits of the company a cash dividend of
> 9*s*. 6*d*. in respect of each fully paid share in the company. In accordance with this
> decision I enclose cheque for [. . .] being the amount to which you are entitled, and I
> will be obliged if you will sign and return to me in due course the attached form of
> acknowledgment. I have also been instructed to state that the dividend is being paid C
> out of the profits arising from the sale of breeding stock, being assets of the company
> not required for purposes of resale at a profit, and that it is free of income tax.

There was in that case also no article authorising a capital distribution and
the correctness of that decision is not challenged. But the judgment of the
Board delivered by Lord Russell of Killowen contains some propositions
of a general character which (counsel for the widow submits) show that such
an article where found cannot have effect. He relies on the following passages D
([1930] A.C. 720, at p. 731) :

> (2) A limited company not in liquidation can make no payment by way of return
> of capital to its shareholders except as a step in an authorised reduction of capital.
> Any other payment made by it by means of which it parts with moneys to its shareholders
> must and can only be made by way of dividing profits. Whether the payment
> is called " dividend " or " bonus," or any other name, it still must remain a payment
> on division of profits. (3) Moneys so paid to a shareholder will (if he be a trustee) *prima* E
> *facie* belong to the person beneficially entitled to the income of the trust estate. If such
> moneys or any part thereof are to be treated as part of the corpus of the trust estate
> there must be some provision in the trust deed which brings about that result. No
> statement by the company or its officers that moneys which are being paid away to
> shareholders out of profits are capital, or are to be treated as capital, can have any
> effect upon the rights of the beneficiaries under a trust instrument which comprises
> shares in the company. F

But, in my judgment, I am bound by the decision of Clauson, J., in *Re
Ward's Will Trusts* (4) to hold that those observations have not the effect for
which counsel for the widow contends, and to hold that an article authorising
capital distribution is effective. In that case the article was as follows :

> The company in general meeting may from time to time and at any time resolve that
> any surplus moneys in the hands of the company representing the moneys received or
> recovered in respect of or arising from the realisation of any capital assets of the G
> company or any investments representing the same instead of being applied in the
> purchase of other capital assets or for other capital purposes be distributed amongst
> the members on the footing that they receive the same as capital and in the shares
> and proportions in which they would have been entitled to receive the same if it had
> been distributed by way of dividend.

The resolution was as follows : H

> That pursuant to cl. 67 (*a*) of the articles of association . . . the sum of £819,200,
> part of the surplus moneys in the hands of the company representing moneys received
> or recovered in respect of or arising from the realisation of certain capital assets of the
> company then standing to the credit of " capital reserve account," instead of being
> applied in the purchase of other capital assets or for other capital purposes, be distributed
> amongst the members, on the footing that they receive the same as capital
> and in proportion to the shares held by them respectively in the company and that the
> managers be, and that they are thereby authorised . . . to distribute the same accordingly.

The relevant trust was as follows :

> . . . to pay the dividends, interest, and annual income to arise therefrom to [the testator's] wife, Caroline Theodora Ward . . . during . . . her . . . life or until she shall marry again.

Clauson, J., dealt with *Hill* v. *Permanent Trust Co. of New South Wales* (2) as follows ([1936] 2 All E.R. 773, at pp. 779, 780) :

> It was, I think, conceded by counsel for the tenant for life that before the year 1930 there was no case in the books which laid down any principle which would be inconsistent with the decision which I have expressed in this judgment, but he suggested that there was to be found some principle laid down in a Privy Council decision of *Hill* v. *Permanent Trustee Co. of New South Wales* (2) which precluded me from arriving at the decision which I have expressed. I have studied that case with some care, and, as far as I can see, the points which are material to the present case, namely, as to whether or not there is any objection to be made to the validity of an express provision such as I have in this case, enabling the company to make a payment by way of capital distribution, and as to the operation of such a provision, were not before the court in that case. The constitution of the company with which their Lordships were dealing contained nothing corresponding with art. 67 (*a*), and, as far as I can see, no such points as I have before me are covered by anything which was said in that case.

In the result he held that art. 67 (*a*) was effective and that payments made thereunder were not "dividends, interest or annual income." It seems to me that there is no difference in substance between the effect of that art. 67 (*a*) and art. 104A here or between "dividends, interest or annual income" and "net income," and I hold that payments made pursuant to art. 104A are not part of the "net income" of the trust fund, but are accretions to the capital thereof.

Declaration accordingly. Costs to be paid as between solicitor and client out of the residuary estate.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Ponsonby, Carlile & Booths*, Oldham (for the plaintiffs and the defendants other than the widow) ; *Peacock & Goddard* (for the widow).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

MERSEY DOCKS AND HARBOUR BOARD *v.* COGGINS & GRIFFITHS (LIVERPOOL) LTD. AND McFARLANE.

[House of Lords (Viscount Simon, Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt), May 23, 27, 28, July 26, 1946.]

Master and Servant—Loan of servant—Hire of crane and driver—Contract subject to dock regulations—"The drivers so provided shall be the servants of the applicants"—Accident due to negligent driving of driver—Driver not subject to control of hirer in regard to manner of driving—General employer responsible for negligent driving of driver.

A firm of stevedores had hired from the Mersey Docks and Harbour Board the use of a crane together with its driver to assist in loading a ship lying in the Liverpool docks. The contract was subject to the board's regulations, reg. 6 of which contained the clause : "The drivers so provided shall be the servants of the applicants." The driver in question was a skilled workman engaged and paid by the board, and the board alone had power to dismiss him. The stevedores directed what operations should be executed by him, but they had no authority to direct how he should work the crane. Owing to the negligence of the driver, a checker employed by the forwarding agents who had engaged the stevedores was injured in the course of his employment. The question to be determined was whether, in applying the maxim *respondeat superior*, the general employers of the crane driver or the hirers were liable for his negligence. It was contended by the board that, under the terms of the contract between the board and the stevedores, the stevedores were liable :—

Held : (i) the question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver.

(ii) the board, as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The board were, therefore, liable for his negligence.

Decision of the Court of Appeal, sub nom. McFarlane v. *Coggins and Griffiths (Liverpool), Ltd.* ([1945] 1 All E.R. 605) *affirmed.*

[**EDITORIAL NOTE.** In the Court of Appeal this case was decided by applying the test laid down in *Nicholas* v. *Sparkes* (5), namely : " In the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom, upon his employer's direction, he was using the vehicle ? " The House of Lords affirm the decision of the Court of Appeal, Lord Uthwatt expressing the view that the proper test to be applied in such cases is whether or not the hirer had authority to control the manner of the execution of the work. Given the exercise of that authority, it is pointed out, its exercise or non-exercise on the occasion of the doing of the act in question is irrelevant. The hirer is liable for the wrongful act of the workman whether or not he has given any specific order.

As to Liability for Servants of Contractors, see HALSBURY, Hailsham Edn., Vol. 22, pp. 241-243, paras. 421, 422 ; and for Cases, see DIGEST, Vol. 34, pp. 22-28, Nos. 23-61.]

Cases referred to :

(1) *Quarman* v. *Burnett* (1840), 6 M. & W. 499 ; 34 Digest 23, *29* ; 9 L.J.Ex. 308.
(2) *Donovan* v. *Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629 ; 34 Digest 26, *49* ; 63 L.J.Q.B. 25 ; 68 L.T. 512.
(3) *M'Carton* v. *Belfast Harbour Comrs.*, [1911] 2 I.R. 143 ; Digest Supp.
(4) *Cairns* v. *Clyde Navigation Trustees* (1898), 25 R. (Ct. of Sess.) 1021.
(5) *Nicholas* v. *Sparkes & Son*, [1945] K.B. 309.
(6) *Ainslie* v. *Leith Docks Comrs.*, [1919] S.C. 676 ; 34 Digest 26, *49i* ; 57 Sc.L.R. 5.
(7) *Rourke* v. *White Moss Colliery Co.*, (1877) 2 C.P.D. 208 ; 34 Digest 25, *46* ; 46 L.J.Q.B. 283 ; 36 L.T. 49.
(8) *Johnson* v. *Lindsay*, [1891] A.C. 371 ; 24 Digest 22, *24* ; 61 L.J.Q.B. 90 ; 65 L.T. 97.
(9) *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491 ; [1942] A.C. 509 ; 167 L.T. 404.
(10) *Bain* v. *Central Vermont Ry. Co.*, [1921] 2 A.C. 412 ; 34 Digest 27, *54* ; 90 L.J.P.C. 221.

Appeal by the Mersey Docks and Harbour Board from a decision of the Court of Appeal (Scott, du Parcq and Morton, L.JJ.), dated Feb. 9, 1945, and reported *sub nom. McFarlane* v. *Coggins and Griffiths (Liverpool), Ltd.* ([1945] 1 All E.R. 605). The facts are fully set out in the opinions of Viscount Simon and Lord Macmillan.

F. E. Pritchard, K.C., and *G. Glynn Blackledge* for the appellants.

Wilfrid Clothier, K.C., and *R. S. Nicklin* for the respondents Coggins & Griffiths (Liverpool), Ltd.

The House took time to consider its opinion.

Viscount Simon : My Lords, in this appeal the Mersey Docks and Harbour Board (hereinafter called the board), against whom a plaintiff named John McFarlane has obtained judgment at Liverpool Assizes for £247 damages with costs on the ground of negligence in the working of a mobile crane belonging to the board, seeks to have the judgment against the board discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against Coggins & Griffiths (Liverpool), Ltd., who are master stevedores and who had hired from the board the use of the crane, together with its driver, for the purpose of loading a ship called the Port Chalmers lying at the quay at the North Sandon Dock, Liverpool. The question in the case is, therefore, whether Newall, the driver of the crane, is to be regarded, for the purpose of McFarlane's claim, as employed by the board or by Coggins & Griffiths. Both the trial judge, Croom-Johnson, J., and the Court of Appeal (Scott, du Parcq and Morton, L.JJ), held that the board was responsible to the plaintiff for Newall's negligence, but the board contends that Newall was not at the time of the accident and for the purpose of the operation in which he was then engaged a servant of the appellant board but was the servant of Coggins & Griffiths.

When the case was called on before the House it appeared that, in an effort to simplify proceedings, the board and Coggins & Griffiths were the only parties before us, and it was pointed out that McFarlane, who in the action had sued both these parties in the alternative, was indifferent as to which of them was pronounced to be liable to him as, once he had established that his injuries were due to Newall's negligence, he was bound to get payment from one or other. The House, however, felt that it could not proceed to hear the appeal unless McFarlane was made a party to it, since your Lordships were being asked to reverse a judgment which he had obtained. The petition of appeal was, therefore, varied by adding McFarlane's name as a respondent and he intimated through his solicitors that he did not desire to take part in the argument but was ready to accept the decision of the House on the question which of the two original defendants was liable to him.

The further facts which raise the question to be decided can be very briefly stated. The board own a number of mobile cranes, each driven by a skilled workman engaged and paid by it, for the purpose of letting out the apparatus so driven to applicants who have undertaken to load or unload cargo at Liverpool Docks. The conditions upon which such cranes are supplied are contained in the Mersey Docks and Harbour Board's Regulations, reg. 6 of which runs as follows :

> Applicants for the use of cranes must provide all necessary slings, chains and labour for preparing the article to be lifted, and for unshackling the same. They must also take all risks in connection with the matter. The board do not provide any labour in connection with the cranes except the services of the crane drivers for power cranes. The drivers so provided shall be the servants of the applicants.

On the evening when the accident happened McFarlane, who was a registered checker employed by James Dowie & Co., was engaged in checking goods which were in course of being transferred from shed to ship by means of this crane. McFarlane, it will be observed, was not in the employ of Coggins & Griffiths ; his employers were the forwarding agents who had engaged Coggins & Griffiths as stevedores to load the cargo on the ship. The crane, which does not run on fixed lines but can be moved in any direction by the crane driver, had picked up under McFarlane's direction a case of which McFarlane had to note the number and marks, but instead of further movement of the crane being stopped by Newall till McFarlane could take the particulars, it was negligently driven on, with the result that McFarlane was trapped and injured.

What has now to be decided is whether, in applying the doctrine of *respondeat superior,* liability attaches on these facts to the board as the regular employers of Newall or to Coggins & Griffiths as the persons who were temporarily making use of of the crane which Newall was driving. As already stated, the board had engaged Newall, and it paid his wages. It alone had power to dismiss him. On the other hand, Coggins & Griffiths had the immediate direction and control of the operations to be executed by the crane driver with his crane, *e.g.*, to pick up and move a piece of cargo from shed to ship. Coggins & Griffiths, however, had no power to direct how the crane driver should work the crane. The manipulation of the controls was a matter for the driver himself.

That this was the actual situation is plain from the evidence given by Pullen, an official of Coggins & Griffiths, who was called at the trial. Pullen, with reference to the extent of control exercised by Coggins & Griffiths over the crane driver, said :

> We have no control over the way he drives it. We can only tell him what we want and it is not up to us to tell him how to drive it or anything. If he did not do it to our satisfaction we would certainly send in a complaint to the dock board . . . We leave it to the cranedriver to take it [*i.e.*, the moving of a parcel of goods] in his way. We do not interfere with the driver of the crane.

Similarly, Coggins & Griffiths' staff foreman testified that the stevedores give orders to the crane driver to pick up goods and to lower them into a particular hold, but do not give orders "how he drives the crane, or when he puts his brake on." In the present case the accident happened because of the negligent way in which the crane driver worked his crane, and since Coggins & Griffiths had no control over how he worked it, as distinguished from telling him what he was to do with the crane, it seems to me to follow that Newall's general employers must be liable for this negligence and not the hirers of the apparatus.

Counsel for the appellants placed much reliance upon the language of the Mersey Docks and Harbour Board's Regulations, reg. 6. But when the plaintiff has proved injury caused by the negligence of Newall, and the question arises who is answerable as *superior* for such negligence, this question is not to be determined by any agreement between the owner and the hirer of the crane, but depends on all the circumstances of the case. Even if there were an agreement between the board and Coggins & Griffiths that, in the event of the board being held liable for negligent driving of the crane while it is under hire to the latter, the latter would indemnify the board, this would not in the least affect the right of the plaintiff to recover damages from the board as long as the board is properly to be regarded as the crane driver's employer.

It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances.

It is not easy to find a precise formula by which to determine what these circumstances must be. In the century-old case of *Quarman* v. *Burnett* (1), which has always been treated as a guiding authority, the defendants owned a carriage, but habitually hired from a jobmaster horses to draw it. The jobmaster also supplied a regular driver who wore a livery provided by the defendants. It was decided that the defendants were not liable for the results of the driver's negligence in handling the horses. The ground of the decision was that the defendants had no control over the way in which the horses were driven, though they could direct the driver where and when to drive. The test suggested by Bowen, L.J., in *Donovan* v. *Laing Construction Syndicate* (2), when he said ([1893] 1 Q.B. 629, at p. 634) : " by the employer is meant the person who has a right at the moment to control the doing of the act " can be understood in this sense, and in this sense I would accept it : *i.e.*, " to control the doing of the act " would mean " to control the way in which the act involving negligence was done."

I find it somewhat difficult, however, to fit the facts in *Donovan's* case (2) into this proposition, and if that decision is upheld, it must be on the basis found in the words of Lord Esher, M.R., when he said (*ibid.*, at p. 632) :

> The man was bound to work the crane according to the orders and under the entire and absolute control of [the hirers].

But, as the House of Lords insisted in *M'Cartan* v. *Belfast Harbour Comrs.* (3), the value of an earlier authority lies, not in the view which a particular court took of particular facts, but in the proposition of law involved in the decision. In *M'Cartan's* case (3) Lord Dunedin referred to, and expressly approved, the judgment of Lord Trayner in *Cairns* v. *Clyde Navigation Trustees* (4), which, on facts closely resembling the present, held that the trustees, as general employers, were in law liable for the negligent driving of a crane which they had let out with its driver for discharging a ship. Notwithstanding the *dictum* of Bowen, L.J., in *Donovan's* case (2), the principle of the carriage cases and the crane cases appears to me to be the same : I would especially refer to what Lord Dunedin said ([1911] 2 I.R. 143, at p. 151) in *M'Cartan's* case (3).

The Court of Appeal in this case, following its own decision in *Nicholas* v. *F. J. Sparkes & Son* (5) applied a test it had formulated, where a vehicle is lent with its driver to a hirer, by propounding the question ([1945] 1 All E.R. 605, at p. 608) :

> In the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom upon his employer's direction, he was using the vehicle . . . ?

I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workman, the manner in which the vehicle is driven. It is this authority which determines who is the workman's *superior*. In the ordinary case, the general employers exercise this authority by delegating to their workman discretion in method of driving, and so the Court of Appeal correctly points out ([1945] 1 All E.R. 605, at p. 608), that in this case the driver Newall :

> . . . in the doing of the negligent act, was exercising his own discretion as driver—

a discretion which had been vested in him by his regular employers when he was sent out with the vehicle—and he made a mistake with which the hirers had nothing to do.

If, however, the hirers intervene to give directions as to how to drive which they have no authority to give, and the driver *pro hac vice* complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors.

I move that the appeal be dismissed with costs.

LORD MACMILLAN [read by LORD PORTER]: My Lords, John McFarlane, the plaintiff in the action which has given rise to this appeal, is a registered checker who in Aug., 1943, was employed by Dowie & Co., forwarding agents, in checking parcels of cargo which were in course of being loaded in S.S. Port Chalmers at the North Sandon Dock, one of the docks of the appellants, the Mersey Docks and Harbour Board. The stevedores who were engaged in loading the vessel were the respondents Coggins & Griffiths (Liverpool), Ltd. To assist them in their work the stevedores hired from the board a portable travelling crane with its driver, Newall. On the night of Aug. 22, 1943, while the plaintiff was endeavouring to check the marks on a parcel loaded on the crane which was standing in the dock shed, Newall set the crane in motion with the result that the plaintiff was struck by it and seriously injured. It is admitted that Newall was negligent in starting the crane as he did and that the injury to the plaintiff was due to his negligence.

The only question for your Lordships' determination is whether, on the principle of *respondeat superior*, the responsibility for the negligence of the driver of the crane lies with the stevedores or with the board, whom the plaintiff sued alternatively. The answer depends upon whether the driver was acting as the servant of the stevedores or as the servant of the board when he set the crane in motion.

That the crane driver was in general the servant of the board is indisputable. The board engaged him, paid him, prescribed the jobs he should undertake and alone could dismiss him. The letting out of cranes on hire to stevedores for the purpose of loading and unloading vessels is a regular branch of the board's business. In printed regulations and rates issued by the board the cranes are described as "available for general use on the dock estate at Liverpool and Birkenhead" and as regards portable cranes the stipulated rates vary according as they are provided "with board's driver" or "without board's driver." *Prima facie*, therefore, it was as the servant of the board that Newall was driving the crane when it struck the plaintiff. But it is always open to an employer to show, if he can, that he had for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts. The burden is on the general employer to establish that such a transference has been effected.

Agreeing as I do with the trial judge and the Court of Appeal, I am of opinion that, on the facts of the present case, Newall was never so transferred from the service and control of the board to the service and control of the stevedores as to render the stevedores answerable for the manner in which he carried on his work of driving the crane. The stevedores were entitled to tell him where to go, what parcels to lift, and where to take them, *i.e.*, they could direct him as to what they wanted him to do, but they had no authority to tell him how he was to handle the crane in doing his work. In driving the crane, which was the board's property confided to his charge, he was acting as the servant of the board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff. It was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the board to do.

Counsel for the board sought to make out that the true view was that Newall was a participant with the stevedores' men in the common task or enterprise of loading the ship and that for this purpose he had become temporarily the servant of the stevedores and subject to their control, but I have already pointed out that Newall was never subjected to the orders and control of the stevedores in the only relevant matter of the driving of his crane, as to which the stevedores had neither expert knowledge nor responsibility. Reference was also made to the Mersey Docks and Harbour Board Regulations, reg. 6, which states that drivers provided by the board " shall be the servants of the applicants," *i.e.*, of the parties to whom they are hired. But this does not mean that the board's drivers cease to be the servants of the board when they accompany cranes which the board lets out on hire. Servants cannot be transferred from one service to another without their consent, and, even where consent may be implied, there will always remain a question as to the extent and effect of the transfer. Here the driver became the servant of the stevedores only to the extent and effect of his taking directions from them as to the utilisation of the crane in assisting their work, not as to how he should drive it.

Many reported cases were cited to your Lordships but where, as all agree, the question in each case turns upon its own circumstances, decisions in other cases are rather illustrative than determinative. So far as attempts have been made to formulate a criterion of general application, it cannot be said that these attempts have been very successful. Counsel for the board very naturally placed much reliance on *Donovan* v. *Laing, Wharton and Down Construction Syndicate* (2), where the facts bore a considerable resemblance to those in the present case and where stevedores were held liable for the negligence of the driver of a crane hired by them. The current of subsequent authorities has set against this case and the opinions of the judges who have commented upon it have been largely concerned with distinguishing and explaining it, if not explaining it away. If the ground of judgment in *Donovan's* case (2) is to be found in the words of LORD ESHER, M.R. ([1893] 1 Q.B. 629, at p. 632), where he says that the crane driver " was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co.," the wharfingers, then it is enough to say that, in my opinion, the position of Newall *vis a vis* the stevedores in the present case cannot be so described. More satisfactory guidance is to be found in the opinions expressed in this House in *M'Cartan* v. *Belfast Harbour Comrs.* (3). There LORD DUNEDIN found himself in entire agreement with LORD TRAYNER'S judgment in *Cairns* v. *Clyde Navigation Trustees* (4), and both these cases were in turn followed in *Ainslie* v. *Leith Dock Comrs* (6), where LORD MACKENZIE discusses the matter fully and convincingly. The facts in those three cases were in all material respects identical with the facts in the present case and in each the same decision was reached, and the dock authority held liable. I find ample warrant in them for my view, which I understand all your Lordships share, that the appeal should be dismissed.

LORD PORTER: My Lords, I need not repeat the facts giving rise to the question to be determined in this appeal. That question is whose servant was the crane driver, Francis Newall, at the time of the accident. As to this matter I find myself in agreement with those members of your Lordships' House who sat to hear the appeal and only desire to add a few observations as to the principles concerned.

In determining this question it has to be borne in mind that the employee's position is an important consideration. A contract of service is made between master and man and an arrangement for the transfer of his services from one master to another can only be effected with the employee's consent, expressed or implied. His position is determined by his contract. No doubt, by finding out what his work is and how he does it and how he fulfils the task when put to carry out the requirements of an employer other than his own, one may go some way towards determining the capacity in which he acts, but a change of employer must always be proved in some way, not presumed. The need for a careful consideration of the circumstances said to bring about the change of employment has latterly been accentuated by the statutory provisions now in force for compulsory health and accident insurance and, in the case of many firms, by the existence of funds accumulated under a trust for the benefit of employees who will not lightly incur the risk of losing such benefits by a transfer of their services from one master to another. Nor is it legitimate to infer that a change of masters has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. A contract of this kind may of course determine the liability of the employers *inter se*, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion.

The *indicia* from which the inference of a change is to be derived have been stated in many different ways, notably in the words of BOWEN, L.J., in *Donovan* v. *Laing, Wharton & Down* (2), where he says ([1893] 1 Q.B. 629, at p. 634):

> There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them and in that case he does not retain control over the work.

He adds, and LORD ESHER, M.R., uses words to the same effect:

> It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do.

In that case, as in this, a crane driver was lent to a firm of stevedores to enable them to load a ship and an employee of the wharfingers whose duty it was to direct the working of the crane was injured by the driver's negligence. In these circumstances it was held that his general employers were not liable as they had parted with the power of controlling him. The appellants strongly relied upon both the inference to be drawn from the facts and the statement of principle contained in that case. If that statement means that the employer on whose work the man was engaged controlled both the object to be achieved and the method of performance, I should think a finding that that employer was liable justified, but whether, in view of the later decision of *M'Cartan* v. *Belfast Harbour Comrs.* (3), in your Lordships' House, the same inference would now be drawn from the facts proved in evidence in *Donovan's* case (2) may be doubted. The decision itself is justified upon the finding of fact that all control had passed to the temporary master.

A number of other tests have been suggested as helping to determine in particular cases under which of two employers the man was working at the relevant time. The appellants quoted and relied upon, among others, *Rourke* v. *White Moss Colliery* (7), where the words were "actually employed to do their work," and *Johnson* v. *Lindsay* (8) where the phrase "working to a common end" is used. For myself I do not find much assistance in the circumstances of the present case from such expressions, especially as they were used with reference to men who had left their ordinary employment and taken on work for another employer, as distinguished from those who continued to do their ordinary work though no doubt from time to time subjected to the directions of a third party as to the work they were to do.

Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health unemployment and accident.

I cannot think that such a conclusion is to be drawn from the facts established. I should dismiss the appeal.

Lord Simonds [read by Lord Uthwatt]: My Lords, I agree that this appeal should be dismissed. The facts and the somewhat unusual manner in which the case has been brought before this House have already been stated. I will only emphasise that the single question for your Lordships is whether the appellants are answerable to the respondent McFarlane under the maxim *respondeat superior* for the tortious act of one Newall. The question whether, if they are so answerable, they have any rights against the respondents Coggins & Griffiths (Liverpool), Ltd. (whom I will call "the respondents"), is not here relevant.

It is not disputed that at the time when the respondents entered into a contract with the appellants under which the latter were to supply the former with the service of a crane and craneman, Newall was the servant of the appellants. He was engaged and paid and liable to be dismissed by them. So also, when the contract had been performed, he was their servant. If, then, in the performance of that contract he committed a tortious act, injuring McFarlane by his negligence, they can only escape from liability if they can show that *pro hac vice* the relation of master and servant had been temporarily constituted between the respondents and Newall and temporarily abrogated between themselves and him. This they can do only by proving, in the words of Lord Esher, M.R., in *Donovan's* case (2) that entire and absolute control over the workman had passed to the respondents. In the cited case the court held upon the facts that the burden of proof had been discharged and I do not question the decision. But it appears to me that the test can only be satisfied if the temporary employer (if to use the word "employer" is not to beg the question) can direct not only what the workman is to do but also how he is to do it.

In the case before your Lordships, the negligence of the workman lay, not in the performance of any act which the respondents could and did direct and for which, because they procured it, they would be responsible, but in the manner in which that act was performed, a matter in which they could give no direction and for which they can have no responsibility.

The doctrine of the vicarious responsibility of the *superior*, whatever its origin, is to-day justified by social necessity, but, if the question is where that responsibility should lie, the answer should surely point to that master in whose act some degree of fault, though remote, may be found. Here the fault, if any, lay with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. If an accident then occurred through his negligence, that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice. Suppose that the negligence of the craneman had resulted in direct damage to the respondents, I do not see how the appellants could escape liability. For the obligation to supply a crane and a man to work it is an obligation to supply a crane which is not defective and a man who is competent to work it. It would be a strange twist of the law if, the negligence resulting in damage not to the respondents but to a third party, the liability shifted from the appellants to the respondents.

My Lords, I am conscious that in thus stating my view of the law I leave little room for the application of that part of the rule stated by Bowen, L.J., in *Donovan's* case (2) which in certain circumstances throws vicarious responsibility upon the temporary employer. I must admit that I do not find it easy to reconcile all that that judge said with earlier and later authorities, and I doubt whether any complete reconciliation is possible. But I would recall the words used by Lord Esher that I have already cited and the further fact that in that case the temporary employer was said to have the power of dismissing the workman. It is in the context of such facts, which enabled Lord Dunedin in *M'Cartan's* case (3) to say he would have decided the case in the same way, that the judgment of Bowen, L.J., should be read. If it were not so, the decision in *Donovan's* case (2) could not stand with the recent decision in this House in *Century Insurance Co, Ltd.* v. *N. Ireland Road Transport Board* (9), and should be regarded as overruled.

Counsel for the appellants laid great stress upon the terms of the contract between the appellants and respondents. This contract incorporated the "regulations and rates applying to the fixed and moveable cranes on land available for general use" prescribed by the appellants and one of these regulations was as follows:

> 6. . . . The board do not provide any labour in connection with the cranes except the services of the crane drivers for power cranes. The drivers so provided shall be the servants of the applicants.

With this he linked up certain answers given by Newall at the trial in which he said, *inter alia,* that it was his duty:

A

> . . . to take orders from the firm you are hired out to, go where you are sent, do what you are told.

The argument was that this was the best evidence that the service of Newall was *pro hac vice* transferred from the appellants to the respondents and that the transfer was recognised and acquiesced in by him, and reference was made to the judgment of the Privy Council in *Bain's* case (10). But I do not think B this argument is sound. *Prima facie,* the contract between the appellants and respondents is not evidence against the plaintiff in determining the liability of either of them to him, though he may, if he thinks fit, adduce it in evidence for the purpose of showing what is the function of the workman in relation to one employer or the other. In this sense it may be the best evidence available against the employer. But the terms of the bargain that the driver shall be the servant of one party or the other cannot be used by either of them to contradict C the fact, if it is the fact, that the complete dominion and control over the servant has not passed from one to the other. It is nothing else than an incorrect inference of law which cannot affect the rights of the plaintiff. It is vain to attempt to give to such an agreement the effect of a tripartite bargain between, *e.g.*, two householders and a jobbing gardener by which the latter agrees to serve each of them for so many hours or days a week, in which case the gardener, D if, indeed, he does not remain his own master throughout, is now the servant of one of them, now of the other. The observations in *Bains*' case (10) when carefully read do not lead to any other conclusion. Nor can the answers of Newall himself displace the fact that he did not, and was not expected to, take orders from the respondents as to the way in which he should carry out their directions. As to that he said: "I take no orders from anybody," a sturdy answer which meant that he was a skilled man and knew his job and would E carry it out in his own way. Yet ultimately he would decline to carry it out in the appellants' way at his peril, for in their hands lay the only sanction, the power of dismissal.

Since writing this opinion I have had the advantage of reading that of my noble and learned friend LORD MACMILLAN. I am indebted to him for a reference to *Ainslie* v. *Leith Dock Comrs.* (6), and I find in the judgment of LORD MACKENZIE in that case a wholly satisfactory explanation of the word F "control" in the context in which it has been used in the earlier authorities on this subject and an analysis of those authorities with which I am in full accord.

LORD UTHWATT: My Lords, arrangements for the supply by an employer of one of his workmen to a third party, whom I will call "the hirer," for the purposes of a particular job are common and have given rise to many disputes G on the question whether, while engaged on the job, the workman for the purposes of the maxim *respondeat superior* is to be treated as the servant of the general employer or of the hirer. The principles established by the authorities are clear enough. The workman may remain the employee of his general employer, but at the same time the result of the arrangements may be that there is vested in the hirer a power of control over the workman's activities sufficient to attach to the hirer responsibility for the workman's acts and defaults and to H exempt the general employer from that responsibility. The burden of proving the existence of that power of control in the hirer rests upon the general employer. The circumstance that it is the hirer who alone is entitled to direct the particular work from time to time to be done by the workman in the course of the hiring is clearly not sufficient for that purpose. The hirer's powers in this regard are directed merely to control of the job and the part the workman is to play in it, not to control of the workman, and the workman in carrying out the behests of the hirer as to what is to be done is not doing more than implementing the general employer's bargain with the hirer and his own obligations as a servant of his general employer. To establish the degree of control requisite to fasten responsibility upon him, the hirer must in some reasonable sense be shown to have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character. Unless there be that authority the workman is not serving the hirer, but merely serving the interests of the hirer, and service under the hirer in the sense I have stated is essential. Whether there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the arrangement made: see *Century Insurance Co.* v. *Northern Ireland Transport Board* (9).

It may be an express term of the bargain between the general employer and the hirer that the workman is to be the servant of the hirer or is to be subject in all respects to his authority. That, in my opinion, does not of itself determine the workman's position. The workman's assent, express or implied, to such a term would, I think, conclude the point one way, and his dissent conclude it the other way. In cases where the point cannot be disposed of in this fashion, the nature of the activities proper to be demanded of the workman by the hirer and the relation of those activities to the activities of the hirer's own workmen are of outstanding importance in determining whether the hirer has in any reasonable sense authority to control the manner of execution of the workman's task. For instance, the position under the hirer of a craftsman entrusted for the hirer's purposes with the management of a machine belonging to his general employer, that machine demanding for its proper operation the exercise of technical skill and judgment, differs essentially from the position under the hirer of an agricultural labourer hired out for a period of weeks for general work. In the case of the craftsman the inference of fact may be drawn that he was not the servant of the hirer even though the bargain provided that he should be; and in the case of the agricultural labourer the inference of fact may be that he became the servant of the hirer, though the bargain provided that he should not be. The realities of the matter have to be determined. The terms of the bargain may colour the transaction; they do not necessarily determine its real character.

The facts of this case have already been stated and I do not propose to travel over them again. There is, however, one matter in the evidence to which reference need be made. The hiring agreement contained the following provision:

> The drivers so provided [*i.e.*, the crane drivers] shall be the servants of the applicants [*i.e.*, the company].

There is no evidence that the workman agreed to this provision or was, indeed, aware of it. Without his consent he could not be made the servant of the company. In light of the surrounding circumstances it is impossible to construe the provision as authorising the company to direct the manner in which the workman should do his work and for the purpose in hand I read the provision merely as stating what the board and the company agreed should be the legal result of an arrangement the operative terms of which are to be found elsewhere. Their agreement on a matter of law is immaterial. For the purposes of this case this point may be left there.

Applying the general principles which I have stated to this case, the particular question to be determined is whether or not Coggins & Griffiths (Liverpool), Ltd. had authority to give directions as to the manner in which the crane was to be operated. To my mind it is clear they were not intended to have, and did not have, any such authority. The manner in which the crane was to be operated was and remained exclusively the workman's affair as the servant of the dock board. The workman, in saying in his evidence: "I take no orders from anybody," pithily asserted what was involved in the hiring out of the crane committed to his charge by the dock board and, so far as the company was concerned, gave an accurate legal picture of his relations to the company. The company's part was to supply him with work: he would do that work but he was going to do it for the dock board as their servant in his own way.

With respect to the authorities, I find myself in complete agreement with the observations made by the noble and learned Lord on the Woolsack and I desire to refer to one matter only. The test suggested in *Nicholas*' case (5) was as follows ([1945] K.B. 309n., at pp. 311, 312) :

> One test in cases of a vehicle . . . lent with its service to a hirer, is this question : "In the doing of the negligent act was the workman exercising the discretion given him by the general employer or was he obeying . . . a specific order of the party for whom upon his employer's direction he was using the vehicle . . . ?

The test is not, I think, correct and, to my mind, the second question contained
A in the test leads to confusion. The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority, its exercise or non-exercise on the occasion of the doing of the act is irrelevant. The hirer is liable for the wrongful act of the workman, whether he gave any specific order or not. Where there is no such authority vested in the hirer, he may, by reason of the giving of a specific order, be responsible for harm resulting from the negligent execution of that order.
B But it is not every order given by the hirer that will result in liability attaching to him. The nature and terms of the order have to be considered. For instance, an order given to unload cargo from a particular hold in the ship would not—assuming that to be a proper operation—subject the hirer to liability for damage resulting from any negligent driving of the crane in carrying out the order. And lastly, where liability does attach to the hirer by reason of a
C specific order, that liability arises by the reason that in the particular matter he was a joint tortfeasor with the workman. The general relation arising out of the contract of hiring is in no way involved.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *R. H. Bransbury*, Liverpool (for the appellants) ; *Botterell & Roche*, agents for *Weightman, Pedder & Co.*,
D Liverpool (for the respondents Coggins & Griffiths (Liverpool), Ltd.).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

E OCEAN STEAMSHIP CO., LTD. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. THE PRIAM.

[COURT OF APPEAL (Scott, Tucker and Bucknill, L.JJ.), May 10, 13, 14, 15, June 4, 1946.]

Insurance—Marine insurance—War risks—Warlike operations—"Consequences of
F *warlike operations"—Ship carrying war material including heavy deck cargo—Necessity to maintain speed and take zigzag course for fear of enemy submarines—Damage caused by effect of heavy seas on deck cargo and aggravated by reason of speed of ship—"Consequence of warlike operation."*

The Priam, which was requisitioned by the Government, was insured by war-risks insurers against "the consequences of hostilities or warlike operations." On Dec. 2, 1942, she sailed from Liverpool for Alexandria,
G *via* the Cape, with a very heavy cargo, consisting mainly of war material urgently needed by the Army in North Africa and including deck cargo of a type which would not in peace time have been carried in such a position on a voyage across the Atlantic in winter. Under Admiralty instructions the ship was to proceed right out into the North Atlantic, zigzagging all the way. Between Dec. 7 and 12, the ship encountered very heavy weather. The deck cargo, which had been securely lashed to the hatch covers,
H became loose and caused part of the hatch covers to be stripped away, with the result that the holds were flooded. In spite of the heavy seas and the damage suffered, the ship continued at the maximum speed possible, zigzagging continuously, for fear of attack by enemy submarines. She thereby suffered still further damage. The question to be determined was whether the damage so caused was, as a matter of law, the consequence of warlike operations within the meaning of the policy. It was contended by the shipowners that the special circumstances of the particular warlike operation on which the ship was engaged created additional risks and

perils which were the effective cause of the damage. The war-risks insurers contended that they were not liable on the policy because the damage was caused solely by heavy weather :—

Held : at the time when the damage occurred the ship was engaged in a warlike operation ; the damage resulted from the stowage and carriage on deck of a heavy cargo of war stores and the need to maintain speed and keep a zigzag course in spite of the heavy weather for fear of enemy submarines ; those acts were done in furtherance of the warlike operation A undertaken by the ship ; and, therefore, they were the consequence of a warlike operation within the meaning of the policy.

Per Scott, L.J. : Although the final cause of loss is a peril of the sea, if it was the condition of the ship due to a war peril which made her succumb to the sea peril and thereby suffer loss or damage, that loss or damage is, in an insurance sense, proximately caused by the war peril.

Judgment of Atkinson, J., ([1946] 1 All E.R. 123) *affirmed.* B

[**EDITORIAL NOTE.** The Court of Appeal, while affirming the court below, examine at length the phrase " consequences of hostilities or warlike operations " in a marine insurance policy against war risks. The perils insured against in a war risks policy are equivalent to those excepted from an ordinary marine policy by the f.c. and s. clause and it would seem that the meaning of " consequences " in this phrase has not been fully understood. It does not mean the effects or results of the war peril but rather acts done in furtherance of the warlike operation and, therefore, implies a cause C of the damage, which is insured specifically *eo nomine.* The proper question to ask, therefore, is : Did the sea peril operate by reason of one or other of the named perils included in the " consequences " of hostilities and warlike operations ?

As to War Risks, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-318, paras. 439-442, and Supplement ; and for Cases, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861, and Supplement.]

Cases referred to : D

(1) *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] 2 All E.R. 6 ; [1942] A.C. 691 ; 111 L.J.K.B. 512 ; 167 L.T. 349 ; *revsg.*, [1941] 3 All E.R. 214.

(2) *A.G.* v. *Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd.* v. *S.S. Richard De Larrinaga Marine Underwriters,* [1921] 2 A.C. 141 ; 29 Digest 228, *1851* ; 91 L.J.K.B. 31 ; 125 L.T. 548.

(3) *A.-G.* v. *Adelaide S.S. Co.* (*The Warilda*), [1923] A.C. 292 ; 29 Digest 228, *1850* ; 92 E L.J.K.B. 537 ; *sub nom. Adelaide S.S. Co.* v. *R.*, 129 L.T. 161.

(4) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548 ; 29 Digest 206, *1650* ; 63 L.J.Q.B. 753 ; 71 L.T. 238.

(5) *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350 ; 29 Digest 229, *1858* ; 87 L.J.K.B. 395 ; 118 L.T. 120.

(6) *Athel Line, Ltd.* v. *Liverpool and London War Risks Insurance Assocn., Ltd.*, [1945] 2 All E.R. 694 ; [1946] 1 K.B. 117 ; 115 L.J.K.B. 141 ; 174 L.T. 81.

F Appeal by the defendants from a judgment of Atkinson, J., dated Nov. 16, 1945, and reported ([1946] 1 All E.R. 123). The facts are fully set out in the judgment of Scott, L.J.

Patrick Devlin, K.C. and *H. L. Parker* for the appellants (the insurers).

Owen L. Bateson, K.C., and *A. J. Hodgson* for the respondents (the shipowners).

Cur. adv. vult. G

June 4. The following judgments were read.

Scott, L.J. : This appeal arises out of a claim by the Ocean Steamship Co., under a marine policy of insurance against war risks on their motor vessel Priam and subscribed on behalf of the defendants, the Liverpool and London War Risks Insurance Association, Ltd. Atkinson, J., gave judgment for the plaintiffs and the defendants' appeal. The policy, *inter alia*, indemnified the H plaintiffs against war risks including " the consequences of hostilities or warlike operations " by or against the King's enemies.

Between Dec. 8 and 15, 1942, the ship met with a series of very heavy gales and sustained damage. The plaintiffs claimed that this was caused by " the consequences of warlike operations." This the defendants denied, their contention being that it was not in a marine insurance sense caused by the peril insured against, but by the perils of the seas under war conditions. The appeal has been very well argued on both sides, each contending that the principles enunciated by the House of Lords in *The Coxwold* (1) entitle it to our judgment.

The Priam is a twin screw motor ship of 10,329 tons gross register, 486 ft. in length and 66ft. in beam, and at the time in question was on a voyage from Liverpool to Alexandria. The Priam was loaded with approximately 6,846 tons of cargo, of which 78.5 per cent. were war stores. The cargo included deck cargo on the forward and after well decks, and in particular a bridge layer tank and two cases of aeroplanes, all of which were stowed on the fore well deck over No. 2 hold. The two cases of aeroplanes were secured on the top of the hatchway of that hold, the coamings of which stood two feet above the deck, and the bridge layer tank, which weighed 21 tons and was about 24 ft. in length, was secured on the deck on the starboard side of the hatchway. The Priam was also equipped with a 12-pounder gun, which was mounted on a platform riveted to the forecastle deck, in the eyes of the ship. The Priam's draft on sailing was 29ft. 4ins. forward and 30ft. 9ins. aft, with a freeboard of 8ft. 4¼ins., a good trim for North Atlantic weather.

At the trial the defendants conceded that the Priam's voyage was a warlike operation, and we agree that in law the concession was rightly made. She sailed from a military loading base to a military receiving base with a cargo, most of which was of a military character needed for the war in North Africa and included deck cargo of that type which would not on that voyage have been carried at all in that position in peace time. The Priam started on her voyage on Dec. 2. Before starting her master received orders from the Admiralty as to the course to be taken by him. Generally speaking, the Priam was to proceed in a westerly and northerly direction to longitude 35° west and latitude 58° north, when she was to steam in a southerly direction and pass to the westward of the Azores and then to the Cape, zigzagging all the way or at any rate on that part of the voyage with which we are concerned. The Priam, whose normal full speed was about 17½ knots, proceeded alone and without escort. The master in his evidence stated that his great fear was of a submarine attack and that he considered speed his greatest safety, and so he carried on with all speed, zigzagging continuously. He also stated that he was very reluctant to take this deck cargo on this voyage in mid-winter, which required him to navigate well out into the North Atlantic. There was, however, a great need for war materials at this time in North Africa (the victory of El Alamein had been won only a few weeks before the ship sailed) and those in charge of the loading of the Priam were pressed to take the bridge layer tank and the aeroplanes, and the only place in the ship where the master could stow them was on the fore well deck, because the holds were full. The judge accepted the master's evidence, saying that, in his judgment, he was an obviously truthful witness.

About 4 p.m. on Dec. 7, the ship ran into bad weather and started to ship water forward. The Priam continued on at her full speed with her engines working at 105 revolutions per minute until 2.15 a.m. on Dec. 8, when she reduced to 85 revolutions, and at 2.50 a.m. to 75 revolutions. At this time her log records:

> Whole gale, very high sea, high S. by W. swell. Vessel pitching heavily and shipping water forward.

At 4 a.m. the speed was further reduced to 50 revolutions, which under normal conditions would give the Priam about 8½ knots, but which under the weather conditions then prevailing only gave her about 3 knots, or just sufficient to give her steerage way. The master said in his evidence that in normal circumstances he would have reduced his speed earlier as soon as the ship began to take heavy water on board, but that he carried on at speed because he was :

> . . . looking out for torpedoes and was, therefore, maintaining all possible speed under all conditions of weather.

At 11 a.m. on Dec. 8, a sea struck the two aeroplanes on No. 2 hatch, causing the containing cases to collapse and thus slackening the lashings and causing the cases to see-saw across the hatchway, thereby tearing the upper tarpaulins. The cases were secured with extra lashings, and at 8.30 p.m. the master increased his speed to 80 revolutions, the force of the wind having decreased to a moderate gale.

At dawn on the following morning, Dec. 9, those on board the Priam saw that the tarpaulins on No. 2 hatch were badly torn and a few of the short hatch covers were missing, and that the bridge layer tank was adrift on the starboard side of the fore well deck. The ship was then kept away before the wind to enable the crew to work on that well deck and secure the two cases of aeroplanes and the bridge layer tank, and that hatchway was refitted with spare hatch covers and spare tarpaulins. Soundings were taken of No. 2 hold and gave 11 ft. of water which had got through the opening left by the missing hatch covers. This meant that there was by calculation about 800 tons of water in the hold, which would increase the ship's draft to about 32 ft. 10 ins. forward and 29 ft. 10 ins. aft, or 3 ft. down by the head, instead of being about 1 ft. 6 ins. by the stern, an alteration of trim gravely detrimental to her forward buoyancy and the power of the bows to lift out of the waves as she pitched. The pumps were unable to pump much of this water out of the hold, because the suctions were being constantly choked with wood shavings from packages in the hold which had got adrift and had been smashed. At 6 p.m. on Dec. 9, there was 10 ft. of water in No. 2 hold, and the ship remained down by the head throughout Dec. 9. Although the ship was in this trim, the master for some part of the night steamed at 100 revolutions on a southerly course, but reduced the revolutions to 60 at 2.30 a.m. on Dec. 10, owing to the gale and rough sea.

On the morning of Dec. 10 those in charge of the Priam ascertained that the windlass motor room had been flooded by sea water. In my view, most of this water had come from the forward well deck as the seas which swept this deck tended to flow forward after the trim of the ship had been altered and she was down by the head. There was also a minor leakage into the motor room from damaged rivets holding down the gun platform to the forecastle deck, which probably did some damage to the electrical fittings which were attached to the walls of the room. Water had also got into the forepeak. The weather remained bad throughout Dec. 10 and 11. From 7 a.m. on Dec. 10 for some time, and again at 9.45 a.m. on Dec. 11, the master kept the ship before the wind and hove to. On the latter day his report speaks of her then "riding the seas very nicely."

About 2.30 a.m. on the morning of Dec. 12, in very bad weather, the bridge layer tank again got adrift and crashed across No. 2 hold and completely stripped the after end of the hatch of its covers, whereby much more water entered No. 2 hold. At 3 a.m. the master again wore ship. At dawn soundings showed there was 32 ft. 6 ins. of water in No. 2 hold. This meant that there was by calculation approximately 2,243 tons of water in the hold, which increased the ship's draft to 39 ft. 9 ins. forward and 28 ft. 1 in. aft, so that she was down by the head by about 11 ft. 8 ins. On this draft the forward well deck was completely awash and even the higher forecastle deck was frequently under water in the weather prevailing. The Priam then steered a course for the Azores in bad weather. She remained seriously down by the head, although by degrees the water in No. 2 hold was reduced. On Dec. 14 the sounding in No. 2 hold showed 20 ft. 5 ins. Eventually the master succeeded in navigating the Priam to Freetown, where the cargo in No. 2 hold was discharged.

The nature of the damage may be conveniently divided under these heads: (i) Damage directly due to the breaking adrift of the deck cargo, such as damage to the hatch tarpaulins and covers, damage on the fore well deck, and damage in No. 2 hold. (ii) Damage to the fittings, etc., on the forecastle deck, to compartments under that deck, and other compartments forward of No. 2 well deck, including the windlass motor room. (iii) Damage to the centre castle and to the ship abaft the centre castle. (iv) Damage caused by the explosion of some fuses in No. 2 hold, probably on Dec. 15. Counsel for the defendants argued that damage falling under heads (ii) and (iii) was caused by heavy weather and had nothing to do with the deck cargo, and that even the damage done by the deck cargo under head (i) was also proximately and solely caused by heavy weather. In my opinion, the damage under the first head was clearly caused by the breaking adrift of the deck cargo. No doubt the damage would not have been done unless the ship had also encountered heavy weather, but the predominant and effective cause of this damage was the breaking adrift of the bridge layer tank and the two cases of aeroplanes on the fore well deck.

As regards the second head of damage, the judge said that he accepted the evidence that the damage due to the flooding of the windlass motor room would not have happened unless the vessel had been down by the head and had been

driven unduly fast against the seas. I agree with this finding. There is no evidence, based on actual observation, as to when this damage was done, but all the probabilities appear to me to indicate it was done after the ship got down by the head and shipped heavier seas forward, from which she freed herself more sluggishly. There was a certain amount of leakage into the windlass motor room from the started rivets of the gun platform, but this would not account for the flooding of the compartment. As regards the damage to these
A rivets, the judge apparently excluded the damage to the gun platform, possibly on the ground that the Admiralty had already made it good. The plaintiffs included it and the resulting damage due to the started rivets as part of their claim, and in my view this damage was most probably done after the water got into No. 2 hold and the ship got down by the head.

As regards the third head of damage, this was done by seas shipped during the heavy weather, but there is no evidence to establish the particular time between
B Dec. 8 and 15 when it was done or when the damage was first discovered. The first entry in the log of the Priam shipping heavy water over all is at 8 a.m. on Dec. 8. The master in his evidence said that he considered that "the damage on the poop and after well deck was due to the heavy weather and zigzagging," meaning, we are satisfied, by exposing the ship to heavy beam seas as she turned. It may therefore have been done on Dec. 8. As regards the fourth head of
C damage, this explosion clearly occurred after No. 2 hatch had been damaged by the deck cargo breaking adrift and the hold became flooded and the fuses began to be washed about.

The question now arises whether all or any part of this damage was, in a legal sense, caused by the perils insured against. The plaintiffs expressed their argument in two alternate ways. In the first place they argued that the voyage of the Priam was a warlike operation and that damage occurring during
D the progress of such a voyage in steaming through the seas in performance of the operation was a direct consequence of that operation. If wrong in that contention, they argued, secondly, that the special circumstances of the Priam's particular warlike operation showed that the damage claimed was caused by it, for the special circumstances disclosed at least three respects in which this warlike operation of the Priam differed from a normal peace-time voyage from Liverpool to the Cape: (i) the ship carried war stores as deck cargo on the fore
E well deck, which she would not have normally done: (ii) she proceeded right out into the North Atlantic and off her normal course: (iii) she proceeded at a higher speed in bad weather than she would normally do.

As regards the plaintiffs' first contention, ATKINSON, J., said he took the view that damage caused to a ship by heavy weather while engaged in a warlike operation was not a consequence of that operation in the absence of any special
F circumstances. The judge, however, said that it was not necessary to decide the case on the first issue because he considered that the plaintiffs succeeded on their second contention. On this he said in effect that there were two such special circumstances, (i) the carrying by the Priam of this heavy deck cargo of war stores on this voyage in winter across the Atlantic, and (ii) that she was driven at a speed in excess of her normal speed in heavy weather because of the requirements of the Army in the field, and that those two aspects of the Priam's
G warlike operations were the real cause of the damage.

Subject to a minor correction on the second, I agree with both conclusions, but, with great respect to the judge, I do not think the evidence justifies a finding that the reason why the master pressed the vessel into the wind and waves to a greater extent than he would have done in peace time was because of the requirements of the Army in the field. I do not find in the ship's log or the master's report, or indeed in the master's evidence, any statement that he was
H hurrying because of the immediate need of this cargo by the Army. On the other hand, it is quite clear from his evidence that at times he pushed her at a higher speed and hove her to and ran before the wind less often and for shorter periods than he would have felt prudent in peace time, but it was because of his fear of enemy submarines. For the same reason he zigzagged at a time when by so doing he increased the danger of shipping heavy beam seas on both well decks and the poop. But all such features of the voyage were just particular steps taken in order to carry out the warlike operation, or as a defence against the enemy's hostilities, just as much as the mounting of the gun in the bows. They

were all consequential on "hostilities or warlike operations" because they were for these purposes, and in that true sense they were "consequences of hostilities or warlike operations."

As regards their second contention, I think that this is a stronger case than *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (1), inasmuch as the Priam had on board at all material times a potential danger and source of damage to herself in the presence of the bridge layer tank and the two cases of aeroplanes on the fore well deck. This was a deliberate addition to the dangers of the warlike operation in which the Priam was taking part, *viz.*, the carriage of war stores to the battle area. If the Priam had been carrying a mine on her deck and it had exploded in consequence of a heavy sea striking it, I think it could hardly be suggested that the damage to the ship resulting from the explosion was not caused by the warlike operation in which the ship was engaged. I can see no substantial difference, so far as the safety of the ship was concerned, between the stowage on the deck of the bridge layer tank on this particular voyage and the stowage of a mine.

In either case, for reasons which I will state in a moment, I regard the carriage of that deck cargo and its stowage as "consequences" of the "hostilities" in which the British Empire was engaged, or of the "warlike operation" in which the Priam was engaged.

In my view the damage was not caused by any "definite external event, unexpected and unavoidable," to quote the words of LORD PORTER, ([1942] 2 All E.R. 6, at p. 21) in *The Coxwold* (1). A heavy gale in the North Atlantic in December is not unexpected, The weather was undoubtedly very severe and prolonged, but it caused no damage to the ship until the deck cargo on the fore well deck got adrift. It is not as if the Priam encountered an unexpected tidal wave or a typhoon which caused the deck cargo to break adrift. The Priam was an "active participant" and not a "quiescent sufferer" in the matter, because she was at all material times under way and under command and was doing her best to continue her warlike operation under adverse conditions.

There is very little, if any, of the damage claimed which was not directly caused by the stowage on the No. 2 deck of the aeroplanes and bridge layer tank, but if there was any, it was, in my opinion, still caused by the insured perils, and in that context there is one point on the interpretation of war risk policies in the present form—and the phraseology of the present form is practically universal—which I think throws light on what up to now has been the most controversial arena in the interpretation and application of war-risk policies. The policy on the Priam for all relevant purposes is in the same terms as the insurance in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, (1), to which for brevity I shall refer as *The Coxwold*, the name of the ship there under discussion. The insurance contract there was contained in a particular clause in the charterparty on the terms of which that ship had been requisitioned; but it was agreed in all courts that it was to be treated as an insurance policy. Its language was in common form—an insurance agreement against "the consequences of hostilities or warlike operations." It therefore possessed one important feature, equally common to all, or nearly all, war-risk policies, *viz.*, that the risks covered by the insurance were expressed to be co-extensive with the risks excepted from the marine-risk policies by the f.c. and s. clause, or its equivalent. That feature is important, as it shows that all the words in the phrase "the consequences of hostilities or warlike operations," itself normally characteristic of the f.c. and s. warranty, are descriptive of, and relate solely to, the perils, whether insured or excluded, and to nothing else, and therefore that it has no bearing on, or concern with, the different question whether the loss was proximately caused by the insured peril. That separate question has always had to be answered, whether at common law before the Marine Insurance Act, 1906, or since the Act under s. 55, which is merely declaratory of the common law and says:

> (1) Subject to the provisions of this Act, and unless the policy otherwise provides the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

In the above phraseology describing the war risks, whether for exclusion from the marine policy or for inclusion in the war policy, the two words "the consequences" constitute an extension or at least an elucidation of the words "hostilities or warlike operations," possibly added by an early draftsman *ex majore cautela* in order to make sure that the general words should not be construed in too narrow a sense. In strict logic it may be said that the additional mention of any number of species adds nothing to the genus, and therefore that the words "the consequences" add nothing to "hostilities or warlike operations," but the draftsman may have been a business man and not a logician and may have thought it safer that everything consequential on either of the generic perils should be covered as a specific peril. At any rate, that seems to me the natural sense of the language used. If so, it follows that the word "consequences" does not mean effects or results of the war peril. This question of construction is important just because it is so easy to slip unconsciously into treating the word "consequences," in the phrase "consequences of hostilities or warlike operations," not as itself a named peril but as the loss or damage consequential on—*i.e.*, *caused by*—a named peril.

It may be urged that this criticism of the loose use in thought, and even in judgments, of the word "consequences," without distinguishing between its two insurance senses, is academic and of little legal import—but I do not agree. Once the true interpretation is recognised, *viz.*, that the word "consequences" in the established phrase is descriptive of perils and therefore that every happening which arises out of hostilities or warlike operations and every act or thing done for those purposes constitutes a specific war peril consequential on the generic perils named, the causal nexus between peril and loss becomes clearer, just because the particular happening, or act, is nearer to the loss; the cause is more obviously "proximate," in the sense given to that word in the decided cases. If so, the above interpretation does seem to me to be helpful for the light it throws on the final inquiry, *viz.*, whether the loss or damage claimed was proximately caused by an insured peril.

On the facts of the present case there is, I think, no doubt that one such "consequence" of the warlike operation (in my sense of the insured peril) was the stowage, for the purpose of the warlike operation, on No. 2 well deck, of certain military cargo of a kind and in a manner likely on the intended voyage in North Atlantic winter weather to do damage to the ship. That act of stowage and the consequential carriage of that cargo in that position were both acts done by the assured in furtherance of, and therefore consequential on, the admittedly warlike operation undertaken by the assured. Each was thus a consequence of the warlike operation of the Priam and insured specifically *eo nomine*, and, so far as that stowage was the cause of the damage which resulted therefrom to the ship, the assured's case is thereby established.

It remains to consider the authorities. The terms of the war-risk policy sued on in the present action are for all relevant purposes the same as those of the indemnity clause in the Government charter in *The Coxwold* (1). The decision of the House of Lords in that case as to the meaning of those terms is therefore directly binding on this court in the present appeal, but there is nothing in that decision contrary to my construction of the policy. The decision was unanimous that the stranding of the Coxwold in the course of the warlike operation upon which that ship and other vessels of the same convoy were engaged was proximately caused by the peril insured against. But in the present appeal both sides prayed in aid different passages in the five opinions in *The Coxwold* (1) in the House of Lords, and the first duty of this court is to analyse those opinions in order to see exactly what principles of interpretation of such a policy as that presently before us were expressly formulated or necessarily involved in the reasoning of their Lordships, if unanimous, or of the majority if there was not unanimity in their reasoning. Counsel before us suggested a greater divergence of views amongst their Lordships than I can detect—and it is, of course, more important for us to concentrate on the broad identity of the reasons upon which their unanimous decision rested than on divergencies of expression or even of individual views. It may help if I, as president and surviving member of the court which went wrong in that case, try to bring out the exact nature of our error. There is no doubt that we thought we were resting our judgments on the broad principle that the mere happening of a marine casualty *during* a warlike operation is not of itself proof that the warlike operation caused it. I at any rate regarded an unexpected set of the tide as in no insurance sense different from unexpectedly bad wind and sea; both may happen equally whether the "operation" on which the ship is engaged is warlike or peaceful. For that reason I (erroneously) thought that the necessary causal connection between the warlike operation and the loss was absent. In taking that view we did not attach sufficient weight to the important consideration, much discussed subsequently in the opinions of their Lordships in the House of Lords, that the mere prosecution of the warlike operation, upon which the convoy and each ship in it were alike actively engaged, may have been, in the marine A insurance sense, the cause of the stranding. Of the specific order to the Coxwold to deviate to starboard for the purpose of avoiding an enemy submarine reported to be in the neighbourhood, we took no notice, because we did not think it had any more causal significance than the general orders to the convoy to execute the warlike operation on which it was engaged.

Although the House in *The Coxwold* (1) were unanimous in their final conclusion, I humbly think that there was some divergence of opinion, or at least of B expression, between VISCOUNT SIMON, L.C., and LORD MACMILLAN, on the one hand, and LORD ATKIN, LORD WRIGHT and LORD PORTER, on the other, on the question how far the general "war operation" of such a voyage as that of the Priam can be regarded as the cause of casualties occurring during it. On the question of the tidal set and the order to starboard, VISCOUNT SIMON, L.C. said ([1942] 2 All E.R. 6, at pp. 8, 9): C

> There is no finding that the tidal set was the proximate cause of the stranding. Reading the findings in the case as a whole, I deduce that the arbitrator's view was that, though the tidal set would have brought the vessel nearer to the land than she would otherwise have been, it was the combination with this of the alteration of course ordered for the avoidance of an enemy submarine and persisted in for half-an-hour, without subsequent correction, which was the effective explanation of the disaster. . . . Authority is hardly needed for the proposition that you do not prove that an accident is "the consequence of" a warlike operation merely by showing that it D happened "during" a warlike operation.

He treated the order to starboard in order to avoid an enemy submarine as strongly supporting the arbitrator's award. LORD MACMILLAN said ([1942] 2 All E.R. 6, at p. 12):

> I think that the ordinary man, if asked what caused the casualty, would reply that it was caused by the vessel, in obedience to orders from the commodore of the convoy, E deviating from a safe course in order to avoid a suspected enemy submarine.

On the other hand, LORD ATKIN said (*ibid.*, at p. 11):

> I do not myself think that in the present case the determining factor is the change of course to avoid submarine danger.

His view (*ibid*) was that:

> If the warlike operation includes the direction of the war vessel through the water F from one war starting point to another war destination, it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation. Not all, for there may be circumstances of accident on board or the result of wind and wave that may not come within the definition, though I should find it necessary to know all the facts relating to a suggested accidental fire or a suggested great wave before I was able to draw the line. However, if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of G a warlike operation (*A.-G.* v. *Ard Coasters* (2)), it is surely impossible to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide or current or wind.

His general view, thus expressed, of the causal nexus between the insured peril and the loss was, at any rate within very wide limits, shared by LORD WRIGHT and LORD PORTER. LORD WRIGHT, after a reference to decisions H of the House arising out of the war of 1914-18, with which he dealt at length later in his opinion, said ([1942] 2 All E.R. 6, at p. 13):

> . . . if the damage was caused by the action of the vessel in executing a warlike operation, it should on the decisions of this House be classed as a consequence of a warlike operation.

After quoting LORD SUMNER in *The Warilda* (3), he said (*ibid.*):

> The war-like operation is, as it were, an umbrella which covers every active step taken to carry it out, including the navigation, the course and helm action intended

to bring the vessel to the position required by the warlike operation, and that none the less because accident or mischance or negligence leads to stranding or collision. No doubt a wilful act such as barratry or scuttling would raise different questions.

He then proceeded to trace in the decisions of the House from 1921 onwards on the interpretation of war-risks clauses the gradual emergence of the recognised principle that the *active* prosecution of the warlike operation, in whole or in part, should, generally speaking, be regarded as in fact causing any casualties
A arising out of it. He, however, recognised certain exceptions, or rather limitations, indicated by him in the last paragraph of his opinion (*ibid*, at p. 18). They demonstrate the difficulty of drawing a clear line of principle between what is and what is not a causal result of a "war operation."

It is just on this difficulty that I venture to think that my point upon the interpretation of the policy is helpful. All the various perils insured against in a war-risks policy, as are those excepted by an f.c. and s. clause from an ordinary
B marine policy, are generically covered by the one phrase "the consequences of hostilities or war-like operations." "Hostilities" and "warlike operations" are not introduced as separate and specific perils; indeed, it is only their "consequences" which the policy purports to insure; and the only task in any particular dispute is to ascertain whether some particular "consequence" of "hostilities" or "warlike operations" was the *proximate cause* of the loss; the word "consequence" in that context *ex hypothesi* in the policy not meaning
C effect, but cause. Its use by the draftsman has, however, naturally tended to obscure the whole discussion, just because the word "consequence" usually means effect and not cause. Even in the language of the noble Lords in the relevant cases in their House, the word "consequence" is not infrequently quoted as referring not to the peril but to the result caused by the operation of the peril. I venture humbly to think that if one keeps one's mind on the
D true insurance interpretation, *viz.*, that "the consequences of warlike operations" is just a description of one wide category of perils, with particular aspects of them covered by the word "consequences," contained in the full Lloyd's policy *pari passu* with perils of the seas, but excepted by the f.c. and s. clause, it helps to a clearer understanding of the contrast to be drawn between the causal effect of any one insured peril and a loss or damage received casually *during*, but not caused by, any one of the insured perils. I think what LORD WRIGHT
E said ([1942] 2 All E.R. 6, at p. 18) illuminates what I have just been trying to express. After saying that he saw no reason for carrying the principle of treating every sort of damage by sea perils as "a consequence of a warlike operation" of the vessel and adding that he saw no reason for carrying the principle further than the cases have carried it, he added:

> In particular, it might plausibly be said that, if she were deliberately forced at full
> F speed ahead, when a prudent navigator would heave to, or deliberately taken in the area of a cyclone for some warlike purpose, resulting damage would be a consequence of warlike operations . . . There are, however, I think, obviously some damage claims in the case of a requisitioned ship while engaged on a warlike operation which do not come within the war-risk provision. Thus, a fire accidentally caused on board, or accidents within the Inchmaree clause, or leaks due to inherent defects in the hull, would not seem to me, as at present advised, to come within the war-risk cover in any event. The basis of the decisions seems to be that the casualty can be traced to
> G definite action on the part of those on board the warship or quasi-warship (if I may use that term) in directing the course of the vessel in order to carry out the warlike operation. Such instances of damage as I have just given seem to me, as at present advised, to fall outside the rule. What is being discussed is not a general principle of law, but the construction of words which have been in common use during the last war and this war.

My interpretation of the word "consequences" comes within this last sentence
H which I have just quoted.

It follows from what I have said that in a war-risk case, if the loss or damage in question was immediately due to damage done by wind and weather, or heavy seas, or a collision, or a stranding, or any other peril of the sea, then a proper question to ask is: Did the sea peril operate by reason of one or other of the named perils included in "the consequences" of hostilities and warlike operations? And the law to apply to that question is the rule laid down in *Reischer* v. *Borwick* (4), and *Leyland Steamship Co., Ltd.* v. *Norwich Union Fire Insurance Society, Ltd.* (5). The former was an insurance against "collisions with any object." The ship had such a "collision" and a hole was made in her. It was patched up, but perils of the seas subsequently caused the wound to re-open, and a loss resulted. It was held that the loss was proximately caused by collision as well as by perils of the sea and in effect that there can be two proximate causes of a loss, simultaneously operating. In the *Norwich Union* case (5), the insured ship had a hole made in her below water by an enemy torpedo in the English Channel. She was successfully navigated into the harbour of Le Havre, but days later, before she had been repaired, a heavy storm blew up and caused her to sink in the harbour. The House of Lords held that she was lost by the war peril, as the hole made by the torpedo was her death wound. It follows from these two decisions that, although the final cause of loss is a peril of the sea, if it was the condition of the ship due to a war peril which made her succumb to the sea peril and thereby suffer loss or damage, that loss or damage is in an insurance sense proximately caused by the war peril. That view is shortly stated in Halsbury's Laws of England, Hailsham edn., Vol. 18, pp. 305, 306, para. 430. As I had editorial responsibility for that passage, but am not dead, I do not quote it as an authority, but I think it is correct, subject to the qualification that it may become necessary to consider which was the predominant cause—as, *e.g.*, if the assured, being in doubt, sues both sets of underwriters as co-defendants in the alternative.

If one concentrates, not on the question: "Was the proximate cause of loss a war peril," but rather on the question: "Was the state of affairs which in fact brought about the loss itself consequential on the hostilities in which the British Empire was engaged, or on the warlike operation on which the ship was engaged," I think one gets a rather simpler and easier criterion whether a particular item of damage is or is not proximately caused by the war peril, than if one asks: "Are there any special circumstances which take the case out of the rule that what merely happens *during* a warlike operation is not caused *by* the warlike operation ?"

In my view the whole of the damage claimed was proximately caused by "consequences of hostilities or warlike operations" within the meaning of the policy. And in this view I find direct support in the language of Lord Greene, M.R., in *Athel Line, Ltd.* v. *Liverpool & London War Risks Association, Ltd.* (6), in spite of his apparent use of the word "consequences" in what I think is an erroneous sense. In that case MacKinnon, L.J., who had been with me party to the decision in *The Coxwold* (1), which the House of Lords reversed, recognised that the decision of the House compelled him to agree with Lord Greene, M.R. Tucker, L.J., also agreed. The Atheltemplar, on a voyage to Scapa Flow with fuel oil for war purposes, was engaged upon a warlike operation. In the course of the voyage she anchored temporarily at Lochalsh, but happened unfortunately as the tide fell to sit upon a rock and damage her bottom. There was a war-risks policy in the same terms as that of the Priam in the present appeal. The underwriters contended that the cause of the damage was not an insured peril for two reasons. Their first reason was that the voyage of the ship, a merchant ship, was not a warlike operation. Their second reason, if they were wrong on the first (as they obviously were), was that the warlike operation was in suspense whilst the ship was at anchor, because a warlike operation presupposes continuing movement of the ship through the water, *i.e.*, what they called some "action" in the prosecution of it. Lord Greene, M.R., disposed of both contentions. Neither is relevant to the present appeal, but in his judgment he attributed to the word "consequences," in the stereotyped phrase describing the war perils (as indeed did some of their Lordships in *The Coxwold* (1)), the interpretation which I have in this judgment humbly submitted is erroneous. In doing so he was repeating the language used in the award of the arbitrator. That case affords a clear illustration of the way in which the problem, so much discussed in *The Coxwold* (1), and all the decisions there discussed and analysed, is simplified by giving the word "consequences" in the list of perils its proper meaning. If this court had treated the temporary anchoring of the Atheltemplar as an act consequential upon the ship's warlike operation, insured as a particular peril, it would have made the underwriters' case plainly unarguable. My point of interpretation does not make the war underwriters' contention in the present appeal as obviously unarguable as in the *Atheltemplar* case (6); but it does, to my mind, facilitate the decision at which we have all arrived, that this appeal must be dismissed ; and I am quite certain that it would have prevented me going wrong in *The Coxwold* (1) had I then thought out this question of construction.

The appeal is dismissed, with costs.

TUCKER, L.J. : I agree as to the facts and inferences to be drawn therefrom stated in the judgment which SCOTT, L.J., has delivered. They are, I think, with one slight modification, in substance the same as the findings of ATKINSON, J.
A I also agree that on these findings the damage so caused was as a matter of law the consequence of warlike operations within the meaning of this policy of marine insurance. The authorities on this matter have recently been fully discussed in *The Coxwold* (1), and the results of the previous decisions were there summarised by LORD PORTER. Consequently, I do not consider it necessary to refer to any of the earlier cases. In *The Coxwold* (1) VISCOUNT
B SIMON, L.C., propounded the problem in these words ([1942] 2 All E.R. 6, at p. 9) :

> The relevant contrast is not, strictly speaking, between marine risks and war risks. The Coxwold accidentally stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat, and she consequently ran aground. No misfortune could be more marine in its nature than this, but the question here is not whether this was a marine risk, but whether, granting
> C that stranding is a marine risk, this stranding is not to be regarded as " the consequence of warlike operations." That, in my opinion, depends on whether, in the practical sense in which a policy of insurance must be interpreted and applied, the " dominant " or " determining " cause of the disaster was warlike operations. The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for " *the* cause " involves a selection of the governing explanations in each case.

D Applying this test to the facts of the present case, it appears to me that the damage was brought about by a combination of causes occurring in the course of a warlike operation. The combination of causes were (i) deck stowage of the bridge layer tank, (ii) the zigzag course taken in the storm to avoid submarines, and (iii) maintaining speed in the storm during the hours of darkness for the same reason, when the vessel would otherwise have remained hove to. This combination occurring in the course of a warlike operation was, in my view,
E a consequence of that warlike operation, notwithstanding that the existence of heavy weather was a necessary element in bringing about the harmful results of the combination. In the *Coxwold* case (1) several of the learned Lords referred to, and reserved for future decision the question of damage attributable to heavy weather, but I cannot find in their opinions anything which points to the conclusion that the mere existence of heavy weather as a contributory cause is decisive against the view that the resulting damage may none the less
F be the consequence of warlike operations.

In my view, the correct approach in every case must be to ascertain all the circumstances and to balance all the contributory causes. Heavy weather is one of the circumstances to be considered and may in some cases be one of the contributory causes to be weighed in the balance. but it seems to me fallacious to seek to put it in a separate category by itself and say its presence as a factor is necessarily conclusive, or is conclusive in the absence of some special or peculiar
G circumstances. I do not regard this case as one which presents any special or peculiar features distinguishing it from some general or normal type of " heavy weather " case, but the facts as a whole seem to me to point to the conclusion that this damage, to which the marine misfortune of heavy weather contributed, and without which it would not have occurred, was the consequence of the warlike operation upon which the Priam was engaged.

H SCOTT, L.J. : BUCKNILL, L.J., has asked me to say that he agrees with the judgments which have been delivered.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Hill, Dickinson & Co.* (for the appellants) ; *Bentleys. Stokes & Lowless,* agents for *Alsop, Stevens & Collins Robinson,* Liverpool (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Criticised. Hopes *v.* Hopes. [1948] 2 All E.R. 920.

WANBON *v.* WANBON

Doubted. Hopes *v.* Hopes. [1949] P. 227

[Probate, Divorce and Admiralty Division (Pilcher, J.), May 22, 1946.]

Divorce—Desertion—Parties continuing to live in same household—Wife refusing to allow marital intercourse or to perform any wifely duty.

The respondent wife left the matrimonial home only 6 months before the husband presented a petition for divorce on the ground of desertion, but 10 years previously she had withdrawn from the husband's bedroom and refused any longer to have marital intercourse with him. During this period the parties continued to live not only under the same roof but in the same household, but the wife never addressed the husband except to find fault with him and refused to cook his meals, make his bed, mend his clothes, or perform any wifely duty whatsoever :—

Held : The wife had deserted the husband in the legal sense for three years and upwards before the presentation of the petition, and the petitioner was entitled to a decree.

[**EDITORIAL NOTE.** The circumstances of this case are very unusual. There may be desertion although the parties continue to live under the same roof, but where the wife continues to carry out her usual household duties, refusing only marital intercourse, it was held in *Littlewood* v. *Littlewood*, ([1942] 2 All E.R. 515), that desertion was not proved. In the case now reported, however, the wife had failed over a period of years to carry out any wifely duties whatever, and desertion is held to be established.

As to Limited Cohabitation, see HALSBURY, Hailsham Edn., Vol. 10, p. 656, para. 965 ; and for Cases, see DIGEST, Vol. 27, pp. 308, 309, Nos. 2855-2867.]

Undefended Petition by the husband for divorce on the ground of desertion. The facts are set out in the judgment.

G. Russell Vick, K.C., and *I. H. Jacobs* for the petitioner.

Pilcher, J. : This is an unusual case and one which is difficult to decide. The petitioner seeks a decree against his wife, she having left the conjugal home only 6 months or so before the petition was filed. Having heard the petitioner and the witnesses who have been called before me, I have come to the conclusion that this is one of the rare instances in which it would be proper to grant the petitioner a decree on the ground of his wife's desertion and to hold that his wife had in fact deserted him in the legal sense for 3, and probably many more, years before the filing of the petition in Oct., 1945. I am satisfied from the evidence that for the last 10 years at least husband and wife have been completely at arm's length. More than 10 years ago the wife withdrew from the husband's bedroom and has ever since refused to have any marital relations with him. During this time the wife has never addressed a word to her husband except to find some fault with him ; she has refused to cook dinner for him, make his bed, mend his clothes or perform any wifely duty for him whatsoever. It is very rare, I think, that the court can find facts on which it is proper to order a decree *nisi* in a desertion case where the parties have lived not only under the same roof but in the same household in the way these parties have lived. There have, of course, been cases where husband and wife have occupied different storeys in the same house where it has been held that the one has deserted the other, although they have been living under the same roof. In this case, although there was only one household, I am satisfied on the facts that the petitioner is entitled to the decree *nisi* which he seeks.

Decree nisi.

Solicitors : *Neil Maclean & Co.* (for the petitioner).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

BROWNING v. FLOYD AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), May 8, 1946.]

Carriers—Railway—Offences by passengers—Use of partly used non-transferable ticket issued to another—Intent to avoid payment of fare—Intent to defraud—Breach of bye-law—Regulation of Railways Act, 1889 (c. 57), *s.* 5 (3) (*a*).

A married woman bought a monthly non-transferable return railway ticket A from L. to P., made the outward journey by road, returned by rail, and transferred the unused outward half of her ticket to her husband. The husband later bought a monthly return ticket from P. to L., travelled on his forward half to L., and on the return journey used the unused half transferred to him by his wife. The husband was charged before justices with travelling on a railway without having previously paid his fare and with intent to avoid payment thereof, contrary to the Regulation of Railways Act, 1889, s. 5 (3) (*a*), and B with using a partly used non-transferable passenger ticket, contrary to the railway company's bye-laws. The wife was charged with aiding and abetting her husband to travel with intent to avoid payment of the fare and with transferring a partly used non-transferable ticket, contrary to the same bye-laws. The justices dismissed the informations on the ground that there had been no intent to defraud :—

C HELD : intent to defraud did not matter, the offences were proved, and the case should be remitted to the justices.

[**EDITORIAL NOTE.** This is an unsatisfactory decision, which well illustrates the remarks of MATHEW, J., in reference to railway bye-laws, in *Dyson* v. *London & North Western Ry. Co.* ((1881), 7 Q.B.D. 32, at p. 37) : " They are regulations, the administration of which is entrusted to the officials of railway companies—officials scattered over the whole country—and regulations likely to be enforced without much considera- D tion for those against whom they are directed, whenever it is supposed that there has been an intention to defraud the company." It is, perhaps, regrettable that railway companies are not required to prove fraudulent intent in such prosecutions, and although there was technically an offence in the case now reported, the strict application of the decision might well lead to absurdities, some of which were referred to by the court in the course of the argument.

AS TO TRAVELLING WITH INTENT TO AVOID PAYMENT OF FARE, see HALSBURY,, Hailsham Edn., Vol. 4, p. 81, para. 120 ; and FOR CASES, see DIGEST, Vol. 8, p. 109. E Nos. 731-737.]

APPEAL by way of case stated from a decision of justices of the county of Kent, who, on the ground that there had been no intent to defraud, dismissed informations (1) against the first respondent for (*a*) travelling on a railway without previously having paid his fare and with intent to avoid payment thereof, contrary to the Regulation of Railways Act, 1889, s. 5 (3) (*a*), and (*b*) F using a partly used non-transferable passenger ticket, contrary to the railway company's bye-laws, and (2) against his wife, the second respondent, for (*a*) aiding and abetting the first respondent to travel with intent to avoid payment of the fare and (*b*) transferring a partly used non-transferable ticket to the first respondent, contrary to the same bye-laws. The facts are sufficiently set out in the judgment of LORD GODDARD, C.J.

G *Vernon R. M. Gattie* for the appellant.

LORD GODDARD, C.J. : This is a case stated by justices for the county of Kent upon an information preferred by the Southern Railway against a husband and wife. What happened was this. The wife bought a return ticket from London Bridge to Paddock Wood, but she only travelled one way, because she got a lift from a friend in a motor car for the forward journey. She did what may be wrong, but no doubt it is a thing which would be done by countless wives H in the circumstances. She gave her husband the forward half of her ticket, and the husband, having that in his possession, bought a return ticket from Paddock Wood to London Bridge, kept the return half of his own ticket to use on some future occasion, and on his return journey used the forward half which his wife had given him. In those circumstances, the husband and wife were prosecuted, the husband and the wife with aiding and abetting that offence for unlawfully travelling on the Southern Railway without having previously paid his fare and with intent to avoid payment. The intent to avoid payment was apparently sufficiently found by his own evidence that he did not produce his return half because he was so certain he was right in using the forward half of his wife's ticket which had been transferred to him by his wife. He did intend to do that journey on his wife's ticket without using the ticket he had bought himself. The offence is proved. Intent to defraud does not matter. It is a question whether he intended to avoid payment of fare. With regard to the charge of using the ticket bought by his wife, that is in breach of the bye-law; the wife transferred the ticket to him, and that was in breach of the bye-law. Again it does not matter whether there is intent to defraud, or whether there is not, or whether they intended to contravene the statute or bye-laws or not. Therefore, the case must go back to the justices with an intimation that both offences charged against the respondents are proved, and with an intimation that they can deal with the case under the Probation of Offenders Act, or by imposing any fine they like from 1*d.* to 40*s.*

HUMPHREYS and SINGLETON, JJ., agreed.

Appeal allowed. Case remitted to justices.

Solicitor: *H. L. Smedley* (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

FLATMAN *v.* LIGHT AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), May 1, 1946.]

Criminal Law—Autrefois acquit—Charge of unlawful possession—Acquittal—Subsequent charge of larceny — Metropolitan Police Courts Act, 1839, (*c.* 71), *s.* 24.

Criminal Law—Pleading—Double plea—Autrefois acquit after plea of not guilty.

The respondents were found, in the early morning, driving towards London in a car which contained a considerable number of fowls. They were charged, under the Metropolitan Police Courts Act, 1839, s. 24, with having in their possession or conveying goods reasonably suspected of being stolen or unlawfully obtained, and they were remanded. During the period of the remand information was received by the police that the fowls had been stolen from a poultry-keeper in the Isle of Ely. When the respondents again appeared before the justices on the unlawful possession charge, no evidence was offered by the prosecution and the respondents were discharged. They were then re-arrested and brought before the justices of the Isle of Ely and charged with larceny of the fowls. They pleaded guilty but later withdrew that plea and entered a plea of not guilty, setting up the defence of *autrefois acquit.* The justices, being of the opinion that the respondents had already been charged with and discharged of offences arising in connection with the same acts and could not be charged again, dismissed the informations:—

HELD: the justices were wrong; the charge of larceny was a charge of an entirely different nature from the charge under the Metropolitan Police Courts Act, 1839, s. 24; the respondents had not previously been in peril of being convicted of larceny; and, consequently, the defence failed and the case should be remitted to the justices.

[**EDITORIAL NOTE.** The basis of this decision is that as the defendants had never been in peril of being convicted of larceny, there was no ground for the plea of *autrefois acquit.* The magistrates based their decision on the erroneous view that a person cannot be charged for an offence in relation to certain goods when he has already been discharged of another offence in relation to the same goods.

It was argued that the plea of *autrefois acquit* was not available, since the defendants had pleaded not guilty, but LORD GODDARD, C.J. points out that all that was decided upon this matter in *R.* v. *Banks* (1) was that the plea of *autrefois acquit* could not be dealt with until the plea of not guilty had been withdrawn with leave. He also doubts whether pleas before magistrates of previous conviction or acquittal are strictly pleas of *autrefois convict* or *autrefois acquit.*

AS TO PLEAS OF AUTREFOIS ACQUIT, see HALSBURY, Hailsham edn., Vol. 9, p. 152, para. 212; and FOR CASES, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.]

Case referred to :

*(1) *R.* v. *Banks*, [1911] 2 K.B. 1095 ; 14 Digest 337, *3553* ; 81 L.J.K.B. 120 ; 106 L.T. 48.

Case Stated by Isle of Ely justices. The facts are fully set out in the judgment of Lord Goddard, C.J.

Linton Thorp, K.C., and *Neil Lawson* for the appellant.

C. J. T. Pensotti for the respondents.

A Lord Goddard, C.J. : This is a Special Case stated by the magistrates of the Isle of Ely who, on a charge preferred against the respondents of larceny of fowls, discharged them on the ground that they had already been charged with and discharged of offences arising in connection with the same goods. They, accordingly, held that they could not be charged again with the larceny which was the subject of the information before the court.

B The facts are these. On Oct. 3, 1945, in the early morning, these men were found by a police officer at Epping in possession of a considerable number of fowls, some of which were alive and some dead. Their possession of the fowls at that time in the morning and driving towards London in a motorcar naturally roused suspicion in the mind of the policeman. The police officer said he was going to take the men to the station, but they got away and were stopped afterwards at Waltham Cross. Then a charge was preferred against them, C Waltham Cross being within the Metropolitan Police District, under the Metropolitan Police Courts Act, 1839, s. 24, which provides :

> Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour, and shall be liable to a penalty of not more than five pounds, D or, in the discretion of the magistrate, may be imprisoned in any gaol or house of correction within the metropolitan police district, with or without hard labour, for any time not exceeding two calendar months.

That is a section applicable in the metropolis, and similar sections operate in some of the large cities of England, certainly in Liverpool, to provide for this class of case. A man is found in very suspicious circumstances in possession of property. He can be called upon to give an account of how he got it. If E the police, or whoever start the prosecution, are satisfied that it was stolen and could show it was stolen, there is no need to invoke this section. The section is designed to cover cases where it is impossible to show at the time of the man's arrest that the property is stolen. It is not necessary to show that it is stolen, because the section deals with property which is "reasonably suspected of being stolen or unlawfully obtained." If that is so, a man can be brought before the magistrates and dealt with under this section.

F These fowls, it turned out, were in fact stolen, and during the time for which the respondents were put on remand, between Oct. 4 and 9, the Essex police got information. I suppose it came down from the Isle of Ely. When the case came before the magistrates on remand at Chingford the police officer in attendance gave information as to the proposed charge of stealing the goods and thereupon the magistrates dismissed the charge of unlawful possession G as it was not necessary to proceed with it. The respondents were then arrested and brought before the justices of the Isle of Ely. They seem, according to the Case, to have made a full confession that they had stolen the fowls. When they were brought before the magistrates they pleaded guilty. Then a solicitor arrived, a solicitor who, I think, one may say must have considerable powers of advocacy in that court, for he not only persuaded the magistrates to allow the plea of guilty to be withdrawn and a plea of not guilty to be entered, but H he then persuaded the magistrates he had a good defence to this charge under the doctrine of *autrefois acquit*, and succeeded in persuading the magistrates that they could not convict these men of larceny because they had already been acquitted of the same offence at Chingford.

Two points are taken by counsel for the appellant. I mention the first because he took it and cited an authority, but it is only necessary to deal with it in a very brief manner. He said the plea of *autrefois acquit* was not available to the defendants because they had pleaded not guilty and the case had proceeded on that footing. In support of that he cited *R. v. Banks* (1) which was a decision of the Court of Criminal Appeal, and which does decide, no doubt, that a double plea is not allowed in a criminal case, but one just has to see what the court said there. It was that :

> . . . according to well established rules of criminal pleading, a defendant, having pleaded not guilty to an indictment, is not entitled, while that plea is standing, to have a plea of *autrefois acquit* put upon the record.

In that case the court was dealing with an extremely technical objection which had been raised. A prisoner had expressed his intention through counsel of A pleading guilty to an indictment of manslaughter, there being at the same time a coroner's inquisition against the prisoner for murder. A plea of not guilty was accepted by the prosecution on the coroner's inquisition, on which, of course, the prisoner could have been convicted of manslaughter. Then, when he was arraigned on the charge of manslaughter, he attempted to plead *autrefois acquit* although he had pleaded not guilty, and had never obtained leave to withdraw his plea of not guilty. I think the only thing the court decided B was that, so long as the plea of not guilty stood, the plea of *autrefois acquit* could not be dealt with, but they nowhere said the court could not give leave to withdraw the plea of not guilty. They said, first of all, the plea of *autrefois acquit* should be dealt with, and then, if the plea had been decided adversely to the prisoner, it being a charge of felony, the prisoner could have pleaded over and pleaded not guilty. Nowadays it would be seldom that any technical point of that C sort would really be allowed to prevail except in such a case as *Banks* case (1), where a very technical point was taken by the defendant and answered, equally technically, by the prosecution. In common justice and fairness, if during the course of the case it turned out that a man had been previously convicted or acquitted of the same offence with which he was then charged, the court would, of course, allow him to plead it and give effect to that plea. When a case is before magistrates I doubt very much whether it is right to say that a plea that a man has been D already convicted or acquitted of a previous offence is in any strictness a plea of *autrefois acquit* or *autrefois convict*, for those pleas are pleas which have to be pleaded formally because they form part of the record of the court. They ought to be pleaded in writing and then a replication is pleaded by the prosecution. When a case is being dealt with by a court of summary jurisdiction I think it is true to say that what the court must do is to give effect to the maxim *nemo bis vexari potest pro eadem causa*. I do not think it is technically E *autrefois acquit*, but that does not matter.

In this case we do not decide the case on any such ground that the plea of not guilty was standing, because it is obvious that, if the magistrates could properly find that these men had been already acquitted of the offence or convicted of the offence, they should have given effect to it at any stage of the proceedings. The real answer to this case, of course, is that these men had never been charged F with larceny. Larceny is a felony. The charge of larceny charges these people with having stolen the goods. It is no answer to that to say : " Well, I was brought before the magistrates and charged with the unlawful possession of the goods under the Metropolitan Police Courts Act, 1839, s. 24," because that is an entirely different offence to the offence of larceny. When people are in custody for the offence of unlawful possession with a view to their being brought before the magistrates to see whether they can give an account satisfactory G to the magistrates of their possession of the goods, it is perfectly right, if it then turns out that the police are in a position to charge them with larceny, to charge them with that larceny, and then the magistrates can perfectly well dismiss the case of unlawful possession, because they know that a charge of larceny is about to be preferred, and the charge of larceny is a case of an entirely different nature from the one before the magistrates. That is quite apart from the fact that the Chingford magistrates would have had no jurisdiction H to have heard the charge of larceny in this case, because the larceny had been committed in the Isle of Ely, and not in the county of Essex.

For these reasons it is quite clear that the magistrates came to a wholly wrong decision. The case must go back to the magistrates with an expression of the opinion of this court that they came to a wrong decision in holding that the respondents were entitled to be acquitted of larceny because they had been already acquitted of the offence of unlawful possession, and they must hear and determine whether the men were guilty of larceny or not.

Humphreys, J.: I am of the same opinion. In this case a bench of magistrates on Oct. 9 discharged the accused persons who were before them, no evidence being offered by the prosecution against them in respect of charges of having in their possession goods, being certain fowls dead and alive, reasonably suspected of having been stolen or unlawfully obtained, and they having not given the explanation which is required in those circumstances by the Metropolitan Police Courts Act, 1839, under which they were charged. There was another charge, that they were guilty of causing unnecessary suffering to these fowls, and in regard to one of the accused there was a quite different charge, that he was a deserter. The magistrates, apparently, had all these matters before them and quite properly discharged the accused on the ground that the prosecution offered no evidence. After they had been discharged with regard to the first charges made against them, an acquittal, no doubt, on the merits of the case because the prosecution offered no evidence, they were then charged in respect of those same fowls with the offence of larceny. What they said through their solicitor, who persuaded the bench that he was talking good sense and good law, was that they could not be tried on the charge of larceny at all by any bench, because they had been already acquitted. What does that mean ? In law that means quite plainly, as has been said over and over again, that they had been discharged already of the offence with which they were now being re-charged. In point of fact they had never been charged with larceny of these fowls before. They had been discharged upon matters which, except that the fowls were the same fowls, had no relation to the charge of stealing and did not consist of the same elements. I think the way in which the magistrates have gone astray is made perfectly plain by their opinion stated in this Case. They say :

> We being of opinion that the respondents having already been charged with and discharged of offences arising in connection with the same acts could not be charged again . . . .

That is not the law. The law has never said that a person cannot be charged in relation to certain goods because he has already been discharged of some offence in relation to those same goods. What the law says is that persons must not be convicted of an offence if they have already been acquitted of that offence, and that includes an acquittal on any charge upon which they might have been convicted of that offence. I think the case is a very simple one. The magistrates ought to have heard this charge and adjudicated upon it.

Singleton, J.: I agree. The principle upon which a plea of *autrefois acquit* should be dealt with is stated in Archbold's Criminal Pleading, Evidence and Practice, 31st edn., p. 135, in these words :

> It is an established rule of the common law that a man cannot be put twice in peril for the same offence.

That is amplified on the next page in this way :

> If, therefore, a man has been tried and found to be not guilty of an offence by a court competent to try him, the acquittal is a bar to a second indictment for the same offence. And the rule applies not only to the offence actually charged in the first indictment, but to any offence with which he could have been properly convicted on the trial of the first indictment.

The same principles apply, it seems to me, in the hearing of a case by a court of summary jurisdiction. These respondents on the first hearing within the Metropolitan Police District were not in jeopardy upon a charge of larceny at all. It seems to me the case is too clear for argument. I agree that it must be remitted to the justices with an expression of this court's opinion so that those who at one time appear to have confessed themselves guilty of stealing poultry may be dealt with for that offence.

Appeal allowed with costs. Case remitted to justices.

Solicitors : *Metcalfe, Copeman & Pettefar* (for the appellant) ; *J. H. Fellowes* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

UNITED AFRICA CO., LTD. *v.* OWNERS OF M.V. TOLTEN. THE TOLTEN.

[Court of Appeal (Scott, Somervell, and Cohen, L.JJ.), February 11, 12, 13, 14, April 16, 1946.]

Admiralty—Jurisdiction—Action in rem—Damage by British ship to pier in Nigerian harbour—Exercise of Admiralty jurisdiction over British ship for damage in any waters—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *ss.* 22 (1) (*a*) (iv); 33 (2).

In an action *in rem* by the respondents, who were owners and occupiers of a wharf in Lagos, Nigeria, for damage done to the wharf by the appellants' ship, a preliminary issue of law was raised by the appellants that there was no jurisdiction in the Admiralty Court to try the action. The objection was based on the rule which was considered and applied by the House of Lords in *British South Africa Co.* v. *Companhia de Mocambique* (1) that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situated abroad. The judge in the court below, basing his judgment in the main on the unqualified words defining Admiralty jurisdiction in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (*a*) (iv), read with s. 33 (2) of the Act, as extending to any claim in proceedings *in rem* or *in personam* for damage done by a ship, decided that the court had jurisdiction, and that the rule did not compel him to limit the construction of the words as contended by the appellants:—

Held, by the Court of Appeal, the claim being for the enforcement of a maritime lien by proceedings *in rem,* the rule did not apply, and, consequently, the action should proceed.

Per Scott, L.J.: In an Admiralty " cause of damage " the *Mocambique* rule, which is a conception wholly foreign to the essential nature of Admiralty jurisdiction, can have no place, whether the proceedings be *in rem* or *in personam,* and even apart from the maritime lien to which the damage gives rise.

Per Somervell, L.J.: In view of the terms of s. 33 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, the court would have the same jurisdiction in an action *in personam* as in one *in rem.*

Decision of Bucknill, L.J. ([1946] 1 All E.R. 79) *affirmed.*

[**EDITORIAL NOTE.** The *ratio decidendi* of this decision is that the rule laid down by the House of Lords in *British South Africa Co.* v. *Companhia de Mocambique* (1) is inconsistent with Admiralty jurisdiction. It does not therefore apply where, as in the circumstances of the case now reported, there is a claim *in rem* to a maritime lien. The judgments contain an exhaustive survey of the liability of shipowners for damage done by vessels and the international implications of the Admiralty jurisdiction.

As to the Jurisdiction of the High Court over Claims for Damages Done by any Ship, see HALSBURY, Hailsham Edn., Vol. 1, pp. 94-98, paras. 120-126; and for Cases, see DIGEST, Vol. 1, pp. 139-142, Nos. 467-502.]

Cases referred to:

(1) *British South Africa Co.* v. *Companhia de Mocambique,* [1893] A.C. 602; 11 Digest 346, *334*; 63 L.J.Q.B. 70; 69 L.T. 604; *revsg.,* [1892] 2 Q.B. 358.
(2) *Doulson* v. *Matthews* (1792), 4 Term Rep. 503; 11 Digest 346, *332.*
(3) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414; 11 Digest 464, *1195*; 39 L.J.C.P. 350; 23 L.T. 48.
(4) *Harmer* v. *Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 11 Digest 485, *1376*; 19 L.T.O.S. 235.
(5) *The Sara* (1889), 14 App.Cas. 209; 1 Digest 129, *347*; 58 L.J.P. 57; 61 L.T. 26.
(6) *The Two Ellens* (1872), L.R. 4 P.C. 161; 1 Digest 129, *346*; 8 Moo. P.C.C.N.S. 398; 41 L.J.Adm. 33; 26 L.T. 1.
(7) *The Ripon City,* [1897] P. 226; 1 Digest 105, *70*; 66 L.J.P. 110; 77 L.T. 98.
(8) *The Dictator,* [1892] P. 304; 1 Digest 224, *1499*; 61 L.J.P. 73; 67 L.T. 563.
(9) *The M. Moxham* (1876), 1 P.D. 107; 11 Digest 346, *333*; 46 L.J.P. 17; 34 L.T. 559; *revsg.* (1875) 1 P.D. 43.
(10) *The Bonaparte* (1850), 3 Wm. Rob. 298; 1 Digest 124, *304.*
(11) *The Hamburg* (1864), Brown & Lush. 253; 1 Digest 124, *305*; 2 Moo. P.C.C.N.S. 289; 33 L.J.P.M. & A. 116; 10 L.T. 206.
(12) *The Parlement Belge* (1880), 5 P.D. 197; 1 Digest 110, *140*; 42 L.T. 273.
(13) *The Tervaete,* [1922] P. 259; Digest Supp.; 91 L.J.P. 213; 128 L.T. 176.

(14) *Currie* v. *M'Knight*, [1897] A.C. 97 ; 1 Digest 251, *1793* ; 66 L.J.P.C. 19 ; 75 L.T. 457.
(15) *Luke* v. *Lyde* (*or Lloyd*) (1759), 2 Burr. 882 ; 41 Digest 650, *4824* ; 1 Wm. Bl. 190.
(16) *The Sarah* (1862), Lush. 549 ; 1 Digest 106 ; *83*.
(17) *The Zeta*, [1893] A.C. 468 ; 1 Digest 245, *1728* ; 63 L.J.P. 17 ; 69 L.T. 630.
(18) *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161 ; 1 Digest 108, *115* ; 38 L.J.M.C. 12; 19 L.T. 400.
(19) *R.* v. *Carr and Wilson* (1882), 10 Q.B.D. 76 ; 1 Digest 108, *116* ; 52 L.J.M.C. 12 ; 47 L.T. 450.
(20) *R.* v. *Jemot* (1812), Russell on Crimes and Misdemeanours, 8th Edn., 34 ; 14 Digest 139, *1114*.
(21) *R.* v. *Allen* (1837), 7 C. & P. 664 ; 1 Digest 109, *122* ; 1 Mood. C.C. 494.
(22) *The Mecca*, [1895], P. 95 ; 1 Digest 127, *329* ; 64 L.J.P. 40 ; 71 L.T. 711.
(23) *The Veritas*, [1901] P. 304 ; 1 Digest 141, *489* ; 70 L.J.P. 75 ; 85 L.T. 136.
(24) *The Malvina* (1862), Lush. 493 ; *affd.* (1863) 1 Moo. P.C.C.N.S. 357 ; 1 Digest 141, *487* ; Brown & Lush. 57 ; 8 L.T. 403.
(25) *The Uhla* (1867), 37 L.J. Adm. 16 *n.* ; 1 Digest 141, *488* ; 19 L.T. 89.
(26) *The Diana* (1862), Lush. 539 ; 1 Digest 141, *485* ; 32 L.J.P.M. & A. 57 ; 7 L.T. 397.
(27) *The Courier* (1862), Lush. 541 ; 1 Digest 141, *486*.
(28) *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161 ; 11 Digest 410, *781*.
(29) *Sydney Municipal Council* v. *Bull*, [1909] 1 K.B. 7 ; 11 Digest 307, *6* ; 78 L.J.K.B. 45 ; 99 L.T. 805.
(30) *Deschamps* v. *Miller*, [1908] 1 Ch. 856 ; 11 Digest 347, *339* ; 77 L.J.Ch. 416 ; 98 L.T. 564.

INTERLOCUTORY APPEAL by the defendants from an order of BUCKNILL, L.J., sitting as a judge in the Probate Divorce and Admiralty Division, dated Dec. 3, 1945, and reported ([1946] 1 All E.R. 79). The facts are fully set out in the judgment of SCOTT, L.J.

Patrick Devlin, K.C., for the appellants.
Owen Bateson, K.C., for the respondents.

Cur. adv. vult.

April 16. The following judgments were read.

SCOTT, L.J. : This appeal raises a preliminary question of law in an ordinary damage action *in rem* against the owners of the motor vessel Tolten. The respondents allege in the statement of claim that they were owners and occupiers of a wharf at Lagos and that the appellant ship by negligent navigation damaged it. The appellants contend that the court has no jurisdiction to try the case. Counsel for the appellants attacks and counsel for the respondents defends the jurisdiction of the English Admiralty Court to hear and decide the case, which was upheld by BUCKNILL, L.J., sitting as an additional judge of the Probate, Divorce and Admiralty Division. The issue is not whether the statement of claim discloses a good cause of action, but whether the court had jurisdiction to entertain it. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) provides :

> The High Court shall, in relation to Admiralty matters, have the following jurisdiction . . . (*a*) . . . (iv) Any claim for damage done by a ship.

By sect. 33 (2) of the 1925 Act the jurisdiction may be either *in personam* or *in rem*. That Act did not create new jurisdiction, for those provisions merely re-stated the jurisdiction conferred by the Admiralty Court Act, 1861, ss. 7 and 35, in identical terms and the latter Act was intended to extend jurisdiction. BUCKNILL, L.J., relied on the wide and unqualified language there used and held that it covered the facts of the present case. I agree entirely with his judgment ; but the appellant's argument for a limiting interpretation of those very words raises questions of general importance, relating, on the one hand, to public and private international law, both procedural and substantive, and, on the other, to the nature and scope of English jurisdiction in Admiralty and to the nature and effects of the maritime lien for damage as recognised to-day by British Admiralty Courts. In the result the forensic dispute has taken shape as an antinomy between the proposition of counsel for the appellants that there is in England a universal rule of private international law, based on settled practice, that no English court ever takes cognizance of a tort committed in respect of land situate abroad, and the counter proposition submitted by counsel for the respondents that the Admiralty Division will always, or at least in an action *in rem*, take cognizance of "damage" done by a ship anywhere within the

geographical limits of Admiralty jurisdiction, and also will give effect to the proprietary right of maritime lien to which the tortious act or default of the wrong-doing ship automatically gives rise in favour of the injured party wherever his property may have been situate—*i.e.*, whether in this country, or out of it, whether it was afloat or on land, and whether moveable or immoveable. The two competing principles of law, at any rate as originally propounded by opposing counsel, are equally universal in scope, and on the facts of the present case, seem to be mutually exclusive. One, therefore, must give way to the other, or A
one must constitute an exception from the other. When I speak of the wrong-doing ship, I use the personification metaphorically for the persons responsible in law for her negligent navigation.

So far as this court is concerned, I think that, subject to one *caveat*, our municipal rule of common law jurisdiction, as laid down by the House of Lords in *British South Africa Co.* v. *Companhia de Mocambique* (1), is correctly stated in the headnote to the report : B

> The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad . . .

The *caveat* is that the House was addressing its mind, not to an Admiralty action *in rem* against a ship, but to an ordinary common law action for breaking and entering the plaintiff's lands, for ejecting the plaintiff therefrom and for damages for such trespass. Still less was it considering the application of its rule to C
maritime liens. As the statement of claim was originally framed, the Mocambique Co. claimed (i) a declaration that the plaintiffs were lawfully in possession and occupation, and (ii) an injunction to restrain the defendants from asserting title to and continuing in occupation of the said lands. The British South Africa Co. by their defence denied the plaintiffs' title, and the trespass alleged, and further pleaded that the Queen's Bench Division had no jurisdiction to adjudicate D
upon the plaintiffs' claim. Lawrance and Wright, JJ., upheld the demurrer and dismissed the action, so far as it claimed a declaration of title and an injunction. The plaintiffs appealed to the Court of Appeal. There they abandoned their claims for a declaration and an injunction, thus formally eliminating the issue as to title and limiting the action to one of damages for trespass ; and on that footing the court by a majority (Fry and Lopes, L.JJ., Lord Esher, M.R., dissenting) allowed the appeal, but the dissenting judgment was upheld E
unanimously in the House of Lords. Lord Herschell, L.C., began his opinion ([1893] A.C. 602, at p. 617) by pointing out that in the era before the Judicature Acts, when the distinction between transitory and local actions was vital on the question of jurisdiction, no action for damages for trespass to lands situate in a foreign country could be brought (*ibid.*, p. 619). He referred (*ibid.*, p. 621) to *Doulson* v. *Matthews* (2) and other decisions, and also to Story on Conflict of Laws ; but he said (*ibid.*, p. 629) : F

> My Lords, I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before.

Counsel for the respondents submitted that the issue of title never passed wholly out of the *Mocambique* case (1) and that there are certain passages of G
Lord Herschell's opinion which indicate that he was not intending his words to apply to a mere case of damages for trespass. Counsel also sought to distinguish the present action on the ground that in a damage action in Admiralty for injuries to fixed property by the negligence of those in charge of the navigation of the defendant ship, no issue of title need arise, since the defendant wrong-doer cannot challenge the plaintiff's right of action if the plaintiff establishes his *de facto* possession at the time the wrong was committed. Nor H
could any occasion arise, in his submission, for the courts being called upon to enforce any order by execution in Lagos where the plaintiffs' wharf is situate. In this context he prayed in aid the passage in Lord Herschell's opinion (*ibid.*, p. 624) where his Lordship seemed, in his submission, to be indicating that an action for mere damages where no issue of title to the foreign land is involved might be actionable in our courts. I recognise that in a case where the action is brought by a party in possession of land and structures, suing merely for damages for negligence, or even, it may be, for trespass *quare clausum*

fregit, and the plaintiff relies solely on his possession as the foundation for his action, the House of Lords might hereafter distinguish the *Mocambique* case (1); but I do not think it would be right for this court to attempt that distinction as I am satisfied that in regard to common law actions no such distinction was then in the mind of the House; and I therefore, in spite of the argument of counsel for the respondents, accept the statement of the legal position in the headnote to that case as an accurate summary of the decision of the House in A regard to common law actions.

The question accordingly, which we have to decide, is whether that rule of common law jurisdiction prevents the respondents having their present action *in rem* for damage (in the Admiralty sense of that word) tried and decided in the Admiralty Division. In my opinion it does not; but the question is one of far-reaching importance and calls for careful consideration of British Admiralty law, and if there be doubt about that, then of the general law of the sea amongst B western nations, out of which our maritime law largely grew, and, from which it is to the interest of maritime commerce that it should not unnecessarily diverge. Judicial action cannot, of course, reverse a definite departure from the general law of the sea once definitely taken by our own maritime law and expressed in the judgment of a court which binds; but where there is doubt about some rule or principle of our national law, and one solution of the doubt C would conform to the general law and the other would produce divergence, the traditional view of our Admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons; (i) because that course will probably be the true reading of our legal development; (ii) because uniformity of sea law throughout the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle—as many of our Admiralty judges have said in the past.

D The problem of principle before us raises logically three questions for consideration, though an affirmative answer to the second, or even only to the third, would suffice for the dismissal of the present appeal. Proceedings in Admiralty against the owners of a delinquent ship may, at the choice of the plaintiffs, be either *in personam* or *in rem*. In the former procedure the defendants are named as in a King's Bench writ, in the latter the writ is addressed to "the owners of the . . . ship" as defendants; the proceeding is against the ship and E no personal service, is required. In *Castrique* v. *Imrie* (3) LORD CHELMSFORD thus described the nature and effect of the Admiralty jurisdiction *in rem* (L.R. 4 H.L. 414, at p. 448):

> To sum up my opinion in the words of BLACKBURN, J., and the other learned judges who concurred with him, "I think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and secondly, whether the sovereign authority of that state has con-F ferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

The first of my three questions is: Has the procedural bar of the *Mocambique* rule at common law any application to the jurisdiction of the Admiralty Divison in an Admiralty "damage" action whether *in personam* or *in rem*? The second G question is: Even if an Admiralty action *in personam* can for the purpose of that rule, properly be assimilated to a common law action, do the peculiar characteristics of Admiralty jurisdiction *in rem* so differ from common law jurisdiction as to make the common law rule wholly inappropriate? The third question is: If even the peculiar nature of Admiralty jurisdiction *in rem* does not of itself exclude the bar, does the substantive law in Admiralty, that damage by a ship through its maritime fault *ipso facto* gives rise to a maritime lien in favour of H the injured party, make the crucial difference, and enable, and indeed compel, the Admiralty Court to exercise its jurisdiction over the High Seas in an action *in rem* against the ship for damage done by its negligent navigation to fixed property abroad, without regard to the procedural bar of the common law as enunciated in the *Mocambique* case (1)? My personification of the ship is of course metaphorical. In the present appeal, the action being *in rem*, my first question is in a sense academic, and it might seem to be unnecessary to express any final opinion one way or the other. Even the second question might be thought superfluous, if an affirmative answer is given to the third, as I think it certainly must be, for, when addressed to such a proprietary right, the *Mocambique* rule can, in my opinion, have no application. On the other hand, the general nature of Admiralty law and jurisdiction is so different in kind from that of the common law, that to me the *Mocambique* rule seems incompatible both with the general law of the sea as I understand it and equally so with our Admiralty law and jurisdiction, as already expressed in judgments and statutes ; and therefore I would answer all three of my questions by excluding it. Besides, I feel that all the three questions are really involved in the discussion of any one A of them. Nevertheless I will begin with the third question because the answer to that is plainest.

The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effects. In *The Bold Buccleugh* (4), Sir John Jervis, delivering the judgment of the Privy Council, said this (7 Moo. 267, at p. 284) :

> " Having its origin in this rule of the civil law, a maritime lien is well defined by B Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process ; and Story, J. (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches . . .

The judge in that judgment added an *obiter dictum* which was subsequently disapproved ; but that error does not touch the passage I have quoted. In C *The Sara* (5), Lord Macnaghten said this (14 App. Cas. 209, at p. 225) :

> " A maritime lien," as was observed in *The Two Ellens* (6), " must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged . . . It commences and there it continues binding on the ship until it comes to an end." [L.R. 4 P.C. 161, at p. 169.] D

In *The Ripon City* (7), Gorell Barnes, J., reviewed the history of the maritime lien in our law in a long judgment from which so far as I know there has been no subsequent dissent. The following extracts describe the essential characteristics. He said ([1897] P. 226, at pp. 241, 242) :

> The definition of a maritime lien as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process . . . E The result of my examination of these principles and authorities is as follows : The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. F

Note the phrase " privileged claim " ; I shall revert to it later. In an important passage indicating his view of the proper judicial attitude, in considering doubtful questions of law, to the public interest in encouraging prudent navigation, on the one hand, and the proper protection of the party injured by negligent navigation, on the other, Gorell Barnes, J., said (*ibid.*, p. 244) :

> In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the naviga- G tion of a vessel by those in charge of her should not be deprived of the security of the vessel . . .

The argument against " the security " of the lien depended on the facts of that case which were quite different from those of the present case, but the principle underlying the general law of the sea, of protecting maritime commerce, which the judge prayed in aid, is directly applicable in the present case, and is one reason for paying regard to the international conventions to which I refer H later. The positive principle of the automatic attachment to the ship of the creditor's lien upon it is at least as indubitably a rule of substantive law in Admiralty as the negative principle, upon which the *Mocambique* rule rests, is at common law—and I think more so. I can see no *prima facie* reason why the Admiralty principle should give way to the common law rule. That the creditor secured by his lien will be deprived of a vested right of property if the court is prevented by the *Mocambique* rule from enforcing his lien, is obvious. It will also follow, as I will explain presently, that he may lose all remedy. In most actions *in rem* for damage the ship is released on bail, but cases may occur where the liens or rights *in rem* against the ship are so heavy as to exceed the ship's value to her owners, who in such case will probably not enter an appearance and obtain the ship's release on bail. The lien consists in the substantive right of putting into operation the Admiralty Court's executive function of arresting and selling the ship, so as to give a clear title to the purchaser and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities, and subject thereto rateably. I call that function of the court "executive" because once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform, save in the registry, where priorities, *quantum* and distribution are dealt with. When the court has thus discharged the whole of the secured claims, the balance (if any) of the proceeds will, if there be no limitation of liability to prevent it, go to the unsecured creditors, and the final surplus, if any, to the owners. Now contrast the position if the damage claimant be prevented by the *Mocambique* rule from starting or continuing his action *in rem*; but that some other creditor with a maritime lien—perhaps for a subsequent collision, or salvage, or wages, or bottomry, or master's disbursements—arrests the ship and proceeds to judgment, in most cases unopposed. The reference is carried through, and the proceeds of the sale of the ship are completely distributed. The damage creditor looks on disconsolate but gets nothing. All he has left is the doubtful possibility of a personal action against the owners on the principle of *The Dictator* (8). Even if he succeeds in serving the shipowner with a personal writ, he will be met with the *Mocambique* objection and the submission that that rule applies *a fortiori* to an action *in personam*; and possibly also with the defence that the whole of the fund constituting the limit of the shipowner's liability has been distributed amongst the claimants who have been admitted to proof against it. In any event he will have lost his priority, and the defendant may have no other assets within the jurisdiction. If the total claims exceed the limit of the owner's liability, the damage creditor will also lose any right of action *in personam*, which otherwise he might have prosecuted in the court of the country, where the offending ship had caused the damage to the plaintiff's land, for the limitation of shipowners' liability, whether under our statutory system, or under the continental system of limiting liability to the value of the ship and freight, extends to all claims at least in respect of the one accident. One can state the position, for which the appellants contend, almost as a *reductio ad absurdum*. Suppose ship A, by one and the same act of negligent navigation at Lagos, to have caused injury to (i) the plaintiff's wharf; (ii) merchandise on the wharf; (iii) people on the wharf; (iv) ship B lying near the wharf. On those assumed facts, the injured parties Nos. (ii), (iii) and (iv) can conduct a suit *in rem* in the Admiralty Court, but if the *Mocambique* rule is applied, No. (i) is barred. Can anything more contrary to common sense be imagined?

The answer of the respondents based on the maritime lien alone is enough of itself to dismiss the appeal; but Admiralty jurisdiction is an integral whole, and cannot be divided up into water-tight compartments. Fundamental questions of the jurisdiction of our Admiralty Court, and indeed of the general law of the sea are raised by the appeal, and I think it is right to deal with the wider issues raised by my first and second questions, apart from that of the maritime lien by itself. In my view, the law maritime of "damage," as administered in our Admiralty Court, vests a right of action in any person who suffers injury anywhere in the world either to his person or to his property, whether moveable or immoveable, afloat or ashore, when caused by the maritime fault of the owner of a ship, he being responsible for the acts or defaults of his servants. There may be an exception where the damage is done in foreign territorial waters and it is proved that by the law of that country the English doctrine of *respondeat superior* does not apply: see *The Mary Moxham* (9); but there is, naturally, no averment in the defence in the present case, that that English doctrine is not the law of the British Colony of Lagos. If the substantive law administered by our Admiralty Court be what I have stated, it follows, at least logically, that it must be the same whether the procedure be *in rem* or *in personam*. I do not discuss whether the proprietary right vested in the damage claimant by his maritime lien can or cannot be enforced by the Admiralty Court in an action *in personam*. because that is irrelevant in this appeal. As was pointed out by Lord Herschell, L.C., ([1893] A.C. 602, at p. 624) in the *Mocambique* case (1), international law is not, as such, binding upon our municipal courts, but only in so far as our courts have made it a part of our municipal law—whether as a result of statutory enactment or because the particular principle of international law which may be in question has been adopted by our courts as one recognised generally by all civilised nations. A comparable principle applies in regard to the general law of the sea and the maritime law administered in the Admiralty Court. That process of adoption is observable historically in the development of English Admiralty law, and jurisdiction. Originally the jurisdiction, both civil and criminal, was unlimited over the "high seas." The struggle with the common law courts has no bearing on this appeal, at any rate until the Admiralty Court Act, 1840. The present jurisdiction of the Admiralty Division of the High Court is based partly on statutes, but primarily and mostly on principles previously adopted by the Admiralty Court from the general law of the sea, observed by western nations, instanced in early time, *e.g.*, by the Laws of Oleron, and in later times widely followed in the general practice of continental nations. It has been characteristic of English judges exercising Admiralty jurisdiction, as I have already said, to look to "the general law of the sea" for two allied, but distinct purposes: (i) to resolve doubts on a question of English law by adopting what they believed to be the relevant rule of the "general law"; (ii) as a principle of judicial policy in order to avoid creating divergence by our law from the "general law." The importance to maritime commerce of uniformity in all seas, the world over, has received frequent emphasis, both before the Judicature Acts and since. Judicial illustrations will be found in later citations in this judgment. If there be any doubt as to what our Admiralty law is in the present case, both judicial practices are relevant, and in my opinion it is highly important to prevent any such restriction of our Admiralty jurisdiction as would result from even a partial admittance of the *Mocambique* rule, *i.e.*, even apart from the maritime lien. I therefore pray in aid all considerations which go to show that it is equally inapplicable to any "cause of damage" whether *in rem*, or even *in personam*. And for this reason I regard it as relevant and proper to follow judicial precedent and resort to "the general law of the sea," following in the wake of Lord Stowell and Dr Lushington in order to resolve any doubt there may be about our law and to preserve international uniformity in maritime law.

But in taking this course I recognise that I may be criticised on the ground, first, that there is no evidence of foreign law before the court, and, secondly, that the references, which I am about to make to two conventions on maritime law, which have been adopted and ratified by very many countries and passed into law by a considerable number of countries since 1909, are both inadmissible for want of proof and also irrelevant. To the first criticism, I conceive the proper answer to be that I do no more than our past Admiralty judges have done when they made statements about the "general law of the sea"; and, in regard to the conventions, that they are public documents which I use merely as illustrations of the trend of legal opinion, and further that, to the very limited extent to which I pray them in aid, it is judicially my duty to use the knowledge of the "general law of the sea," which I happen to possess through having been personally concerned in the making of all of them.

The substantial points of their relevance are (i) that our maritime lien and the Continental "privilege" are shown by them to be identical in legal meaning, so far as is material to any question now before us; (ii) that the Convention on Mortgages and Liens to which I shall refer, is based on that identity: (iii) that that identity is again a fundamental assumption of the Convention on Limitation of Shipowners' Liability, to which I shall also refer: and (iv) that that relationship of liens to limitation of liability is essentially characteristic of the general law of the sea, of our own law, and of the conventions.

Limitation of shipowners' liability, and maritime lien seem at first sight unconnected topics, but they are not. There is an integral—almost an organic—connection between the two in the history of our own Admiralty law, and that connection comes from the ancient law of the sea in which it is deep-rooted. The basic principle underlying the correlation is seen most clearly in its original form, which was still extant in Continental law before the conventions. Both rules were in truth adopted from the customs of merchants (who then included shipowners), in whose usage they had been applied as measures of public policy for the encouragement of sea commerce. The first object was to bring within forseeable and moderate limits the risks to be undertaken by the shipowner when he adventured his ship on a commercial enterprise. The means adopted was to keep his financial liabilities within the ambit of his "*fortune de mer*," consisting of ship and freight at risk on the voyage. The object of the second was, within that limit, to give to the main creditors of the shipowner, whose claims arose out of his maritime adventure, the protection of a "privileged" position—that of the maritime lien, or its continental equivalent, the French word "*privilege*." The limitation and the privilege were thus interdependent in historic origin. When I say claims, I mean well-founded claims, enforceable by action—the active correlative of our passive words "debt" or "liability," in French the word "*creance*," for which our language has no equivalent. The phrase "maritime lien" was not the original expression in our Admiralty diction. We borrowed from the French, who had in their word "*privilege*" a clearer and less ambiguous name: hence their telling phrase "*creances privilegiees*" to describe the secured rights of the sea creditors in the reciprocal adjustment made by sea law, which I have called a "correlation." There is no difference of meaning, so far as anything in the present appeal is concerned, between the "*privilege*" of Continental law and our "maritime lien," and our judges in early cases used our word "privilege" with the same meaning as that in which "maritime lien" was subsequently used. It is echoed in the passage from Lord Gorell's judgment in *The Ripon City* (7), which I have already quoted. He there twice speaks of "privileged claims"—the English version of the French "*creances privilegiees*." The essence of the "privilege" was and still is, whether in continental or in English law, that it comes into existence automatically, without any antecedent formality and simultaneously with the cause of action, and confers a true charge upon the ship and freight of a proprietary kind in favour of the "privileged" creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, has a certain ranking with other maritime liens, all of which take precedence of mortgages. Our Admiralty judges used the phrases "the general law of the sea," or "the general maritime law," or "the ordinary maritime law" to describe the body of law which our Admiralty Court recognised as administered in all maritime countries and applied in England: see those phrases for instance used by Dr. Lushington in *The Bonaparte* (10), and *The Hamburg* (11). How they obtained their knowledge of the "general law of the sea" they did not state; but I do not think it was from expert witnesses in court.

The principle of limitation was given operative effect by the "*droit de l'abandon*"—the right of the shipowner to acquit himself of all the "*creances du voyage*" by abandoning his ship to his creditors, with a view to the ship being realised by the court and the proceeds distributed rateably amongst the creditors in accordance with the several priorities of their "privileges." Limitation with us first came definitely into our statute law in the year 1734 when the Responsibility of Shipowners Act, was passed for limiting shipowners' liability for loss of the cargo caused by negligence of master and crew to the value of the ship and freight. It may well be that that Act was merely declaratory of maritime law as tentatively applied by the Admiralty Court; I have not investigated; but that the idea came from the general law of the sea as administered by continental nations is obvious. The Responsibility of Shipowners Act, 1813, applied the same limitation to collision claimants, the preamble reciting that:

> . . . it is of the utmost consequence and importance to promote the increase of the number of ships and vessels belonging to the United Kingdom and to prevent any discouragement to merchants and others from being interested therein.

Our present statutory method of limiting the owner's liability to an amount based on £x per ton of the ship's tonnage was first adopted by Parliament in the Merchant Shipping Act, 1854. The artificial measure of £15 per ton of the ship's tonnage where personal injuries and loss of life are caused was introduced by that Act, but split up by the Act of 1862 into £8 per ton for damage to property, with an extra £7 where there is loss of life or personal injury. It is thus apparent that our statutory system was derived from the continental system of the "*fortune de mer*," and that the correlation between limitation and lien remains a foundation of our Admiralty law to-day, as adapted by Parliament from the general law of the sea. That correlation, in my view, of itself operates as a very strong, if not a compelling, reason for resolving any doubtful question of law in favour of maintaining the essential character of the maritime lien wherever in the world it may arise and attach; and therefore of admitting no exception unless it amounts to a paramount rule of law like the immunity of a sovereign before the courts of any other sovereign as in *The Parlement Belge* (12), and *The Tervaete* (13), to which I will revert.

During the last 40 years the correlation has been emphasised in the two conventions to which I have referred. They are products of the world-wide movement for the unification of maritime law in the interest of the overseas commerce of all nations conducted by the International Maritime Committee which was formed in Belgium on the initiative of LOUIS FRANCK, a great Belgian lawyer and statesman, now unfortunately dead. The first conventions so passed were on salvage and collisions. They were brought into force in the United Kingdom by the Maritime Conventions Act, 1911, supplemented by the abolition of the defence of compulsory pilotage (a rule of law which had been peculiar to this country) in the Pilotage Act, 1913. Our Carriage of Goods by Sea Act, 1924, gave legislative effect to another convention. Similar procedure produced in 1926 three more conventions, of which the subjects were: (i) immunity of state-owned ships; (ii) mortgages and liens; and (iii) limitation of shipowners' liability. The Immunity Convention (as extended by a Protocol of 1934) provides for the abolition of immunity of state-owned or state-operated ships when engaged in commerce (see Cmd. Papers 5672-3 of 1938); and when translated into British legislation, will prevent the repetition of such decisions as *The Parlement Belge* (12), and *The Tervaete* (13), where the plea of sovereign immunity allowed state-owned commercial vessels to escape adjudication on the merits. The Mortgages and Liens Convention contains an agreed code of law on all charges upon ships whether written or unwritten. There is, in my experience, no doubt that by the general law of the sea, as in our law, the damage lien attaches as from the moment of damage, and applies equally in favour of the owner of an injured ship or of any injured structure on land. Five English judges (four of them from the Admiralty Division, including two presidents) have been concerned in the conferences, unofficial and official, which produced the conventions.

The damage claimant under art. 2 of the Mortgages and Liens Convention gets his maritime lien on the offending ship for damage caused by its faulty navigation on exactly the same footing for damage to fixed structures (*ouvrages d'art*) in harbours, docks or navigable water-ways (*voies navigables*) as for damage to a ship. One salient point about that convention is that nowhere in it is there the faintest hint that the automatic coming into existence of the damage lien is affected in any way whatever by the fact that the fixed property on land, in respect of which the plaintiff claims, is situate in a foreign country, so as to deprive the courts in any other country of jurisdiction. Such an exception would in my opinion be as contrary to the general law of the sea as to the positive and universal language of the convention. The exact order or priorities is laid down explicitly, and again contemplates no exceptions. The first two lines of art. 2 run as follows:

> Maritime liens shall attach to a vessel, to the freight for the voyage during which the secured claim arises.

Then follow the five categories of maritime liens of which the fourth, so far as relevant to the present appeal, is:

> Claims due for collision or other accidents of navigation, and for damage caused to works in or about harbours, docks and navigable water-ways.

Art. 11 runs thus:

> Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.

That language seems to me in terms to exclude the application of any such inhibition as the *Mocambique* rule, but if the letter does not exclude, the spirit certainly does, for the article is a characteristic mandate to the world's Admiralty courts that "this is the law which you shall apply." And such a mandate of jurisdiction would appear to be a proper, and even necessary, attribution to courts whose jurisdiction extends universally over "the high seas," *i.e.*, in all foreign ports "where great ships go."

On the Limitation Convention agreement was achieved by combining the economic effect of the Continental (and original) system of allowing the shipowner to clear his liabilities by abandoning his ship and freight to his creditors (privileged and unprivileged) with the English system of a maximum money liability dependent on the size of the ship, substituting in effect a conventional value of ship and freight for abandonment; but it is an essential principle of the international concordat that the existing correlation of limitation of liability with maritime liens, inherent in the general law of the sea, should be preserved, so as to ensure that the proceeds of ship and freight, or the fund coming from the statutory payment, should be distributed by the court in strict accord with the rights and priorities of the lien creditors. Adherence to the principle of correlation appears in art. 6 which provides for distribution of the limited fund in strict accordance with the order of ranking of all liens on the ship; and likewise in the requirement of art 8, that if proceedings are taken against the same ship in courts of different states, its owner shall be entitled to bring to the notice of any such court all the claims, whether "*privilegiees*" or not, already lodged against him or his ship in all the other courts, so as to ensure that through proceedings being taken in more courts than one, the total limit of his liability shall not be exceeded. In this convention there is again manifest the tacit assumption that the law of the seas shall prevail, whatever national court and whatever the secured claim (*creance privilegiee*) and whatever the country where the claim originated. I do not in any way suggest that the contents of the two conventions to which I have more particularly referred, afford any direct logical support for the particular principles of law about English maritime liens which I am expressing in this judgment, but the fact that so many nations with different systems of law have subscribed to those principles does go some way to showing that those principles are consonant with that "general law of the sea" on which our own Admiralty judges have so often relied. At any rate, it is satisfactory to note that the conclusions, which I have reached as to our Admiralty law, involve no departure from the terms of international conventions so widely agreed.

I now turn to a more particular examination of the established scope of the jurisdiction enjoyed by our own Admiralty courts, to see how far it supports the view I have been expressing. That jurisdiction is mostly original, though to some extent declared or even extended by statute. In my opinion it too is to-day so wide, so self-sufficient and of such a character that in an Admiralty "cause of damage" the *Mocambique* rule can have no place, whether the proceedings be *in rem* or *in personam* and even apart from the maritime lien to which the damage gives rise. The *Mocambique* rule is, in short, a conception wholly foreign to the essential nature of Admiralty jurisdiction, as shown by its history, judicial and Parliamentary. The limiting rules of the common law about venue were unknown in the Court of Admiralty; and the universality of the world area over which it administered justice both civil and criminal affords a striking contrast to the locally restrictive rules of common law jurisdiction. And here again I lay special emphasis on the degree to which, and the frequency with which in Admiralty judgments, both original and appellate, considerations of policy such as the interest of maritime commerce, and the world's need of uniformity in maritime law, have played a conscious part in the judicial development of British Admiralty law. In *Currie* v. *McKnight* (14), an appeal from Scotland, we have an illustration of this source of growth. There the House of Lords affirmed the decision of the Court of Session to the effect that the unauthorised conduct of certain members of the crew of the defendant's ship in cutting certain mooring ropes of the plaintiff's ship did not create a maritime lien on the defendant's ship. That point is irrelevant to the present appeal; but Lord Watson, discussing the view taken by the Scottish courts that in Scottish law there existed no such right as a maritime lien for damage done by a ship, said this ([1897] A.C. 97, at p. 105):

> That such a conflict should be possible [*i.e.*, between the Scottish and English courts

exercising Admiralty jurisdiction] is inconsistent with . . . the maritime code which ought to prevail in both countries, which, in my opinion, is neither English nor Scottish, but British law.

In that case the decision of the Privy Council in *The Bold Buccleugh* (4), where it was for the first time definitely decided that there is a maritime lien for damage done by a ship, was categorically approved; and LORD WATSON also expressly recognised the priority of the maritime lien for damage over the maritime liens for prior salvage and wages claims and for bottomry bonds. A
He said ([1897] A.C. 97, at p. 106):

> It is unquestionably within the authority of this House to reconsider, and if necessary to overrule, the judgment of the Judicial Committee in *The Bold Buccleugh* (4); but it is no less clear that the opinions of the eminent judges who took part in the decision of that case ought not to be disregarded without good cause shewn. To my mind, their reasoning is satisfactory; and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon B
> plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam-power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured C
> craft should have a remedy against the *corpus* of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.

The language of LORD WATSON there echoes many previous judicial opinions that British maritime law derives originally, and continues to get inspiration, from the general law of the sea prevailing amongst maritime nations; *e.g.*, the opinion of LORD MANSFIELD who in 1759 said in *Luke* v. *Lyde* (15), D
(2 Burr. 882, at p. 887):

> . . . the maritime law is not the law of a particular country, but the general law of nations. . . .

meaning that Admiralty judges should still look for inspiration to the parent source. How wide Admiralty jurisdiction was—and, except on the criminal side, still remains—is well illustrated by the letters patent appointing DR. E
GODOLPHIN judge of the Admiralty court in 1658: see BURRELL, 340-344. The criminal jurisdiction, there described, was all inclusive:

> . . . upon the high seas and salt waters and all other places and precincts within or lawfully belonging to the jurisdiction of the Admiralty of England.

The civil jurisdiction was there described under a long series of broad headings containing diverse particular subject-matters under each heading: and ended F
with the widest possible general words (on p. 342):

> . . . and also in all other cases and causes belonging to the Court of Admiralty aforesaid as it may be requisite or expedient to proceed and take bails and recognisances as hath been used and observed in the said court.

Different phrases have been used, by both Admiralty and common law judges and in Admiralty documents, to describe the world-wide ambit of Admiralty jurisdiction, but none is more all-embracing than the one used most often— G
"the high seas." DR. LUSHINGTON used it repeatedly. In *The Sarah* (16) he said ((1862) Lush. 549):

> The court has original jurisdiction, because the matter complained of is a tort committed on the high seas.

LORD HERSCHELL cited that observation with approval in *The Zeta* (17) ([1893] A.C. 468, at p. 480). But, as so used, the descriptive phrase "high seas" had H
no reference to territorial waters or any other concept of public international law: on the contrary, it included as far as the tide reached up rivers. It was for this reason that it became convenient to find a practical boundary. That was afforded by stopping at the first bridge; and in the early days when the law of the sea took shape there were few bridges across the tidal reaches of rivers. Other descriptions emphasising the extensive signification of the phrase "high seas" are "in places where great ships go," a geographical term which would reach a long way up most navigable rivers in those days when probably a ship

of 300 tons was accounted "great". Another descriptive form of words used by BLACKBURN, J., in *R.* v. *Anderson* (18) (L.R. 1 C.C.R. 161, at p. 169) was :

> . . . at a place where the tide flows, and below bridges . . .

These expressions all mean the same thing, although the word "place" imports something visually identifiable and no doubt had reference to places where land and sea meet. As the criminal jurisdiction of the Admiral was co-extensive with his civil jurisdiction, the criminal cases in the Queen's Bench of the last century throw equal light with cases in the Admiralty Court on the geographical aspect of Admiralty jurisdiction. In *R.* v. *Carr* (19), the crime charged was a theft from a British ship when lying moored to the quay at Rotterdam in the open river (the Maas) 16 or 18 miles from the sea, but in tidal waters and below bridges. STEPHEN, J., said (10 Q.B. 76, at p. 86) :

> The whole question is, was the theft within the jurisdiction of the Admiralty of England ? Ever since the time of Richard II, its jurisdiction has extended to where great ships go. Many statutes regulate procedure for applying that jurisdiction, but the jurisdiction itself has, in its extent, so far as I can learn, remained unnarrowed. Of the cases cited, *R.* v. *Jemot* (20) bears out that jurisdiction, it shows it is not limited to waters outside ports. It was a case of an English sailor punished for what he did on an English ship in port in Cuba. *R.* v. *Allen* (21) is to a similar effect. *R.* v. *Anderson* (18) again is an authority, and it goes further, it affects both place and person, for in that case it was a foreigner who was tried, not a British subject, but it was a foreigner one of the crew ; whilst here we have to decide, following these authorities, whether jurisdiction extends to the English ship placed where great ships usually go as part of their voyage for the purposes of its trading, and to all persons who happen to be on board such ship, so as to be entitled to the protection of English law. I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment of the ship to land, or to inquire when the flag is lowered or when hoisted. Such rules would be to make law without meaning, and to narrow well founded and beneficial jurisdiction. I prefer the obvious and wholesome principle that jurisdiction and protection in these cases are co-extensive.

The judge's reference to crimes committed when the ship was inside a foreign port will be noticed.

The Mecca (22) was an Admiralty case, likewise concerned with foreign ports. There the Court of Appeal (consisting of LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ.), as a matter of course treated Alexandria and Algiers as being quite obviously both included in the geographical term "high seas." They expressed a doubt about a particular basin in Port Said harbour open to the Suez Canal, but on what ground I am unable to guess, unless it was some reference in the evidence to there being no tide there. If it was, that is a geographical error, for, although there is very little tidal rise and fall in any part of the Mediterranean, there is, I believe, the same rise and fall in the Suez Canal at its north end where the basin in question is as anywhere else in the Mediterranean. But the importance of the decision of this court in *The Mecca* (22) is the unequivocal ruling that wherever the tide does ebb and flow, *i.e.*, wherever ships go, is included within the jurisdiction of our Admiralty Court. The place where the plaintiff's allege that the Tolten was guilty of negligent navigation was in tidal waters as she was proceeding out to sea. It is, therefore, clear that so far as locality is concerned our Admiralty Court had jurisdiction.

DR. LUSHINGTON at one time expressed the view that the Admiralty "cause of damage" was limited in kind to cases of collision between ships ; but that view was erroneous, as demonstrated by LORD HERSCHELL in *The Zeta* (17) ([1893] A.C. 468, at pp. 482-485). The jurisdiction over the high seas was quite general (i) whenever anywhere on the "high seas" negligent navigation caused damage with or without collision ; (ii) where claims were made by individuals for personal injuries similarly caused (though not under Lord Campbell's Act until the Maritime Conventions Act, 1911, conferred the right to sue *in rem* and so brought our Admiralty law into line on that point with Continental law) ; (iii) for damages similarly caused to property other than a ship, whether moveable or immoveable, as established in *The Veritas* (23). There was never any attempt by the common law courts, even before the Admiralty Court Act, 1840, to prohibit the Admiralty Court dealing with a "cause of damage" in respect of damages caused in English territorial waters unless the scene lay inside "the body of a county" ; and for this purpose the body of a county ended at low water mark; seawards of that boundary was accepted as the exclusive jurisdiction of the Admiral. Every tort on the high seas was within Admiralty jurisdiction. The struggle with the common law courts was not about the kind of claim but about the geographical area of Admiralty jurisdiction; and then it was only to keep it outside the body of the county that they fought so hard; but they construed that expression geographically as defined not by the limit of territorial waters or by the *fauces terrae*, but by the line of low water mark. Whatever doubts Dr. Lushington may have had about the kind of cases within "the jurisdiction" were dispelled by the Act of 1861. *The Malvina* (24) (affirmed in the Privy Council) was a case of collision in the Blackwall Reach of the Thames between a ship and a barge; and the barge sued *in rem.* To this the defendant ship pleaded:

> The . . . barge was not a ship . . . and the . . . collision took place within the body of a county . . .

Dr. Lushington struck out the plea and said it was the intention of the Admiralty Court Act, 1861, s. 7, to give the court jurisdiction.

I have no doubt about the general principle, but illustrations may be helpful. For damage to fixed property see *The Uhla* (25), *The Veritas* (23), and the cases there cited, and the whole trend of Lord Herschell's judgment in *The Zeta* (17). That foreign territorial waters are within the jurisdiction is shown by *The Diana* (26) (*locus in quo* the Great Holland Canal, two miles from the Nieu Deep); *The Courier* (27) (a collision inside the port of Rio Grande). These two were decided by Dr. Lushington on the same day, Nov. 4, 1862. One purpose of the 1840 Act was to get rid of the common law veto upon the exercise of Admiralty jurisdiction within the body of a county; but the Act was addressed only to cases of damage received by ships, probably because damage otherwise than by collision between ships was not in the mind of Parliament. But when the limited scope of the 1840 reform was appreciated Parliament made it quite clear by the preamble to the 1861 Act that its object was to enlarge the extension effected by the 1840 Act still further, and the language was, as Dr. Lushington at once saw, very wide. I agree with Bucknill, L.J., in thinking that it was intentionally wide and that the *Mocambique* rule would be a restriction altogether repugnant to the intention and language of Parliament in those two Acts read together. What Lord Herschell, L.C., said in *The Zeta* (17) where the ship was claiming for damage done to the ship by the negligence of the Mersey Docks and Harbour Board might well be applied *mutatis mutandis* to the Act of 1861 and the present appeal. His words were ([1893] A.C. 468, at p. 477:)

> The words "damage received by any ship or sea-going vessel" are certainly as wide as could well be conceived, and, regarding the language of the statute alone, apart from other considerations, I do not think it would be possible to entertain a doubt that the present case was within it.

If due weight is also given to the whole of the passages (*ibid.*, at pp. 485,486) about the well-understood meaning of the word "damage" in the Admiralty Court, it is apparent that a claim against the ship for injuries to a wharf fall within it.

Counsel for the appellants relied on *The Mary Moxham* (9) as an authority in his favour, but it is not. The only point decided is irrelevant. Owners of harbour works in a Spanish port sued the owners of the ship which was alleged to have caused the damage in an action *in rem.* The question raised by the defence was based on the ordinary law of tort that, unless the act in question is not only a tort by the law of this country but is at least wrongful by the law of the country where it is committed, an action does not lie. The defendants alleged that by the law of Spain the owners of a ship are not responsible for its negligent navigation, but only the master and crew. It was on that footing that the defendants succeeded. There was an *obiter dictum* in that case by James, L.J. (1 P.D., at p. 108), indicating the possibility of a principle on the lines of the *Mocambique* rule applying, but that question was not argued, and I do not agree with it. It was cited in the *Mocambique* case (1), but the weight of that citation is much reduced by the absence of any discussion in that case based on the Admiralty aspect. In the present case there is naturally enough no averment in the defence that by the law of Lagos the ship is not liable. As a matter of fact as Lagos is within a British colony the relevant law there is almost certainly the same as here. Anyhow it is the duty of the court to make that assumption in the absence of averment and proof to the contrary. Counsel for the appellants also relied on *The Parlement Belge* (12), and *The Tervaete* (13), but the only point decided in either of them was that sovereign ownership carries total immunity—not only from legal proceedings but from the attachment of any lien to the property of the foreign sovereign. That rule of public international law relates in truth to the jurisdiction not of the King's Courts but of the King himself. It is territorial and not judicial. One sovereign will not, in peace, exercise power in any way at all over another sovereign whether through his courts or otherwise. It is to that universal rule of comity that the Immunity Convention is mainly addressed; see DICEY'S CONFLICT OF LAWS, 5th edn., General Principle No. II, p. 25:

> English courts will not enforce a right otherwise duly acquired under the law of a foreign country . . . (C) where the enforcement of such right involves interference with the authority of a foreign State within the limits of its territory.

But with that principle, upon which there is no dispute, it is well to contrast his own summarised commentary at the end of Note 11 (xiv), in his Appendix. It is quite general in scope though following on the last of the claims treated by him as falling within the list of " claims in respect of which an Admiralty action is maintainable."

> (xiv) Any claim to enforce a judgment *in rem* obtained against a British or foreign ship in a foreign court.
>
> A judgment *in rem* is obtained against a ship in a foreign Court of Admiralty whereby the plaintiff in the foreign action is entitled to recover £25,000. The judgment not having been satisfied, the ship comes into an English port. A., the plaintiff in the foreign action, brings an action *in rem* against the ship in respect of the foreign judgment. The court has jurisdiction to entertain the action.
>
> This claim (it is submitted) may be put in a more general form, and it may be laid down that the court has . . . jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists.

A curious clerical mistake has crept into the 5th edition. The word " no," appears between the two words "has " and " jurisdiction " in the second line of the paragraph which is intended to be quite general. The " no " does not appear in any earlier edition and is obviously an error. Ignoring the error it is interesting to observe the unqualified affirmation of the general principle which that very learned author enunciates. I regard it as an accurate statement of English law about maritime liens intentionally expressed by the author in general terms. He was a great master of the whole subject of conflict of laws, and discusses the *Mocambique* case at length in the book. He was far too careful and prudent a writer to omit any relevant qualification when enunciating an absolutely general principle of law, such as the above paragraph.

The appeal, although interlocutory, has raised many questions of substantive law of far reaching importance, particularly in the light of the great international movement for the unification of the law of the sea to which I thought it my duty to refer in this judgment. There is a curious absence of direct authority, an absence which of itself throws doubt on the appellant's contention; but in its absence I felt it my duty to explore the maritime field fully, in order to demonstrate the essential incongruity of the *Mocambique* rule with the old established jurisdiction of the Admiralty Court over all the meeting places of land and sea, where *ex hypothesi* the question of the *Mocambique* rule might have been raised but never has been. The only possible explanation seems to me to be that the rule is fundamentally foreign to Admiralty jurisdiction and has even less application there than it has in equity. My brethren have dealt with its parallel inappropriateness in equity, and it is enough for me to say that I agree with their view.

The appeal must be dismissed with costs.

SOMERVELL, L.J.: In this case the appellants submit that on the facts set out in the statement of claim there is no jurisdiction in the Admiralty Court to try this action. The claim is a claim by owners and occupiers of a wharf in Lagos, Nigeria, for damages to their wharf owing to the appellants' ship having collided with their wharf. The proceedings were initiated by service of a writ *in rem.* There was we are told no arrest, the solicitors undertaking to accept service of the writ. The objection is based on the rule which was considered and applied in *British South Africa Co.* v. *Companhia de Mocambique* (1), which for brevity I refer to as the *Mocambique* case. The judge decided that the court had jurisdiction. After referring to the conflicting *dicta* in *The Mary Moxham* (9), and the absence of express authority he based his judgment in the main on the unqualified words defining Admiralty jurisdiction which are now to be found in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (*a*) (iv) which are as follows :

> (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as " admiralty jurisdiction ") that is to say—(*a*) Jurisdiction to hear and determine any of the following questions or claims : . . . (iv) Any claim for damage done by a ship . . .

This should be read with sect. 33 (2) :

> The admiralty jurisdiction of the High Court may be exercised either in proceedings *in rem* or in proceedings *in personam.*

He did not think that the decision in the *Mocambique* case (1) compelled him to limit the construction of the words in the way contended for by the appellants.

The case raises a difficult question of principle which is in my opinion uncovered by authority.

Counsel for the appellants submitted that the *Mocambique* case (1) laid down a general principle as summarised in the first sentence of the head note :

> The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad.

He argued that the general words of the Judicature Act must be read subject to this rule as they must be read subject to the rule against impleading a foreign sovereign as applied to the arrest of a State ship in *The Parlement Belge* (12). I think there is force in this last point and I feel unable to give as much weight to the part of the argument based on the general words of the Judicature Act as was given, I think, by the trial judge with whose conclusion I agree.

The issues became clear as the case proceeded and were very fully dealt with from the appellants' point of view in the reply of counsel for the appellants. It is, therefore, convenient to pass from the above very abbreviated statement of the argument of counsel for the appellants in opening to the three points taken by counsel for the respondents.

He submitted in the first place that the rule in the *Mocambique* case (1) ought to be confined to cases in which the issue raised by the claim involved, as in that case, a conflict as to title between plaintiff and defendant. He submitted that the rule was in the main based on the ineffectiveness of orders of the courts of one country purporting to decide questions of title regarding foreign land. He submitted that in actions such as this where the trespass complained of is clearly not based on the assertion of a title adverse to the plaintiff, neither the principle of ineffectiveness nor any principle of international comity, also referred to in the *Mocambique* case (1), apply.

In my opinion the House of Lords laid down the rule generally so far as common law actions *in personam* are concerned. Lord Herschell, L.C., ([1893] A.C. 602, at pp. 620, 621), refers to two cases in which :

> . . . Lord Mansfield entertained and acted on the view that where damages only were sought in respect of a trespass committed abroad . . . an action might be maintained in this country

These cases are referred to by Lord Mansfield in *Mostyn* v. *Fabrigas* (28) (1 Cowp. 161, at p. 180) Lord Mansfield's decisions were clearly on the basis that no question of title would arise. Lord Herschell, L.C., says (*ibid*, p. 621) ;

> The view acted on by Lord Mansfield in the two cases referred to has not been followed.

and he regarded them as overruled by the Court of Queen's Bench in *Doulson* v. *Matthews* (2). This may not have been necessary to the decision as there was a clear conflict of title between the two parties to the *Mocambique* case (1), but I think that this court should apply the rule as laid down and in my opinion this is fatal to the first submission made by counsel for the respondents.

As the other two points raised by counsel for the respondents to some extent overlap it is convenient to consider them together. The first is that the rule should not be applied to Admiralty jurisdiction which has always been wider than the common law jurisdiction; the second that the rule should in any event not apply to claims where there is a maritime lien and that there is a maritime lien in this case.

In putting forward these submissions counsel as a basis for his argument drew attention to the admitted exception to the rule. This exception is based on decisions of the Court of Equity:

> . . . as showing that our courts were ready, when no technical difficulty of venue stood in the way, to adjudicate on the title to lands situate abroad.

This quotation is from LORD HERSCHELL's speech in the *Mocambique* case (1) ([1893] A.C. 602, at p. 626), and it is to my mind clear that he accepts the validity of the exception.

In DICEY'S CONFLICT OF LAWS, 5th edn., pp. 207, 208, the first sentence of the "Comment" dealing wtih this exception to the rule reads as follows:

> The principle on which this exception, originally derived from the practice of the Court of Chancery, rests is that, though the court has no jurisdiction to determine rights over foreign land, yet, where the court has jurisdiction over a person *from his presence in England*, or now from the court having jurisdiction to serve him with a writ or notice thereof, though he is out of England, the court has jurisdiction to, and will, in a fit case and in the exercise of its discretion, compel him to dispose of, or otherwise deal with, his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land.

It is unnecessary to consider the precise limits of the exception. Counsel for the appellants submitted that it was not really an exception as the rule applies only to real or mixed actions (see the citation from STORY on CONFLICT OF LAWS in the *Mocambique* case ([1893] A.C. 602, at p. 623) and that proceedings in equity at any rate are not within those categories. The importance to my mind is that the existence of the exception negatives any suggestion that the courts have recognised a general principle that no decisions will be given which may determine or affect rights in or over foreign land. If there were any such principle it would be an end of this case. The respondents have alleged they are owners and occupiers of the wharf and that must be taken to be a relevant fact on which the court would pronounce in giving its decision. It does not however follow that because there is one exception there should be another.

On his second submission counsel for the respondents relied *inter alia* on the decision in *The Courier* (27), where it was held that the Court of Admiralty has jurisdiction where there is a collision between foreign vessels in foreign waters. This followed on *The Diana* (26), which dealt with a collision between British ships in foreign inland waters. In both cases the jurisdiction was, of course, founded on the presence of the *res* within the jurisdiction. Admiralty jurisdiction is founded on the court's control over the *res*, as common law jurisdiction is founded primarily on the presence of the defendant. A foreigner defendant who has committed a wrong abroad against another foreigner may be sued here if the act complained of is a wrong by the law of both countries, and this is analogous to *The Courier* (27). Even if, however, it were right to say that the general power of the Admiralty Court acting as it can both *in rem* and *in personam* is wider than the common law jurisdiction that would not in itself be a ground for granting a further extension.

Counsel for the appellants desired to keep open the point whether a collision with a port or pier situated abroad gave rise to a maritime lien. It was decided in *The Veritas* (23) that damage to a port in British waters gave rise to a maritime lien and I seen no reason for applying any different rule when the damage is to a foreign port.

The ultimate issue in this case is whether a claim *in rem* in respect of which a maritime lien is exercisable in which the plaintiff claims for damage to foreign land should be treated as barred by the rule in the *Mocambique* case (1). That rule is said in part to be based on principles of international comity. Speaking broadly I should have thought that it was in the interests of nations *inter se* that where damage is done which gives rise to a maritime lien, that lien should be enforceable in the courts of any country to which the ship may proceed. I have assumed and think I am entitled to assume that the law of other countries or at any rate most other countries is the same as ours on the matter in question here. Does the fact that the plaintiff asserts and if it is disputed will have to prove his ownership and occupation of the foreign land which has been damaged compel one to make an exception to what is as between nations desirable ?

In the *Mocambique* case (1) there was a conflict as to title between plaintiff and defendant. Although, as I have stated, I think the rule as laid down by the House of Lords covers cases where there is no such conflict, it is undoubtedly the dispute as to title between plaintiff and defendant which is the origin of the rule. Here we are dealing with a special procedure, namely the enforcement of maritime liens by proceedings *in rem* under Admiralty jurisdiction. We are dealing with a class of claim in which any issue as to title is very unlikely, and a dispute as to title, in which the defendant owners of the colliding vessel are themselves claiming the title as against the plaintiff, is so improbable that in my view its theoretical possibility can be disregarded. I do not think the conflicting *dicta* in *The Mary Moxham* (9) can be regarded as authority either way. All I wish to say about that case is that if the claim fell under the rule as subsequently laid down in the *Mocambique* case (1) I doubt whether a mere consent would have entitled the court to entertain the claim. That, however, does not arise here. I do not think that what was said in the *Mocambique* case (1) is to be read as covering or being intended to cover an Admiralty claim such as the present. The point, therefore, being uncovered by authority, I think that the nature of a maritime lien and the unlikelihood of any dispute as to title arising, lead to the conclusion that the present claim should be allowed to proceed and that the point taken by the appellants is bad in law.

My decision being based primarily on the existence of a maritime lien and procedure *in rem*, a question may arise whether the Supreme Court of Judicature (Consolidation) Act, 1925, s. 33 (2) applies, so that the court has the same power as in an ordinary case which is properly initiated *in rem* to exercise its jurisdiction *in personam*. The question was not discussed in argument and is not necessary for the decision, but in my view it follows that it would have the same jurisdiction *in personam* as in other cases where the relevant circumstances were the same.

We were referred to many authorities which were clearly relevant in order that the court should have the matter properly before it. I have not referred to them because in the result the matter seems to me to turn on the principles which I have tried to formulate. I would like to say that I do not think that the principles that have been laid down based on the immunity of sovereigns directly assist in solving the present problem.

It is unnecessary in this case to consider whether claims enforceable *in rem* against a ship but which do not give rise to a maritime lien should, if they concern foreign land in the same way as the claim here, be entertained. It may be that such a claim is difficult to imagine. All I need say is that, by relying as I do on the existence of the maritime lien I do not intend to imply that the class of claim referred to in this paragraph if it should arise would necessarily be outside Admiralty jurisdiction.

I think the appeal should be dismissed with costs.

COHEN, L.J. [read by SOMERVELL, L.J.]: On Oct. 13, 1944, the motor vessel Tolten, while proceeding out of Lagos harbour, Nigeria, collided with and did serious damage to the respondents' wharf. The respondents alleged that such damage was caused by the negligence of the appellants or their servants or agents in charge of the Tolten and on Jan. 23, 1945, the respondents issued a writ *in rem* in the Admiralty Division claiming damages for such negligence. They delivered their statement of claim on Apr. 27, 1945, and on June 6, 1945, the appellants delivered their defence, para. 1 of which reads as follows :

> The defendants object that on the facts set out in the statement of claim this Honourable Court has no jurisdiction to adjudicate thereon. If the defendants' objection as aforesaid is not upheld, they will rely on the matters hereinafter pleaded.

By an order made by the registrar on Oct. 2, 1945, the point of law thus raised was directed to be heard as a preliminary issue. This issue came before BUCKNILL, L.J., sitting as a judge of the Admiralty Division and on Dec. 3, 1945, he delivered a reserved judgment holding that the court had jurisdiction to try the action and he dismissed the defendants' objection with costs. BUCKNILL, L.J., based his judgment on the ground that (1) the Supreme Court of

Judicature Act, 1925, s. 22, re-enacting in effect the Admiralty Court Act, 1861, s. 7, provided that the High Court shall have in relation to Admiralty matters jurisdiction to hear and determine among other questions any claim for damages to a ship; (2) these words were clear and simple and must be given the widest possible interpretation. Counsel for the appellants however contended that (1) the words of the statute must be construed in the light of the general rules determining the limits of the jurisdiction of the courts of this country A and (2) one of such rules is that the court has no jurisdiction to entertain an action for the recovery of damages for trespass to an immoveable situate out of England. He says that this rule is clearly laid down by the House of Lords in *British South Africa Co.* v. *Companhia de Mocambique* (1), and that it applies in all cases and not merely where title to the immoveable is in dispute. In support of this last contention he relies on *Municipal Council of Sydney* v. *Bull* (29). This case undoubtedly supports his contention but it does not bind us. B I must, therefore, consider whether the decision of the House of Lords necessarily leads to the conclusion that *Municipal Council of Sydney* v. *Bull* (29) was rightly decided. The point did not directly arise in the *British South Africa Co.* case (1) as the title was clearly in dispute, but I think that a perusal of the speeches of LORD HERSCHELL, L.C., and LORD HALSBURY show that their view was that in common law actions for trespass, if the trespass was to land outside C England, the plaintiff would be non-suited whether or not the title was in dispute. This was clearly LORD HALSBURY's opinion for he says ([1893] A.C. 602, p. 632):

> But wherever the place was material, as the unvarying, current of authorities establishes that it was in all controversies relating to land, the defendant might traverse the place, and, even if he did not, if it appeared in proof that the place was out of England, the plaintiff was nonsuited.

LORD HERSCHELL, L.C., in dealing with two decisions of LORD MANSFIELD D where LORD MANSFIELD had exercised jurisdiction in cases of trespass to land outside England did say (*ibid.*, at p. 624):

> Nor am I satisfied that either LORD MANSFIELD or STORY would have regarded an action of trespass to land as a suit for personal damages only, if the title to the land were in issue, and in order to determine whether there was a right to damages it was necessary for the court to adjudicate upon the conflicting claims of the parties to real estate. In both the cases before LORD MANSFIELD, as I understand them, no question E of title to real property was in issue. The sole controversy was whether the British officers sued were, under the circumstances, justified in interfering with the plaintiffs in their enjoyment of it.

But I do not think he was thereby approving LORD MANSFIELD's decisions, for (*ibid.*, at p. 621) he had pointed out that they had not been followed, that they had been cited in *Doulson* v. *Matthews* (2), that in the case last cited an action F had been held not to lie and that *Doulson* v. *Matthews* (2) had ever since been regarded as law. LORD HERSCHELL's reasoning as a whole seems to me only consistent with the view more definitely expressed by LORD HALSBURY.

I must, therefore, proceed on the basis that at common law no action for trespass to land outside England would be entertained, but as is recognised by LORD HERSCHELL, L.C. ([1893] A.C. 602, at p. 626), courts of equity have not hesitated to adjudicate on the title of land situate abroad where they would act G on the conscience of persons living here. The class of cases in which they will do so is defined by PARKER, J., in *Deschamps* v. *Miller* (30) as follows ([1908] 1 Ch. 856, at p. 863):

> . . . I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a court of equity in this country, would be unconscionable, and do not depend for their existence on the H law of the *locus* of the immoveable property.

The rule relied on by counsel for the appellants is not, therefore, absolutely binding on all the courts of the country and counsel for the respondents suggests that another exception is to be found in the case of actions *in rem* for damage to property abroad caused by ships.

Two alternative grounds for the decision in *British South Africa Co.* v. *Companhia de Mocambique* (1) have been suggested (1) that the court will not make an order which it cannot make effective and (2) that the comity of nations requires that our courts shall not adjudicate in cases where the title to foreign land might be an issue. In my opinion neither of these grounds precludes us from upholding the decision of Bucknill, L.J. On the facts of the present case it could not be said that a judgment if given would be ineffective and if the court is to refuse to exercise jurisdiction it must, I think, be on the ground that to do so would be against the comity of nations. Can it be against the comity of nations that the Admiralty Court should entertain an action at the instance of a person claiming to be the owner of foreign land for damage done to that land by a ship ? Such jurisdiction is based on the presence within the jurisdiction of the offending ship. The accident (subject to an exception to which I will refer later) creates a right of property known as a maritime lien in favour of the owners of the property, be it a ship as in *The Bold Buccleugh* (4) or a wharf in England as in *The Veritas* (23). Maritime liens are recognised in the legal systems of most countries, and I can see nothing inconsistent with the comity of nations in the Admiralty Division of this court holding that a maritime lien arises in favour of the owner of land situate outside the jurisdiction.

Counsel for the appellants says that such a conclusion is inconsistent with the principle of the decision of this court in *The Tervaete* (13), which, he says, shows that there can be no maritime lien in favour of the owner of land situate out of the jurisdiction. In that case it was held that damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, and if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action *in rem*. The basis of that decision seems to me to be that the recognition of a maritime lien would affect the property of a foreign sovereign : see *per* Bankes, L.J. ([1922] P. 259, at p. 266) and *per* Scrutton, L.J. (*ibid.*, at p. 272). I can see nothing in that decision to justify us in holding that a lien cannot be created in favour of the owner of foreign land by the action of a ship not the property of a foreign sovereign.

On the whole I think the comity of nations requires that the Admiralty Division of this court should recognise and enforce a maritime lien in favour of the owner of land situate abroad, for if not and the ship were arrested here, the owner of the foreign land might find himself postponed to the owner of an English ship injured in the same accident or to claims enforceable *in rem* but not protected by a maritime lien.

For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *William A. Crump & Son.* (for the appellants) ; *Lightbounds, Jones & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

versed. H.L. [1948] 1 All E.R. 414.

NUGENT-HEAD *v.* JACOBS (INSPECTOR OF TAXES)

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), July 11, 12, 25, 1946.]

Income Tax—Married woman—Income from separate property abroad—Husband on military service overseas—Whether wife "living separate" from husband —Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 16, *proviso* (2).

The respondent, a married woman, owned property in her own right in the U.S.A., from which she derived an income, part of which was paid to her in the United Kingdom. In 1941, her husband, who was then in the army, and with whom she had since the marriage lived a normal married life, was ordered overseas on military duties and remained away for 3 years. There was no change in the marriage relations except that necessarily caused by the husband's physical absence :—

Held : the expression "a married woman living separate from her husband" in the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (2), was not confined to a wife who was living separate from her husband because of some judicial decree or order, or because of a deliberate intention on the part of one or both spouses to break up the matrimonial home, but included a wife who was, for the time being, living apart from her husband not because either or both wished to do so but by reason of the force of circumstances. The respondent was, therefore, assessable to tax, under r. 16, on the income received by her in the United Kingdom from her property in the U.S.A., as if she were a *feme sole*.

Decision of Macnaghten, J. ([1946] 1 All E.R. 198) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal here reverse the court below, holding that the provision in the Income Tax Act under consideration relating to the assessment of a wife " living separate " from her husband represents merely the antithesis of living together, and is not, therefore, confined to living apart in consequence of some deed or judicial decree or desertion.

As to Liability in Respect of Income of Married Women, see HALSBURY, Hailsham Edn., Vol. 17, pp. 373-375, paras. 767-769 ; and for Cases, see DIGEST, Vol. 28, p. 96, Nos. 570-573.]

Cases referred to :

(1) *Derry* v. *Inland Revenue* (1927), S.C. 714 ; Digest Supp. ; 13 Tax Cas. 30.

(2) *Eadie* v. *Inland Revenue Comrs.*, [1924] 2 K.B. 198 ; 28 Digest 113, *702* ; 93 L.J.K.B. 914 ; 131 L.T. 350 ; 9 Tax Cas. 1.

Appeal by the Crown from an order of Macnaghten, J., in favour of the taxpayer, dated Dec. 10, 1945 and reported ([1946] 1 All E.R. 198). The relevant facts are set out in the judgment of Scott, L.J.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

F. Grant, K.C., and *Terence Donovan, K.C.*, for the taxpayer.

Cur. adv. vult.

July 25. The following judgments were read.

Scott, L.J. : In this appeal the only question in issue is one of interpretation of the Income Tax Act, 1918, All Schedules Rules, r. 16. The respondent before us is the wife of Lieut.-Colonel Nugent-Head. She was, under that rule, assessed and charged to income tax for the year 1942-1943 in respect of the sum of £7,082, income received by her from her own possessions in the U.S.A. The question is whether she was rightly so charged. She and her husband had lived together happily in England since their marriage in 1933, but in Nov., 1941, he had been sent abroad on military duties overseas. There he remained, by military orders, for three years. There was no change in the marriage relations, except that caused by his physical absence ; had it not been for the military orders, he would have been at all relevant times living with her in the matrimonial home as before. In these circumstances, she appealed, without success, to the Special Commissioners and then to the King's Bench Division, where Macnaghten, J., allowed her appeal. Hence the appeal by the Crown to this court. The total income received, or receivable, by her for the year upon which her assessment was based was £13,615, but the balance of £6,533 was retained in America. There is no dispute as to amount, and it is conceded that the husband is in any event chargeable under Case V with the £6,533, and if she succeeds in her present appeal, with the £7,082 also. The only question for us is whether under rule 16 she is properly assessable and chargeable with the £7,082.

The whole litigation is attributable, in my opinion, to the extraordinary ambiguity of the language used in proviso (2) of r. 16 ; and the statutory history of that language shows how the reluctance of the Inland Revenue to see any Parliamentary change made in ancient wording to which they have got accustomed and of which they think (often rightly) they know the meaning (though the taxpayer probably does not) may lead to unnecessary disputes and therefore much public inconvenience. This is the rule :

> A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried : Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee ; and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit.

Before modern reforms of the law relating to the property of married women, the only event in which a married woman was taxed personally was if she was acting as a "sole trader." By the custom of the City of London, and possibly some others, she was then regarded as a *feme sole.* If she had equitable interests it was not herself, but her trustees, who were taxed. Both those positions were recognised in the early Income Tax Acts (1803, sects. 91 and 89; 1805, sects. 101 and 99; 1806, sects. 56 and 54; 1842, sect. 45), the last adding the case of profits to which she was "entitled to her sole or separate use"; but no question is raised in the present appeal upon those words. In the case of "a married woman living with her husband" the husband alone is chargeable, because no other treatment of her would have been consistent with the ancient identification of the wife with the husband so far as rights of property were concerned. The statutory expression of the common law view appeared as a proviso in practically the same terms as in the present proviso (1) to r. 16 (see, *e.g.*, sect. 91 of the 1803 Act). The present proviso (2) first took shape in the latter part of sect. 101 of the 1805 Act, which was as follows:

> . . . provided also, that any married woman living in Great Britain separate from her husband, whether such husband shall be temporarily absent from her or from Great Britain, or otherwise, who shall receive any allowance or remittance from property out of Great Britain, shall be charged as a *feme sole*, if entitled thereto in her own right, and as the agent of the husband, if she receives the same from or through him, or from his property or on his credit.

The main argument of counsel for the respondent is that the word "separate" means and has always meant "separated"—either judicially, or by deed, or at least to such a degree in fact as to show such disruption of the matrimonial home as would be recognised for some purpose or other in courts with matrimonial jurisdiction. It was further urged, with undoubted force, that the words "whether the husband be temporarily absent from her or from the United Kingdom or otherwise" are unintelligible; and on that counsel invoked the principle that a taxing Act should be construed strictly, and not against the taxpayer. He, therefore, submitted that such unintelligible words should be disregarded. If the proviso had stopped short after the direction for charging her in respect of any allowance or remittance from property out of the United Kingdom, as a *feme sole*, this argument might well have prevailed; but that interpretation is, in my opinion, rendered impossible by the last two lines of the second proviso, which charge her "as the agent of her husband if she receives the same" (*i.e.*, the allowance or remittance from abroad) "from or through him or from his property or on his credit." The argument is made impossible because *ex hypothesi* she is "separate" from him when she so receives his money; and the receipt of money voluntarily sent by him is inconsistent with the meaning of the word "separate" which is essential to the argument on her behalf.

When that provision was first added, *viz.*, in 1805, many husbands went to India or the plantations, in search of a livelihood, and remained abroad for two or more years, and yet were in no sense breaking up the matrimonial home; on the contrary they were keeping it up and remitting money to their wives for the purpose of maintaining it. In other words, there was no such "separation" as the argument predicates is to be read into the word "separate." In the eye of the law the wife was still "living with her husband." This construction which interprets the word "separate" as a synonym for "not living with the husband" in a merely local and factual sense is the only one which is not inconsistent with the word "temporarily." What the words "or otherwise" were intended to cover I cannot guess; but the dominant idea is that the wife may be receiving money from her husband though "separate"; and I, therefore, construe that word as merely representing the antithesis to living at the time in question in the same place as the husband.

I have not discussed the three decisions which were cited to us as they do not materially assist in the particular questions of construction raised by the present appeal, but I have read the judgment of Bucknill, L.J., and completely agree with it. It is much more illuminating than my own.

I think the wife was rightly assessed and charged, and the appeal must be allowed with costs here and below.

Bucknill, L.J. [read by Somervell, L.J.]: This is an appeal from the judgment of Macnaghten, J., holding that the respondent was not personally liable to be assessed to income tax for the year 1942-1943 in respect of a sum of £7,082 received by her from abroad and to which she was entitled in her own right.

There is no dispute about the material facts. The question for the decision of the court is whether on those facts at the time when the wife was assessed and charged the respondent was a married woman living in the United Kingdom separate from her husband, within the meaning of proviso (2) of r. 16. Macnaghten, J., reversing the decision of the Special Commissioners, held that the respondent did not come within those words.

The decision of the Special Commissioners was based on their opinion that proviso (2) should be treated as a qualification of proviso (1), *i.e.*, as dealing with the particular case of a married couple who although living together within proviso (1) are temporarily in different places. Macnaghten, J., on the other hand, came to the conclusion that if proviso (1) is to be construed as covering a case such as the present one (which the Crown admitted was so) then "the second proviso must be read in its natural sense as applying only to the case where the spouses have separated in the ordinary sense of the word," to quote the precise words at the end of his judgment.

There is no authority bearing directly on the point. The opinions of the judges of the Court of Session in *Derry* v. *Commissioners of Inland Revenue* (1) were conflicting as to whether in the particular circumstances of that case the wife was living with her husband within the meaning of proviso (1). The case therefore differs fundamentally from the present case inasmuch as in the present case the Crown has admitted that at the material time the respondent was living with her husband within the meaning of proviso (1).

"Wives living with their husbands" has been held to include all wives having a common matrimonial home with their husbands. The home need not be a house or even a room, and need not be at any fixed geographical point. Such wives include those whose husbands are absent from home, provided the absence is not due to a deliberate intention on the part of one or both spouses to break up the matrimonial home, or is not due to any decree or order of a competent court that the parties be no longer bound to cohabit with one another. In other words, "wives living with their husbands" fall into two classes, (*a*) husbands and wives in fact living together, and (*b*) husbands and wives who are for the time being living apart not because they wish to do so but by reason of the force of circumstances.

The question then arises: Does the expression "married woman living separate from her husband" in proviso (2) include wives in my suggested sub-class (*b*) of proviso (1), or does it only include wives who are living separate from their husbands because of some judicial decree or order, or because of a deliberate intention on the part of one or both spouses to break up the matrimonial home? I think the question is a difficult one to answer, but there are two reasons which lead me to the conclusion that the Special Commissioners were right in their reading of the rule. The first reason is that if proviso (2) only includes wives living separate from their husbands because of some decree or order, or by mutual consent, or through desertion, then, inasmuch as such wives obviously do not come within proviso (1), they fall within the general words of the rule. Consequently proviso (2) would be unnecessary and in effect a mere partial repetition of the general words. On such a reading, to quote from the judgment of Lord Sands in *Derry's* case (1) (13 Tax Cas. 30 at p. 37):

> Proviso (2) would be unnecessary and meaningless if regarded simply as a qualification of the provision of the opening clause as regards the wife's separate income.

The second reason is that on such a limited reading of proviso (2) the words "whether the husband be temporarily absent from her" would be almost impossible to apply to any case. "Temporary absence from her" does not seem to fit in at all with the idea of separation by decree or order, or by mutual consent, or by desertion.

Although judicial interpretation has given to the phrase "wives living with their husbands" a meaning which includes wives who are temporarily separated from their husbands by force of circumstances, no interpretation has been given to the phrase "wives separated from their husbands owing to his temporary absence from her" so as to limit it to wives separated by decree or order or mutual consent or desertion. In this connection I may quote the phrase "separation allowance" used officially for payments made in certain circumstances to wives while their husbands are serving in the forces of the Crown, although still having a common matrimonial home. Thus art. 986 of the Royal Warrant for the pay, etc., of the Army published in 1914 is as follows:

> A soldier borne on the married establishment of his corps who, owing to service abroad, is separated from his wife and family shall contribute . . .

And the side-note to the Army (Amendment) No. 2 Act, 1915, s. 1 (1), is "Provisions as to separation allowances." A

For these reasons I think that the decision of the Special Commissioners was right and that the appeal should be allowed.

Somervell, L.J.: This appeal turns on the construction of r. 16 of the All Schedules Rules, dealing with the assessment of married women.

It was conceded by the Crown at the hearing before the Commissioners that on the facts as set out in the Case the respondent was "living with her husband" within the meaning of proviso (1), because although they were apart B for a long period, the marriage, which was a happy one, subsisted. This concession is not, of course, binding on the court, but it is in accordance, I think, with the construction placed upon these words by Rowlatt, J., in *Eadie* v. *Commissioners of Inland Revenue* (2), and I will consider the arguments on the assumption that it is correct.

On this basis the judge held that proviso (2) should be construed as applying C to cases outside proviso (1), *i.e.*, to cases where the spouses are not living together, but are separated by a decree of the court or by a deed or, I think, where, without any deed, each spouse has set up a separate home, because there is no further desire for matrimonial relations and a common home. Counsel for the taxpayer supported this view, and I will consider his argument in more detail later. This view is supported by the general lay-out of the rule. Counsel D for the Crown contended that it was impossible to construe the words of proviso (2) as limited to cases where the parties were separated in the sense that the marriage had broken down and there was no longer a common matrimonial home. He submitted that the phrase must be construed as a whole and the words "living . . . separate from her husband" construed in the light of the words following. The expression "temporarily absent from her" are apt to describe an absence such as that in question here and are unintelligible if E Parliament intended to confine the proviso to wives legally separated from their husbands. The phrase "temporarily absent from her" suggests primarily the case where she remains at the matrimonial home and he is away on service or on official duties or business. These words compel the court to construe proviso (2) in part at any rate as an exception to or cutting down of proviso (1).

He also relied on the final words of the proviso as supporting his construction. This he said was intended to cover a case where, for example, a husband overseas F in the plantations sent remittances to his wife. The revenue authorities would be unable to collect the tax from him because of his absence. The remittance would escape effective tax unless the wife could be assessed. Though, no doubt, it is possible that a husband legally separated from his wife by an order of the Ecclesiastical Courts might make such remittances, the problem would arise far more frequently in cases where the marriage was fully subsisting. G If the construction of counsel for the respondent is right, this far more frequent case is left unprovided for, although Parliament clearly had the problem of such remittances escaping taxation in mind.

The only authority dealing with the construction of this proviso is the Scottish case of *Derry* v. *Commissioners of Inland Revenue* (1). In that case Lord Sands construed the section substantially in the way contended for by the Crown. He based this to some extent on the argument that the opening words H and proviso (1) are exhaustive. All cases not falling within proviso (1) fall to be dealt with under the opening words and, therefore, the first part of proviso (2) is unnecessary unless it is construed as covering cases within proviso (1). Counsel for the taxpayer pointed out that this was not so when proviso (2) was first introduced in the Act of 1805. At that time a married woman could only be assessed and charged in her own name on profits as a sole trader. Her income from sources here could be assessed on her trustees, but there were no means of assessing her on income from foreign possessions if she was not living with her husband. No doubt the court is entitled to look at the history of a statutory provision, particularly when it appears, as r. 16 does today, in a Consolidation Act. On the other hand, the proviso with the words on which LORD SANDS based his argument appear both in the Act of 1806 and in the Act of 1842. LORD SANDS did not, I think, rely solely on this point, and in any case, as it seems to me, we have to construe the words as they now appear.

Counsel for the Crown submitted quite rightly that it was sufficient for A him to establish that the words covered this case. There was, however, a good deal of discussion on the words "or otherwise." They may bring in cases where there is a legal and permanent separation. It is in such cases unnecessary to provide for the wife being assessed in respect of remittances she was entitled to in her own right, but the later words under which she could be assessed as agent for her husband would be effective.

The main argument of counsel for the taxpayer may be summarised as B follows. He relied, and rightly, on the form of the rule. He submitted further that living separate from her husband is the opposite of living with her husband. This is, he submitted, the condition precedent of proviso (2). The following words may be inapt but cannot cut down this condition. He would read the rule somewhat as follows: A married woman living in the United Kingdom but not living with her husband in the sense of proviso 1 can be assessed whether C the husband is in the United Kingdom or not and whether the separation, as he construes that word in this proviso, is temporary or not.

The arguments on both sides were developed with force and clarity and my opinion fluctuated. If the words "living separate" had stood alone I should have accepted the argument of counsel for the taxpayer. I am, however, clear that one must construe the phrase as a whole. I have come to the conclusion that the words "whether temporarily absent from her, or from D the United Kingdom, or otherwise" are inappropriate if the Legislature had in mind legal separations but are on the whole appropriate to cover the facts of the present case. I also think there is substance in the argument of counsel for the Crown based on the concluding words.

Other points were discussed. Counsel for the taxpayer submitted that the rather curious words "from her or from the United Kingdom" were inserted after "absent" as, if they had not been there, it might not have been clear E that absence from the wife although the husband was in the United Kingdom was to be covered.

What is the necessary period of absence? I should myself have thought the year of assessment. This agrees with the submission of counsel for the Crown. Counsel for the taxpayer submitted that it was the previous year on the figures of which the assessment would be based.

It is, I think, possible that the form of the rule, which, as I have said, dates F back in essentials to 1806, may be due to the framers and re-enacters, possibly wrongly, construing the words "living with her husband" as meaning cohabitation in a common home. The form of the proviso certainly affords an argument for this construction, and I think it may have been the view of LORD BLACKBURN in *Derry's* case (1). I express no opinion on the point.

Although counsel for the Crown submitted that the rule clearly covered G the present case, he frankly admitted the difficulties and obscurities of the rule. It is unfortunate that a rule which has such a wide application should be left in this state.

For the above reasons, I think the appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Gordon, Dadds* H *& Co.* (for the taxpayer).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BARRY (INSPECTOR OF TAXES) *v.* CORDY

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), July 1, 2, 3, 25, 1946.]

Income Tax—Sched. D.—Purchase of endowment policies on other people's lives—Purchase made with intention of providing ascertained annual sums—"Adventure or concern in the nature of trade"—Income Tax Act, 1918 (*c.* 40), *s.* 237, *Sched. D, Case* 1.

The respondent, in 1937, formulated a scheme whereby, out of £100,000 available for investment, he could ensure about £7,000 a year to spend for the rest of his anticipated life which, for the purpose of his calculation, he assumed would last until 1960 when, if he lived so long, he would be 74. Over a period of 18 months he bought in the open market endowment policies taken out by other people on their own lives. For his outlay of £100,000 he calculated he would receive over the 23 years his required figure of £161,000, his purchases thus yielding a means of livelihood at the average rate of £7,000 a year. Those sums contained accretions on the sums originally invested. It was contended on behalf of the respondent that all the receipts, actual or contemplated, were capital and not income and that the whole operation was pure investment and involved no trade, either in the natural sense of the word or in its statutory sense as defined in the Income Tax Act, 1918, s. 237, as including "trade, manufacture, adventure or concern in the nature of trade." The Commissioners held that the respondent was engaged in a "concern in the nature of trade" resulting in profits which were assessable under Sched. D, Case I, of the Act. Macnaghten, J. held that it was not an operation within the meaning of "trade" because there was no "dealing" in the policies in the sense of their being bought and sold again, since they were bought to keep and not to sell :—

Held : (i) there was abundant evidence to support the finding of the Commissioners which, therefore, was final.

(ii) the judge's interpretation of Sched. D was too narrow, and the respondent's operations came within the meaning of both "adventure" and "trade" in the definition of "trade" in s. 237 of the Income Tax Act, 1918.

Decision of Macnaghten, J. ([1945] 1 All E.R. 695), *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal reverse the court below, holding that the interpretation of "trade" adopted by Macnaghten, J., as importing a regular business of buying and selling was too narrow. This would exclude such activities as banking, insurance and finance, and the whole trend of modern decisions is to regard Sched. D as embracing almost every method of gaining a livelihood not included in any other schedule.

As to what Constitutes Trading, see HALSBURY, Hailsham Edn., Vol. 17, pp. 95-108, paras. 190-201 ; and for Cases, see DIGEST, Vol. 28, pp. 22-24, Nos. 108-127.]

Cases referred to :

(1) *National Association of Local Government Officers* v. *Bolton Corpn.*, [1942] 2 All E.R. 425 ; [1943] A.C. 166 ; 167 L.T. 312.

(2) *Clerical, Medical & General Life Assurance Society* v. *Carter* (1889), 22 Q.B.D. 444 ; 28 Digest 59, *301* ; 58 L.T.Q.B. 224 ; 2 Tax Cas. 437.

(3) *Cooper* v. *Stubbs*, [1925] 2 K.B. 753 ; 28 Digest 22, *113* ; 94 L.J.K.B. 903 ; 10 Tax Cas. 29.

(4) *Martin* v. *Lowry, Martin* v. *Inland Revenue Comrs.* (1925), 42 T.L.R. 233 ; 28 Digest 22, *114* ; 11 Tax Cas. 297.

(5) *Rutledge* v. *Inland Revenue Comrs.*, 14 Tax Cas. 495 ; Digest Supp.

(6) *Southern* (*S.*) v. *A. B., Southern* (*S.*) v. *A. B., Ltd.*, [1933] 1 K.B. 713 ; Digest Supp. ; 102 L.J.K.B. 294 ; 149 L.T. 22 ; 18 Tax Cas. 59.

(7) *Leader* v. *Counsell, Benson* v. *Counsell*, [1942] 1 All E.R. 435 ; [1942] 1 K.B. 364 ; 111 L.J.K.B. 390 ; 167 L.T. 156 ; 24 Tax Cas. 175.

(8) *Graham* v. *Green*, [1925] 2 K.B. 37 ; 28 Digest 22, *116* ; 94 L.J.K.B. 494 ; 9 Tax Cas. 309.

Appeal by the Crown from an order in favour of the taxpayer made by Macnaghten, J., on Apr. 20, 1945, and reported ([1945] 1 All E.R. 695). The relevant facts are set out in the judgment of the court delivered by Scott, L.J.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the appellant.

Heyworth Talbot for the respondent. *Cur. adv. vult.*

July 25. SCOTT, L.J., read the following judgment of the court. This appeal raises the question whether certain moneys received by the respondent during 5 tax years ending on Apr. 5, 1943, were capital or income. The Commissioners found as a fact that they were income from a source within Sched. D. MACNAGHTEN, J., held that there was no evidence upon which they could so find, apparently not on the ground that they were not income but that the source was not within Sched. D. The Crown appeals. The respondent in 1937 had available some £100,000 of loose money. He had no children and his wife had means of her own sufficient to provide for her. He had lost money on the Stock Exchange and was looking for some means of livelihood by which he could avoid the risk of such losses and at the same time ensure about £7,000 a year to spend for the rest of his anticipated life, which for the purpose of his calculation he assumed would last till 1960, when he would be 74 if he lived so long. In case he should survive longer he decided as part of his plan, to buy forthwith a deferred annuity for himself as from that age. He was a mathematician and consequently able to make his own calculations accurately. In truth he was a well-qualified financier. He thought out a scheme by which he could assure himself his objective of £7,000 a year out of his £100,000 available for investment and at the same time avoid the risk of losing any of his £100,000, a risk obviously incidental to Stock Exchange investments. One financial object was no doubt avoidance of income tax. His happy thought was to utilise endowment policies taken out by other people on their own lives with good assurance companies. He was aware of the fact that there was in London an open market in such policies at fortnightly auction sales conducted by a well-known firm of auctioneers. At these auctions he instructed his solicitor to buy at his limits of price when the endowment dates of the policy offered for sale fitted in with his scheme. It took him 18 months of habitual buying, through his solicitor as his agent, at these auctions to complete his purchasing.

For his outlay of £100,000 he reckoned he would receive over the 23 years his required figure of £161,000, his purchases thus yielding a means of livelihood at the average rate of £7,000 a year. These sums contain accretions on the sums originally invested. If these are to be regarded as accretions of capital on ordinary investments as the respondent contends, they would not be taxable. If, as the Crown contends, they represent profits from an adventure or concern in the nature of trade, the assessments were properly made. The judge rejected the Crown's contention.

Legally the position is the same as if he had attended the auctions himself. In the result his total purchases, as delineated on his own graphs in order to express the financial results of his operations on the endowment policy market, showed a deficiency of £12,000, but that did not disturb him and need not disturb us.

The figures upon which tax is claimed represent the accretions over his capital invested, realised in the year in question. His case is that all the receipts, actual or contemplated, were capital and not income, and that the whole operation was pure investment and involved no trade either in the natural sense of that English word, or in its statutory sense as defined in the Income Tax Act, 1918, s. 237, as including " . . . trade, manufacture, adventure or concern in the nature of trade." The judge held that it was not an operation within the meaning of "trade" because there was no "dealing" in the policies in the sense of their being bought and sold again, since they were bought to keep and not to sell. This interpretation of Sched. D is too narrow—for it would exclude banks, finance houses, underwriters and bookmakers who are all taxed under Sched. D.

The respondent's case raises questions of principle. He had in effect two points. The first was that the whole scheme was in purpose and result a mere case of a person living on his capital and accretions of capital, with no "income" quality attaching to the money on which he was going to live, and did for 5 years live. The second was that even if the money he got out of his scheme was income, the source of it was not an adventure or concern in the nature of trade. He had a third point, alternative to the first two, *viz.*, that even if he was wrong on them, when the scheme was broken off the augmentation of value shown by the figures in that last year was a mere increase of capital value. This alternative may we think properly be disposed of by saying that if his scheme was within Sched. D, the gains, if any, shown on an abandonment of it would bear the same character as the full fruits if realised. The sales in question were over a period which ended before the date to which one policy continued to be held, *viz.*, when it matured. In other words, the original scheme continued in existence while the policies were being sold.

To the respondent's first point that the whole business was a mere investment of capital and that the annual return contemplated by it was no more than a realisation by degrees of one after another of items of capital which had increased in value subsequently to their purchase, and therefore were not income, the finding by the Commissioners that the resultant profits were the fruit of capital invested and not the capital itself showed that they regarded those profits as income. If this question is one of fact, and if there is evidence to support the conclusion, that would be a sufficient answer. The investment regarded as a whole was a wasting asset. The respondent got for 5 years and was on his way with practical certainty to get for the remaining 18 years what he wished. If at the end his "*peau de chagrin*" would have disappeared, as in Balzac's story, he would none the less have enjoyed his annual income in the meantime. But the respondent's submission that the question of income *versus* capital should be considered and decided as a self-contained issue apart from the question whether the operations of the respondent were commercial ("a concern in the way of trade ") is fallacious, because the commercial characteristic may of itself change a capital realisation into an income receipt. The circulating capital of a shopkeeper produces profits of an income tax nature. Purchases and sales of land may equally be income transactions, as is the case with every land company. The real question in the case is: Does the business described come within Sched. D, Case I ? If it does, then the accretions of capital are, in our view, clearly taxable.

The answer to that question depends in the first instance on the legal interpretation of the language of the 1918 Act which defines the scope of Sched. D (para. i), *viz.*:

> . . . The annual profits or gains . . . accruing . . . to any person residing in the United Kingdom from any trade . . . wherever carried on.

and para. 2 adds that the tax shall be charged under six cases, of which Case I is "in respect of any trade not contained in any other Schedule"—*e.g.*, at that time in No. 111 of Sched. A, para. 3, gasworks, docks, ferries, etc., "of a like nature having profits from or arising out of lands."

The word "trade" is given a statutory meaning, as I have already said, by the definition in sect. 237. As the definition includes the very word "trade" without qualification, that word must be used in its ordinary dictionary sense and the other words must necessarily be intended to enlarge the statutory scope to be given to the word "trade" in Sched. D. Whether the word "adventure" is intended to be read like the word "manufacture" as equally independent of the opening word "trade" or like the word "concern" as qualified by the attribute "in the nature of trade" does not, we think, matter in this appeal, though we incline to think it should be read as independent. The Oxford Dictionary gives several meanings of "adventure", but the most appropriate is that numbered 7:

> A pecuniary risk, a venture, a speculation, a commercial enterprise.

The two most apt quotations are:

> 1625 BACON *Ess.* xxxiv, 293 He that puts all upon Adventures, doth often times brake, and come to Pouerty. 1668 CHILD *Disc. of Trade* (ed. 4) 54 Whilst interest is at 6 per cent. no man will run an adventure to sea for the gain of 8 or 9 per cent.

To the word "trade" the most appropriate meanings assigned are No. 3 (*a*) and (*b*), and No. 5 (*a*) and (*b*):

> 3 (*a*) Course, way or manner of life; course of action; mode of procedure, method. (*b*) A way or method of attaining an end; a contrivance, expedient. 5 (*a*) the practice of some . . . business . . . habitually carried on, esp. when practised as a means of livelihood or gain; a calling; formerly used very widely, including professions; now usually applied to a mercantile occupation and to a skilled handicraft, as distinguished from a profession . . . In earliest use not clearly distinguishable from 3; (*b*) Anything practised for a livelihood.

Of the textual citations under No. 5 we select one each of the 17th, 18th and 19th centuries:

> 1653 MILTON *Hirelings Wks.* 1851 V. 371. They would not then so many of them, for want of another Trade, make a Trade of their preaching. 1746 FRANCIS tr. *Horace Epist.* 11, i. 167 Unfit for War's tumultuous Trade. 1865 KINGSLEY *Herew* i. Where learnedst thou so suddenly the trade of preaching?

We think LORD WRIGHT had the Oxford Dictionary in mind when in *National Association of Local Government Officers* v. *Bolton Corporation* (1), he was discussing the meaning of the word "trade" in the Industrial Courts Act, 1919. He then had occasion to consider its ordinary meaning in the English language. After pointing out that in that statute the word was used as including "industry" he said ([1942] 2 All E.R. 425 at p. 433):

> Indeed, "trade" is not only in the etymological or dictionary sense, but in legal usage, a term of the widest scope. It is connected originally with the word "tread" and indicates a way of life or an occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate; it may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman. But the word "trade" is used in the widest applications in connection with "trade unions"; professions have their trade unions.

We can see no reason why Parliament should ever in any one of the Income Tax Acts have intended to restrict the scope of Sched. D. It was always regarded by Parliament as the roof under which to collect all income not coming within any one of the other four schedules. Indeed the Acts of 1803, 1805, 1806 and 1842 all said so in terms. Even within the schedule itself that drafting device is again utilised. Case VI of Sched. D sweeps up the odd sources of income for which it was difficult to find a name in the first five cases. In addition it is noteworthy that Parliament has been perfectly consistent in its treatment of "trade" as a word of very wide import. The words "manufacture, adventure and concern in the nature of trade," which for the first time in 1918 were put into a definition of the word "trade" as used in the statute, had previously in all the Acts from 1803 to 1842 appeared in the particular section which enacted Sched. D: see s. 100 in the Act of 1842, Case 1. Parliament has never cut anything out of Sched. D. On the contrary, it has tended to bring more and more in, *e.g.*, the transfer effected by the Finance Act 1916, s. 28, of the very various income-producing concerns which had up to then been included in Sched. A, No. 111, r. 3. Nor has it ever cut down the scope of Case 1.

The history of judicial decisions has been similar—showing a strong tendency not to restrict the scope of Sched. D, a tendency which was, we think, in sympathy with the general social and economic outlook of the country. There is hardly any activity for gaining a livelihood and not covered by the other schedules, which does not seem to us to be swept into the fiscal net by Sched. D. The same impression was obviously in the mind of FRY, L.J., in *Clerical, Medical & General Life Assurance Society* v. *Carter* (2), a case of tax charged under Sched. D to the Act of 1853 upon a life assurance society in respect of untaxed interest from investments. It was argued that under neither the Act of 1853 nor earlier Acts did "interest of money" fall within "profits or gains," but FRY, L.J., said, 22 Q.B.D., 444 at pp. 450, 451:

> If the point were material, I must say that my present opinion is that interest of money was as much chargeable under the Act of 1842 as under the later Act. In the 102nd section and other sections of the earlier Act it appears to me to be clearly indicated as a subject-matter of taxation, and I think that the general words of Schedule D in that Act were probably adequate to charge it.

The last words were a mere *obiter dictum*, but exhibited the trend of opinion more than half a century ago; and the trend of decisions in this direction—of enlargement rather than restriction—has certainly been no less marked since than before 1889.

The finding of the Commissioners in the present case is that the respondent was "engaged in a concern in the nature of trade, resulting in profits—the fruit of the capital laid out—which are assessable under Case 1 of Sched. D." In our view there was evidence upon which they could so find; indeed, we doubt whether any other inference of fact was open to them. Having regard to the elaborate way in which the respondent calculated out the annual yield of all his purchases, and the very large number of policies bought, and the fact that these were not ordinary investments, Case 1 appears to us the appropriate case under which to charge him. Of the decided cases the only one that raises a doubt in our minds on that point is *Cooper* v. *Stubbs* (3), in the Court of Appeal. There a partner in a Liverpool firm of cotton brokers bought and sold cotton futures on his own account, as a private adventure in which his firm had no concern. POLLOCK, M.R., took the view that Case 1 applied, and we should have agreed with him, but that WARRINGTON and ATKIN, L.JJ., thought there was no evidence on which to hold that there was a " concern in the nature of trade " within Case 1, although they held that the profits made over a series of years were " annual profits " within Case VI. That may be a possible view of the facts found in the present case; but in our opinion either " an adventure " or " a concern in the nature of trade " is a truer finding in the light of the very wide meaning of the words " trade " and " adventure."

It is not necessary to discuss at length the many decisions which were cited to us. That a single transaction may fall within Case 1 is clear; but, to bring it within, the transaction must bear clear *indicia* of "trade"; *e.g.*, *Martin* v. *Lowry* (4)—the single purchase of a vast quantity of linen for re-sale; or *Rutledge* v. *Commissioners of Inland Revenue* (5), where there was a single purchase of paper. Unless *ex facie* the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not a yield of income. But that question is almost necessarily one of fact.

On the other hand, to bring a source of profits within the meaning of " trade " in Case 1, it is not necessary to show the presence of a regular business of buying and selling as MACNAGHTEN, J., seems to have thought. That would exclude banking, insurance, finance, bookmaking (*Southern* v. *A.B.*) (6); or stallion-keeping (*Benson* v. *Counsell*) (7); all of which concerns or businesses have been held to fall within Case 1.

In the present case the finding that the present respondent was engaged in a concern in the nature of trade is final unless it be shown that there was no evidence to support it. There appears to us to be abundant evidence to support this finding. The case is conclusive that he made up his mind to utilise the commercial market in endowment life policies for the express purpose of getting a means of livelihood at the average rate of £7,000 a year over a long period of years. He showed great mathematical skill—an element in the business of an average adjuster, an underwriter, a banker or a financier. He continued to make his purchases in the commercial market over a period of 18 months—*i.e.*, until he had planted enough trees to yield him the fruit he wanted over the series of seasons for which he was making his purchases. To use an expression of ROWLATT, J., in *Graham* v. *Green* (8) ([1925] 2 K.B. 37, at p. 41):

> A person . . . can organise himself to do that [*viz.*, to buy] in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transaction, but of the trade.

In our opinion what the respondent was doing comes within the dictionary definition of both words " adventure " and " trade," which we have quoted.

The finding of the Commissioners we think disposes of the appeal; but if it does not, for the above reasons we think it was right. The appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bird & Bird* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

COLMAN *v.* ISAAC CROFT & SONS AND ANOTHER

[KING'S BENCH DIVISION (Hilbery, J.), July 17, 18, 19, 31, 1946.]

Master and Servant—Common employment—Employee voluntarily undertaking work outside scope of employment—Necessity for contract covering work actually done when injuries sustained.

The first defendants were haulage contractors who undertook, *inter alia*, the removal of household furniture. The second defendant was a regular driver of their lorries employed by them as such. The plaintiff's husband, a bricklayer by trade, was engaged by the first defendants to do building alterations and repairs on their garage and premises. On three occasions whilst so employed, he had voluntarily agreed, at their request during a labour shortage, to accompany the lorry driver in order to assist him in loading and unloading the lorry. On the third occasion, whilst riding on the lorry, he was killed through the second defendant's negligent driving. In an action by the plaintiff to recover damages under the Fatal Accidents Act, 1846, the first defendants pleaded that the admitted negligence of the driver was the negligence of a servant in common employment with the deceased, and that on the occasion when he received the fatal injuries the deceased and the driver were engaged in work in the course of that employment in such circumstances that the claim was barred by the doctrine of common employment :—

HELD : the mere fact of the deceased voluntarily acting in the extraordinary capacity of driver's mate did not give rise to an implied new contract of service, and, therefore, the doctrine of common employment was not applicable, there being no contract of employment covering the work which was being done at the time when the deceased met his death.

[**EDITORIAL NOTE.** In this case the principle of common employment was affixed to the contract of employment under which the deceased worked. Unless, therefore, the fact of volunteering for other work gave rise by implication to a new contract of service the principle had no application, and it is held that no such inference could be drawn.]

AS TO THE DOCTRINE OF COMMON EMPLOYMENT IN THE CASE OF VOLUNTEERS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328 ; and FOR CASES, see DIGEST, Vol. 34, pp. 215-217, Nos. 1782-89.]

Cases referred to :

(1) *Monk* v. *Warbey and others*, [1935] 1 K.B. 75 ; Digest Supp. ; 104 L.J.K.B. 153 ; 152 L.T. 194.

(2) *Morgan* v. *Vale of Neath Ry. Co.* (1865) L.R. 1 Q.B. 149 ; 34 Digest 212, *1750* ; 5 B & S 736 ; 35 L.J.Q.B. 23 ; affirmed (1864) 5 B. & S. 570.

(3) *Alexander and another* v. *Tredegar Iron and Coal Co., Ltd.*, [1945] 2 All E.R. 275 ; [1945] A.C. 286 ; 114 L.J.K.B. 377 ; 173 L.T. 113 ; *affg.* [1944] 1 All E.R. 451.

(4) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637 ; [1939] A.C. 215 ; Digest Supp. ; 108 L.J.K.B. 320 ; 160 L.T. 420.

(5) *Tozeland* v. *West Ham Union*, [1907] 1 K.B. 920 ; 34 Digest 220, *1823* ; 70 L.J.K.B. 514 ; 96 L.T. 519.

(6) *Smith* v. *Steele* (1875) L.R. 10 Q.B. 125 ; 34 Digest 213, *1756* ; 44 L.J.Q.B. 60 ; 32 L.T. 195.

(7) *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311 ; 34 Digest 191, *1565* ; 36 L.J.C.P. 181 ; 16 L.T. 293.

(8) *Degg* v. *Midland Ry. Co.* (1857), 1 H. & N. 773 ; 34 Digest 215, *1782* ; 26 L.J. Ex. 171 ; 28 L.T. O.S. 357.

(9) *Wiggett* v. *Fox* (1856), 11 Exch. 832 ; 34 Digest 214, *1770* ; 25 L.J. Ex. 188 ; 26 L.T. O.S. 309.

(10) *Pollock* v. *Charles Burt, Ltd.*, [1940] 4 All E.R. 264 ; [1941] 1 K.B. 121 ; 110 L.J.K.B. 93 ; 164 L.T. 244.

ACTION to recover damages under the Fatal Accidents Act, 1846. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *G. Dare* for the plaintiff.

H. U. Willink, K.C., *Sir Valentine Holmes, K.C.*, and *H. P. J. Milmo* for the defendants.

Cur. ad. vult.

Hilbery, J.: The plaintiff is the widow and administratrix of one Frank Colman deceased, and, as such, sues to recover damages under Lord Campbell's Act, alleging that her late husband's death occurred as the result of the negligence of one Armitage, the second defendant and a servant of the first defendants, and that those defendants, Isaac Croft & Sons, are vicariously responsible in law.

Both the defendants admit that the deceased met with his death through the negligent act of the defendant Armitage. So far as Armitage is concerned, there is no answer to the claim. The defendants, Isaac Croft & Sons, have, however, A set up in bar of the claim the plea that the admitted negligence of Armitage which caused the death of the plaintiff's late husband was the negligence of a servant in common employment with the deceased man, and on the occasion when he received the injuries from which he died, that Armitage and the deceased man were engaged in work in the course of that employment in circumstances such that the claim is barred by what is usually termed the doctrine of common employment. B

The plaintiff denies that the doctrine is applicable in the particular circumstances of the case, but, in the alternative, asserts that if it is, then inasmuch as the defendant's policy of insurance under the Road Traffic Act, 1930, did not cover the personal liability of Armitage to a third party, the defendants were guilty of a breach of the statutory duty to insure imposed upon them by that Act, and that the plaintiff is entitled to recover against them, as damages for breach of this statutory duty, the amount of damages awarded C against Armitage, and irrecoverable from him because he was not so covered by insurance by these defendants.

The first defendants answer that they were insured at the time in respect of Armitage's driving, that their insurance complied with the requirements of the Road Traffic Act, 1930,, and that they were not guilty of any breach of duty imposed on them by that statute. Furthermore, they reserve and keep D open, though they cannot, of course, argue before me, the contention that *Monk* v. *Warbey* (1), was wrongly decided, and that the plaintiff has not any cause of action in law whereby such damages are recoverable for the alleged breach of statutory duty. All parties agree that the plaintiff's damages amount to £1,548 5*s*. 0*d*.

The short facts are as follows:—The defendants, Isaac Croft & Sons, are haulage contractors, and undertake, amongst other types of carriage by road, E the removal of household furniture. Armitage was a regular driver of their lorries employed by them as such. The deceased man was by trade a bricklayer. The first defendants engaged him about six months before the date of his death, and he entered their employment as a bricklayer to do some building alterations and repairs to these defendants' garage and premises. During his six months of employment with these defendants, the deceased man had been doing this building and repair work of one sort and another at the F address of these defendants. On two occasions, however, during those previous months, when these defendants had had a lorry going on a journey to fetch or deliver goods which were such that the driver would need help in loading and unloading the lorry, and when, owing to the war time shortage of labour, they had no regular driver's mate to go with the lorry, they had asked the deceased man to oblige them by going with the driver of the lorry to assist him with the goods, and the deceased man had consented so to do. G On the third occasion when he had acceded to the same request, and was riding on the lorry, he was killed through the negligent driving of Armitage, which is the negligence complained of in this action.

The first question, therefore, which has to be answered is whether the plaintiff's claim is barred in law by the doctrine of common employment. If the right conclusion is that it is not so barred, then the second point does not H arise for decision.

By the term "doctrine of common employment" is meant, to borrow the words of Blackburn, J., in *Morgan* v. *Vale of Neath Ry. Co.* (2) (1864) 5 B. & S. 570 at p. 578:

> . . . that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services.

The principle is now affixed as an implication of law to the contract of service between a man and his master: see *per* GODDARD, L.J., in *Alexander* v. *Tredegar Coal & Iron Co., Ltd.* (3) [1944] 1 All E.R. 451, at pp. 452, 453. But to make the principle applicable, so as to bar a servant from his remedy in damages against his master as vicariously responsible for the negligent act of another of his servants, not only must it be shown that the negligence complained of was that of a fellow servant in a common employment with the injured man by the same master, but it must be shown that at the time of the negligent act complained of, both servants were engaged in a common task for the same master: see *Radcliffe* v. *Ribble Motor Services, Ltd.* (4) LORD WRIGHT in that case said ([1939] 1 All E.R. 637, at p. 656):

> However, the limitations which I have explained, and which, for purposes of this opinion, I wish to emphasise, are based on the fundamental principle that there must be an actual contract between the employer and employee, so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees. On this footing, it has been held that, where there was no contract at all, as in the case of a workhouse inmate doing work which he was ordered to do (*Tozeland* v. *West Ham Union* (5)) or a pilot employed under compulsion of law (*Smith* v. *Steele* (6)), there is no basis of actual contract on which to found the implied term. BLACKBURN, J., in delivering judgment in the latter case referred to *Indermaur* v. *Dames* (7), as a case in which the law could not imply the term. The decisions which have held that a volunteer may be met by the defence of common employment have not come before this House. If they are right, they can only be considered as special exceptions to the settled general rule that the basis of common employment is a contract, as BLACKBURN, J., specifically said in *Smith* v. *Steele* (6).

In the present case it is true that there was a contract of employment under which the deceased man had worked for the first defendants, and been employed by them for six months before his death. To that contract of employment, therefore, the principle was affixed by the law. That was a contract for work as a bricklayer, and for work in the nature of building alterations and repairs, a totally different class and type of work from that of a lorry driver's mate. When, on each of the occasions I have mentioned, the deceased man went to oblige the first defendants, his employers, to act as assistant to the lorry driver, he did not do so pursuant to his contract of employment at all. There was nothing in his contract of employment which gave his employers any right to order him to do such work. They did not in fact attempt to give such an order, nor was it suggested before me that they had any right so to do. The deceased man undoubtedly could lawfully have refused to go. When he did go, he went as a volunteer. Unless, therefore, the mere fact of his voluntarily acting in this extraordinary capacity gave rise to an implied new contract of service, to which the principle in question then became affixed by law, the principle had no application to the circumstances in which the deceased man met his death. In my view, there is no such implication of a fresh contract properly to be made. There was existing between the first defendants and the deceased man, and current all the time, the contract of employment for a particular type of work which I have already described. The mere volunteering by the deceased on one occasion or on three occasions to do a piece of work for his employers different from anything he was employed to do does not seem to me either reasonably or necessarily to lead to the inference that the parties intended to abrogate the existing contract between them, or to make a new contract for a different type or piece of work. On the evidence it has not been suggested that the deceased man's rate of pay did not remain what it had been under his contract of service, that is to say, the rate applicable to a bricklayer or builder's operative, not that applicable to the mate of a lorry driver. There is no evidence before me that the deceased man undertook this special and exceptional work as a matter of contract at all. In my view, therefore, the principle of common employment is not applicable because there was no actual contract of employment covering the work which was being done at the time when the deceased met his death.

I am not unaware that there is some difficulty in deciding this case on the grounds I have given created by the decision in *Degg* v. *Midland Railway Company* (8). In that case one James Degg was helping the servants of a railway company in the turning and removal from one place to another on a railway of a railway truck, when certain regular servants of the railway company negligently, as it was said, drove some other trucks against the truck James Degg was helping with, and thereby killed him. James Degg was not a servant of the railway company, and had only voluntarily helped to move the truck. In the course of giving the judgment of the Court of Exchequer, Bramwell, B., said (I H. & N. 773, at p. 780):

> . . . we were pressed by an expression to be found in those cases to the effect that "a servant undertakes as between him and the master to run all ordinary risks of the service, A including the negligence of a fellow servant": *Wiggett* v. *Fox* (9); and it was said that there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree . . . that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow workmen, as it would be if he were paid for his services.

That decision is binding on me, and it has stood since 1857, but, with the B greatest respect, I venture to doubt whether it would be so decided today in the light of what the House of Lords has now said in *Radcliffe's* case (4) from which I have already quoted, and of the authoritative statements we now have defining the legal principles governing the implication by the courts of terms in contracts. In *Pollock* v. *Charles Burt, Ltd.* (10) the plaintiff, a branch manager, volunteered, as no one else was available, to do a part of the work of the C branch, known as the mail order work, which involved calling upon persons who had made inquiries by post with a view to obtaining their custom. The work was usually done by another employee who used his own motor car and drove himself. As this man was ill, neither he nor his motor car was available, and when the plaintiff volunteered he asked the defendants, his employers, to provide a motor car to take him to call upon these inquirers, and the defendants sent a car, the property of the defendants, but generally used in D their business for the carriage of one or other of the directors. They sent with it the chauffeur, who regularly drove it, to drive the plaintiff on this occasion. The work of calling upon these inquirers with a view to turning them into customers of the defendants entailed travelling long distances, and it was necessary to do it by road, if the calls were to be made within a reasonable limit of time. The plaintiff was injured while being driven to make these calls by the negligent driving of the chauffeur, whose ordinary work was, as I have said, E to drive one of the directors of the defendant company. I took the view in that case that, though the branch manager might be said to be doing something outside his contract of service which he was not compellable to do, and might be regarded as a volunteer, yet he and the chauffeur, when driving from one address to another, calling upon persons with a view to obtaining their custom for the common employer of both of them, were engaged in the common task of soliciting this custom for the common master, though one performed F one essential part of the task, which was interviewing each person, and the second performed the other essential part of the task, which was carrying the one who had to make the actual calls. The Court of Appeal, however, held that this view was wrong. du Parcq, L.J., held that what was decided in *Degg's* case (8) was a long way from saying that, when a man who is not obliged to do some work, and is not obliged to go in a car, offers to do it, and G is given a lift in the car of the person for whose benefit he is doing the work, he and the driver of the car are then engaged in a common employment. du Parcq, L.J., said ([1940] 4 All E.R. 264, at p. 268):

> It seems to me that there is all the difference between the case of two men working at a turntable or two people, as I suggested in the course of the argument, engaged with others at haymaking, where the labour is obviously common labour, with a common object, and the case of a man who has a particular piece of work which H he wishes to do and is being driven in a car by somebody who has no concern with that particular work at all, but is concerned only to carry the person doing the work from one point to another for a purpose which need not concern the driver in the least, and with which he need not be acquainted.

There it seems to me du Parcq, L.J., is saying that it is wrong to take the view that the two men were engaged in the common task of calling on the customers, each performing a necessary but different part of the work which that common task involved, and is saying that each was engaged at the time in a different piece of work, the one in the work of driving, the other in the work of calling upon and interviewing the prospective customers.

If it is not misinterpreting this decision, then I think in the present case it is possible to take the view, though I am not blind to the arguments against it, that all that the deceased man volunteered for in the present case was to help the driver, when the driver needed help, with the loading and unloading of the lorry, and that when he was being carried in the lorry he was no more than a passenger. Today the court leans against the doctrine of common employment, and it is possible to take the view that the deceased man volunteered to help with the loading and unloading of the lorry, and undertook the risks of the negligence of the lorry driver when both were engaged in doing this, but that he did not volunteer to undertake the risks of the negligence of the lorry driver while driving him from one place to another at which loading or unloading was to be done, any more than the branch manager in *Pollock* v. *Charles Burt, Ltd.* (10) undertook the risk of the negligent driving of the chauffeur, driving him from one place to another to make his calls.

This being the view I have, with some doubts, finally formed on the first point, it follows that the defence of Isaac Croft & Sons fails, and the plaintiff does not need to rely on her contention based on the Road Traffic Act, and the decision in *Monk* v. *Warbey* (1).

The plaintiff now asks to withdraw the action against Armitage, and no longer asks for any judgment against him. At the plaintiff's instance I therefore allow the record to be withdrawn against Armitage.

There must be judgment for the plaintiff against the defendants, Isaac Croft & Sons, for £1,548 5*s.* 0*d.*, and the costs.

Judgment for the plaintiff with costs.

Solicitors: *W. H. Thompson* (for the plaintiff); *Stanley & Co.* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

NEILD *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), July 25, 26, 1946.]

Revenue—Excess profits tax—Exemption—Profession—Profits dependent on personal qualifications—Oculist and optician—Divisibility—Finance (No. 2) Act, 1939 (*c.* 109), *s.* 12 (3).

Where both the profession of an oculist and the trade of an optician are being carried on by the same person at the same place and the proportion of the profits attributable to the profession has been ascertained, the amount found to be due to the carrying on of the profession of oculist should be deducted from the sum representing the combined profits of both the profession and the trade, and the assessment to excess profits tax made on the profits of the trade.

Inland Revenue Comrs. v. *Maxse* (1) *applied.*

[**EDITORIAL NOTE.** It was decided in *Carr* v. *I.R. Comrs.*, ([1944] 2 All E.R. 163), that an optician prescribing and supplying glasses may be carrying on both a profession and a trade. The case now reported indicates how the profits arising from these activities are to be dealt with for the purpose of excess profits tax.

FOR THE FINANCE (NO. 2) ACT, 1939 (*c.* 109), s. 12 (3), see HALSBURY'S STATUTES, Vol. 32, p. 1193.]

Case referred to:

(1) *Inland Revenue Comrs.* v. *Maxse*, [1919] 1 K.B. 647; Digest Supp.; 88 L.J.K.B. 752; 12 Tax Cas. 749.

CASE STATED under the Finance (No. 2) Act, 1939, s. 21, and the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

J. W. P. Clements for the appellant.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

Macnaghten, J.: This is an appeal from a decision of the General Commissioners for the City of Lincoln, confirming an assessment to excess profits tax in the sum of £1,402 made upon the appellant for the chargeable accounting period ended Apr. 5, 1943, in respect of profits derived from the activities as an optician carried on by him in that city.

The ground of the appeal is that the appellant was carrying on a profession within the meaning of the Finance (No. 2) Act, 1939, s. 12 (3). Sect. 12 (1) of that Act provides that where profits arising in any chargeable accounting period of any trade or business to which the section applies exceed its standard profits, there shall be charged on the excess a tax to be called the excess profits tax. Subsect. (2) describes the trades and businesses to which the section applies; they include all trades and businesses of any description carried on in the United Kingdom of Great Britain and Northern Ireland. Lest there should be any mistake about it, subsect. (3) provides that the carrying on of a profession by an individual shall not be deemed to be the carrying on of a trade or business to which the section applies if the profits of the profession are dependent wholly or mainly on his personal qualifications.

The Case stated for the opinion of the court sets out the facts as found by the Commissioners with regard to the "activities" of the appellant. In some respects he plainly was carrying on the trade of an optician, the trade of a maker and seller of spectacles. He and mechanics employed by him made spectacles in accordance with his prescriptions, and in some cases in accordance with prescriptions made by others. He was a member of the British Optical Association and also of the Worshipful Company of Spectacle Makers. He exhibited in a shop window at the entrance to his premises optical frames without glasses and unpriced. He also advertised his "profession" or "trade", whichever it was, in the local press, in magazines, and on cinema screens and buses. If a person troubled about his eyesight called upon him the appellant would examine his eyes and ascertain whether there was any disease; if he found that the patient was suffering from some eye disease, he would advise him to go and consult an oculist. If, on the other hand, he thought there was no disease, he would prescribe spectacles and spectacles in accordance with that prescription would then be made, fitted to a frame, and sold to the customer for the sum of 10*s*. 6*d*.

The Commissioners found that the net profits derived from the "activities" of the appellant amounted to £2,902. The assessment of £1,402 for excess profits tax was presumably arrived at by deducting £1,500, as the appellant's standard profits, from that figure.

The question before the General Commissioners was whether the activities of the appellant were those of a person carrying on, as he contended, the profession of an oculist or eye doctor or, as the Crown alleged, of a person carrying on the trade of an optician. The Commissioners held that £750 out of the net profit of £2,902 for the chargeable accounting period in question was "professional" and the remainder, £2,152, was the trading profit. The meaning of the word "professional" seems clear, *viz.*, that the appellant was carrying on both the profession of an oculist and the trade of an optician, and that of the net profit £750 was attributable to the profession and £2,152 was attributable to the trade.

The appeal before the General Commissioners was held at Lincoln on Feb. 15, 1945. The Crown was represented by the inspector of taxes for the district, and the appellant was represented by a chartered accountant. It appears that after hearing the parties the General Commissioners announced their decision as set out above, but did not say whether they confirmed or reduced the assessment. It occurred to the inspector of taxes that if the matter was left in that way, the decision was ambiguous. The Commissioners had failed to "determine" the appeal. Did they mean that they confirmed the assessment, or did they mean that the assessment should be reduced by £750? Accordingly, both the inspector and the chartered accountant agreed to ask the Commissioners to hear the matter further and a further hearing took place on Mar. 11, 1945. On that occasion the inspector of taxes contended that the appellant's business was a single activity and not two separate activities; secondly, that as the Commissioners had found that out of a profit of £2,902 only £750 represented professional profits, the appellant was not carrying on a profession the profits from which were dependent wholly or mainly on his personal qualifications; and, thirdly, that the whole of the profits were liable to assessment to excess profits tax and that the assessment should be confirmed. Thereupon the Commissioners determined that the appeal should be dismissed because the appellant's business was mainly of a "commercial" nature.

The Commissioners—as I understand their decision—were satisfied that the appellant carried on a profession, and that he also carried on the trade or business of an optician. Those findings of fact are binding upon the court unless there is no evidence to support them; but in this case, as in most of these cases where excess profits have been charged upon persons carrying on the trade of opticians, there is some evidence that the optician was also to some extent carrying on the profession of an oculist. Where both the profession of an oculist and the trade of an optician are being carried on by the same person at the same place and the proportion of the profits attributable to the profession has been ascertained, what assessment ought to be made? Ought the assessment to be upon the profits of the combined trade and profession or ought it to be made on the profits of the trade? That, it seems to me, is a question of law properly to be submitted for the opinion of the court.

The authority for the subtraction of the profits of the profession from the sum representing the profits of the combined profession and trade is *Comrs. of Inland Revenue* v. *Maxse* (1). In some respects Maxse's case was similar to the case of the appellant. Maxse was the proprietor, editor and publisher of the "National Review," a monthly publication, and he was also the person who wrote most of the articles in that magazine. The Court of Appeal held that he was carrying on the trade of a publisher and he was also carrying on the profession of a writer, and that the sum which ought to be allowed to Maxse for his literary contributions ought to be deducted from the profits arising from the sale of the review. The provisions in the Finance Act, 1915, with regard to the excess profits duty imposed by that statute are for the purposes of the present case similar to those contained in the Finance (No. 2) Act, 1939, s. 12 (3). In my opinion, on the facts found by the General Commissioners, the £750 which in their opinion was due to the carrying on of the profession of an oculist, ought to be deducted from the sum representing the combined profits of both the profession and the trade carried on by the appellant. Counsel for the Crown urged that since the profits of the profession amounted to very little more than one-fourth of the combined profits they ought to be included in the assessment since the "activities" of the appellant were mainly—as the Commissioners held—"commercial," but the profits attributable to the "profession" of the appellant were not negligible since they amounted to £750. I think the appeal should be allowed, and that the assessment should be reduced by the sum of £750.

Appeal allowed with costs.

Solicitors: *Waterhouse & Co.*, agents for *Andrew, Race, Midgley & Hill*, Lincoln (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re EDWARDS, LLOYD'S BANK *v.* WORTHINGTON

[Chancery Division (Roxburgh, J.), July 19, 23, 1946.]

Estate and other Death Duties—Succession duty—Exercise by will of special power of appointment—Appointment of life interests in settled fund—Direction in will to pay all duties "payable on my death under the terms of this my will"—Succession duty payable on death of testatrix in respect of life interests under appointment and duties to become payable on death of appointees not within direction for payment of duties.

Under a settlement the testatrix had a power to appoint life interests in a settled fund in favour of her children, and by her will she exercised this power. The will contained a direction to the trustees to pay "all estate duties, legacy and succession duties payable on my death or under the terms of this my will." The question to be determined was whether the succession duty payable on the death of the testatrix in respect of the life interests under the appointment and the duties to become payable on the respective deaths of the appointees fell within the direction for payment of duties:—

Held: upon the true construction of the will, the duties in question did not fall within the direction for payment of duties.

[**EDITORIAL NOTE.** The liability to succession duty in this case is decided apart from authority as a pure question of the construction of the particular words used in the will in relation to payment of death duties.]

As to "Free of Duty" Provisions in Wills, see HALSBURY, Hailsham Edn., Vol. 13, pp. 299-301, para. 312; and for Cases, see DIGEST, Vol. 21, pp. 37, 38, Nos. 235-243, and pp. 40, 41, Nos. 255-260.]

Cases referred to:

(1) *Re Bath's (Marquis) Settlement, Thynne* v. *Stewart* (1914), 111 L.T. 153; 21 Digest 32, *197*.
(2) *Muir or Williams* v. *Muir and Others*, [1943] A.C. 468; 112 L.J.P.C. 39.
(3) *Re De La Bere's Marriage Settlement Trusts, De La Bere* v. *Public Trustee*, [1941] 2 All E.R. 533; [1941] Ch. 443; 165 L.T. 393.
(4) *Re Dickinson's Settlements, Bickersteth* v. *Dickinson*, [1939] Ch. 27; Digest Supp.; 108 L.J.Ch. 40; 159 L.T. 614.

Adjourned Summons to determine a question arising under the will of the testatrix in regard to a direction for payment of death duties. Under a settlement the testatrix had a power to appoint life interests in a settled fund in favour of her children, and by her will she exercised that power. The facts and the relevant clause of the will are set out in the judgment.

A. C. Nesbitt for the trustees.
C. L. Fawell for the first defendant.
Geoffrey Cross for the second defendant.
L. R. Norris for the third defendant.
E. J. T. G. Bagshawe for the fourth and fifth defendants.

Roxburgh, J.: The question to be decided is one of very great difficulty. It is whether the succession duty payable on the death of the testatrix in respect of life interests in the settled fund or portion thereof appointed by the will of the testatrix and the further estate and succession duty to become payable on the respective deaths of the appointees for life of the said settled fund fall within the words "payable on my death or under the terms of this my will." When I look at the direction contained in this will, which is "to pay debts and funeral and testamentary expenses and all estate duties, legacy and succession duties payable on my death or under the terms of this my will," I feel—without, for the moment, having regard to any other consideration—that the testatrix is directing the trustees to pay, not to reimburse, duties which are either payable on her death or directed to be paid by her will.

Counsel for the second defendant contends that the direction is to pay or reimburse the duties of the categories mentioned which are payable by anybody on the death of the testatrix or in consequence of the dispositions made by her will. I think this is a pure point of construction. On the whole, I prefer the construction which I first stated. But if I am wrong in this, and if the clause is to be construed, as counsel for the second defendant contends, as a direction to pay or reimburse duties payable by anybody on the death of the testatrix or in consequence of the dispositions made by her will, nevertheless, in my judgment, the clause ought to be construed as referring to duties payable solely under the terms of the will of the testatrix, and accordingly the phrase would not extend to the duties now in question.'

I have deliberately decided this question as a case of pure construction. Counsel for the second defendant, however, rightly pressed me with the decision in *Re Marquis of Bath's Settlement* (1). The direction in question there was as follows:

> I direct my trustees or trustee out of my ready money . . . to pay and provide for my funeral and testamentary expenses (including estate duty on everything passing under this my will.

The will operated to exercise a special power. The judge held that the interests taken under the exercise of the special power passed under the will within the meaning of the phrase in that will.

Reference to authorities in this field opens up a very wide inquiry which culminates in the decision of the House of Lords in *Muir* v. *Muir* (2). That was a Scottish case upon a point of Scots law, but LORD ROMER in the course of his speech laid down a number of propositions with regard to the nature of the interest which arises when a special power is exercised; and LORD WRIGHT and LORD CLAUSON expressed their concurrence with LORD ROMER'S speech. LORD ROMER said ([1943] A.C. 468, at p. 483):

> If, for example, property be settled on trust for A for life and after his death on trust for such of A's children or remoter issue and in such proportions as B shall by deed appoint, B has no interest in the property whatsoever. He has merely been given the power of saying on behalf of the settlor which of the issue of A shall take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B fills up for him if and when the power of appointment is exercised. The appointees' interests come to them under the settlement alone and by virtue of that document.

I shall not pause to inquire how far, in the light of that speech *Re de la Bere's Marriage Settlement* (3), and *Re Dickinson's Settlement* (4), which were then cited, and *Re Marquis of Bath's Settlement* (1) which was not cited, can stand. I prefer to decide this case as a pure question of construction.

Accordingly, none of these duties fall within the direction in the payment of duties clause.

Declaration accordingly. Costs as between solicitor and client out of the estate in due course of administration.

Solicitors: *Routh, Stacey, Hancock & Willis*, agents for *William Forward & Son*, Axminster (for the trustees and the first defendant); *A. F. & R. W. Tweedie* (for the second and third defendants); *Routh, Stacey, Hancock & Willis* (for the fourth and fifth defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re POINTER, SHONFIELD *v.* EDWARDS AND OTHERS

[CHANCERY DIVISION (Wynn-Parry, J.), July 18, 1946.]

Wills—Family provision—Order for maintenance—Provision to be regarded as a legacy contained in the will when made—Inheritance (Family Provision) Act, 1938 (*c.* 45), *s.* 3 (1)—*Finance Act,* 1941 (*c.* 30), *s.* 25.

By an order made on Dec. 17, 1940, under the Inheritance (Family Provision) Act, 1938, the trustees of the will of a testatrix (who made her will on Mar. 30, 1938, and died on Dec. 7, 1939) were directed to pay to A.S., a disabled daughter of the testatrix, out of the income arising from one-fifth part of the residuary estate of the testatrix, so far as such income should suffice therefor, such a weekly sum as would amount to the clear weekly sum of 30*s.* after deduction of income tax, or such lesser sum as the said income should suffice to pay. The order further provided that, to give effect to the provisions for maintenance, the will should take effect as if it had been executed with the variation that the testatrix had directed her trustees to hold one-fifth part of her residuary estate upon trust out of the income thereof to make the payments in question to A.S. The question to be determined was whether the Finance Act, 1941, s. 25, applied to the payments, with the result that A.S. was entitled to receive only twenty twenty-ninths of the weekly sum of 30*s*. It was contended by A.S., that her right to receive the full sum was unaffected by the 1941 Act because the provision for payment of the sum must be regarded as having been made by the order and not by the will.

Held: (*a*) upon the true construction of the Inheritance (Family Provision) Act, 1938, where an order for maintenance was made under the Act, the provision made thereby was to be treated for all purposes as a legacy and the will was to have effect as if that legacy had been contained in it when made. The provision for the payment of the weekly sum of 30*s*. to A.S. must, therefore, be regarded as having been made by the will and not by the order, but

(*b*) the right of A.S. to receive the full sum of 30*s*. a week was not affected by the Finance Act, 1941, s. 25, because the "provision . . . for the payment . . . of a stated amount free of income tax" to her was not "made" until the moment of the death of the testatrix on Dec. 7, 1939, *i.e.* after Sept. 3, 1939.

Berkeley v. *Berkeley* (2) *followed.*

[**EDITORIAL NOTE.** The effect of an order for maintenance under the Inheritance (Family Provision) Act, 1938, is that the will is to be read as if it contained such variations as may be necessary to give effect to the order. It is, accordingly, held that the provision made by such an order is to be treated as a legacy for the purpose of the Finance Act, 1941, s. 25, and that a power of appropriation provided by such an order is a power conferred by the will within the meaning of s. 41 (6) of the Administration of Estates Act, 1925.]

As to Protection of Testator's Family, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505.

For the Finance Act, 1941, s. 25, see HALSBURY'S STATUTES, Vol. 34, p. 119.

Cases referred to:

*(1) *Re Pointer, Pointer* v. *Edwards*, [1940] 4 All E.R. 372; [1941] Ch. 60; 165 L.T. 3.
*(2) *Berkeley* (*Countess*) v. *R. G. W. Berkeley*, [1946] 2 All E.R. 154.
*(3) *Re Waring, Westminster Bank, Ltd.* v. *Awdry*, [1942] 2 All E.R. 250; [1942] Ch. 426; 175 L.T. 153; 111 L.J. Ch. 284; 167 L.T. 145.

Adjourned Summons by a daughter of the testatrix to determine certain questions arising under the will of the testatrix as varied by an order made under the Inheritance (Family Provision) Act, 1938. The facts are fully set out in the judgment.

J. V. Nesbitt for the plaintiff.
Humphrey King for the trustees.
Harold Christie, K.C., and *W. T. Elverston* for the residuary legatee.

Cur adv. vult.

Wynn-Parry, J.: On Dec. 17, 1940, Morton, J., made an order on an originating summons dated Apr. 29, 1940, taken out by the present plaintiff and her father, Charles Benjamin Pointer, under the Inheritance (Family Provision) Act, 1938, directing (*inter alia*) that the defendants Charles Edwards, Stanley Cecil Theophilus and Ethel Annie Pointer, as trustees of the will of Alice Julia Pointer deceased, who died on Dec. 7, 1939 (and to whom I will refer as the testatrix), should, subject as provided in such order, pay to the plaintiff out of the income arising from one-fifth part of the residuary estate of the testatrix, so far as such income should suffice therefor, such a weekly sum as would amount to the clear weekly sum of 30*s*. after deduction of income tax and free of legacy duty (if any) or such lesser sum as the said income should suffice to pay, such weekly sum to begin from Apr. 29, 1940 (the date of the originating summons). The order further provided that for the purpose of giving effect to the provisions for maintenance to which I have referred, the will of the testatrix which was dated Mar. 30, 1938, and a codicil thereto dated Oct. 30, 1938 (the contents of which codicil did not and do not affect the matters raised on the above-mentioned summons or this summons) should take effect as if the will had been executed with the variation (*inter alia*) that the testatrix had directed that her trustees should hold one-fifth part of her residuary estate upon trust out of the income thereof to make the plaintiff the payments for her maintenance provided by the earlier part of the order.

The facts leading up to the making of this order are fully set out in the report of the previous proceedings reported *sub nom. Re Pointer* (1), and I need not recapitulate them here. Until May, 1945, the trustees of the will paid the sum of 30*s*. to the plaintiff weekly without any deduction. In that month, however, the point was taken on their behalf that the provisions of the Finance Act, 1941, s. 25, applied to this weekly sum, and that consequently the plaintiff was only entitled to receive a sum per week equal to twenty twenty-ninths of 30*s*., and the trustees have since then refused to pay the full sum.

The question which I have to decide is whether the trustees are right in this contention, or whether, as the plaintiff contends, her right to receive the full sum of 30*s*. per week is unaffected by the above section. It was submitted on behalf of the annuitant that the provision which had been made for her must be regarded for the purposes of the Finance Act, 1941, s. 25, as having been made by the order and not by the will. I do not accept this contention.

It is clear from the provisions of the Inheritance (Family Provision) Act, 1938, that a dependant in whose favour an order is made under the Act is placed for all purposes in the position of a beneficiary. Secondly, it is clear that the effect of any such order is to vary the will in question: see sects. 1 (3) and 3. Sect. 3 (1) is in wide terms and provides:

> Where an order is made under this Act, then for all purposes, including the purposes of the enactments relating to death duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed with such variations as may be specified in the order for the purpose of giving effect to the provision for maintenance thereby made.

The reference to the enactments relating to death duties shows that the section proceeds on the footing that the provision made by the order is to be treated as a legacy. In my judgment, the scheme of the Act involves (i) that, assuming the necessary conditions obtain, the court may by order make provision for the dependant applying to it; (ii) that, if it makes such an order, the provision made thereby is to be treated for all purposes as a legacy; (iii) that the will is for all purposes to have effect as if that legacy had been contained in it when it was made.

This does not, however, conclude the matter. Recently, in *Berkeley* v. *Berkeley* (2) the House of Lords, overruling the decision of the Court of Appeal in *Re Waring* (3), has held that a "provision" contained in a will or codicil within the meaning of the Finance Act, 1941, s. 25, is not "made" until the moment of the testator's death. As I have stated the testatrix died on Dec. 7, 1939. It follows, therefore, that the provision made for this applicant under the Inheritance (Family Provision) Act, 1938, is unaffected by the Finance Act, 1941, s. 25, and there will be a declaration accordingly.

Declaration accordingly.

Solicitors: *R. A. W. Moylan-Jones* (for the plaintiff); *Soames, Edwards & Jones* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re PARRY, BROWN *v.* PARRY

[Chancery Division (Romer, J.), June 19, 20, 21, July 19, 1946.]

Executors—Settlement of residuary estate—Trust for sale with power to postpone conversion—Estate including unauthorised investments—Rights of tenant for life and remainderman—Basis of valuation of unauthorised investments—Rate of interest to be allowed to tenant for life.

By his will, the testator gave his residuary estate upon trust for sale and conversion with absolute power to postpone conversion. Subject to the payment of certain annuities, the income of the residue was to be paid to T.S.P. and after his death to O.S.P., and on the death of O.S.P. the residuary estate was to be divided among his children. The testator died on Sept. 3, 1936. The estate included unauthorised investments which greatly increased in value during the first year after the testator's death. Some of these investments were realised during the first year, some later, and others were still retained by the trustees. They did not include wasting assets. On the footing that the rule in *Howe* v. *Dartmouth* (1) applied, the court was asked to determine (*a*) the basis of valuation of the unauthorised investments; (*b*) the rate of interest to be allowed to the life tenants on the value of such investments. On behalf of the life tenants it was contended that the investments which were retained should be valued as at a year after the testator's death and that the principle of *Brown* v. *Gellatly* (5) (*i.e.*, of valuing them at the testator's death), which was followed in the *Re Woods* (4) line of decisions, was inconsistent with earlier authorities:—

Held: (i) where property was given on trust for sale with an unfettered power of postponement, if the executors retained assets in their existing condition, they did so for the benefit of the estate as a whole, and the valuation of the unauthorised investments should, therefore, be based on their respective values as at the date of the testator's death.

Brown v. *Gellatly* (5) and *Re Woods* (4) followed.

(ii) in fixing the rate of interest to be allowed upon the value of the unauthorised investments, the conditions to be considered were those prevailing at the testator's death, and not those prevailing at the hearing of the summons, and, on the evidence of the position at the testator's death, the rate should be 4 per cent. per annum.

[**EDITORIAL NOTE**. It is held that where there is a power to postpone conversion, there is no reason for assuming, for the purpose of valuation, a notional conversion of unauthorised investments as at a year from the testator's death. The most convenient date for valuation, therefore, is the date of the testator's death.

As to Apportionment between Income and Corpus, see HALSBURY, Hailsham Edn., Vol. 14, pp. 368-371, paras. 689-694; and for Cases, see DIGEST, Vol. 23, pp. 464-467, Nos. 5358-5374, and Vol. 40, pp. 674-676, pp. 2101-2127.]

Cases referred to:

(1) *Howe* v. *Dartmouth* (*Earl*), *Howe* v. *Aylesbury* (*Countess*) (1802), 7 Ves. 137; 40 Digest 672, *2090*.

(2) *Re Wareham, Wareham* v. *Brewin*, [1912] 2 Ch. 312; 44 Digest 205, *345*; 81 L.J.Ch. 578; 107 L.T. 80.

(3) *Pickering* v. *Pickering* (1839), 4 My. & Cr. 289; 44 Digest 201, *302*; 8 L.J.Ch. 336.

*(4) *Re Woods, Gabellini* v. *Woods*, [1904] 2 Ch. 4; 40 Digest 656, *1951*; 73 L.J.Ch. 204; 90 L.T. 8.

*(5) *Brown* v. *Gellatly* (1867), 2 Ch.App. 751; 23 Digest 467, *5374*; 17 L.T. 131.

(6) *Re Chaytor, Chaytor* v. *Horn*, [1905] 1 Ch. 233; 40 Digest 675, *2121*; 74 L.J.Ch. 106; 92 L.T. 290.

(7) *Re Thomas, Wood* v. *Thomas*, [1891] 3 Ch. 482; 40 Digest 671, *2082*; 60 L.J.Ch. 781; 65 L.T. 142.

(8) *Re Owen, Slater* v. *Owen*, [1912] 1 Ch. 519; 40 Digest 699, *2335*; 81 L.J.Ch. 337; 106 L.T. 671.

(9) *Re Beech, Saint* v. *Beech*, [1920] 1 Ch. 40; 40 Digest 675, *2110*; 89 L.J.Ch. 9; 122 L.T. 117.

(10) *Re Baker, Baker* v. *Public Trustee*, [1924] 2 Ch. 271; 40 Digest 675, *2116*; 93 L.J.Ch. 599; 131 L.T. 763.

(11) *Re Fawcett, Public Trustee* v. *Dugdale*, [1940] Ch. 402; Digest Supp.; 109 L.J.Ch. 124; 162 L.T. 250.

(12) *Taylor* v. *Clark* (1841), 1 Hare 161; 40 Digest 674, *2102*; 11 L.J.Ch. 189.

(13) *Dimes* v. *Scott* (1828), 4 Russ. 195; 40 Digest 670, *2075*.

(14) *Morgan* v. *Morgan* (1851), 14 Beav. 72; 40 Digest 674, *2103*.

(15) *Sitwell* v. *Bernard* (1801), 6 Ves. 520; 23 Digest 415, *4861.*
(16) *Gibson* v. *Bott* (1802), 7 Ves. 89; 23 Digest 400, *4708.*
(17) *Meyer* v. *Simonsen* (1852), 5 De G. & Sm. 723; 44 Digest 206, *353*; 21 L.J.Ch. 678; 19 L.T.O.S. 337.
(18) *Yates* v. *Yates* (1860), 28 Beav. 637; 23 Digest 465, *5364*; 29 L.J.Ch. 872; 3 L.T. 9.
(19) *Re Llewellyn's Trust* (1861), 29 Beav. 171; 44 Digest 199, *283.*
(20) *Wentworth* v. *Wentworth*, [1900] A.C. 163; 40 Digest 655, *1950*; 69 L.J.P.C. 13; 81 L.T. 682.
(21) *Re Lynch Blosse, Rickards* v. *Lynch Blosse*, [1899] W.N. 27 (8); 40 Digest *675 2122*; 43 Sol. Jo. 297.

ADJOURNED SUMMONS to determine certain questions arising under the testator's will. The facts are fully set out in the judgment.

Wilfrid Hunt for the plaintiff.

Raymond Jennings, K.C., and *A. H. Droop* for the tenants for life.

D. L. Jenkins, K.C., and *G. A. Rink* for the remaindermen.

Cur. adv. vult.

July 19. ROMER, J., read the following judgment.

ROMER, J.: By his will dated Nov. 7, 1935, the testator, Thomas Parry, after appointing executors and making certain specific and pecuniary devises and bequests, gave, devised and bequeathed all the residue and remainder of his real and personal estate whatsoever and wheresoever unto his trustees upon trust that they should out of his estate and the income thereof make a certain provision for the benefit of his wife and subject thereto upon trust to sell and convert into money such part of his estate not thereby otherwise disposed of as did not consist of money with full absolute and uncontrollable discretion in his trustees to postpone the sale and conversion of the whole or any part of his estate so long as they should think fit wise and proper and to stand possessed of the proceeds of sale thereof and of his ready money (thereinafter called his "residuary trust funds") upon trust to invest the same or any part thereof as therein mentioned, and out of the income of his residuary trust funds to pay his wife an annuity of £2,000 per annum free of income tax and sur-tax (reducible to £1,000 per annum tax free on re-marriage) and in the next place to pay certain small annuities, and subject thereto to pay the remaining income of his residuary trust funds to his nephew, the defendant Thomas Sydney Parry, during his life and, upon his decease, to pay the income of the said funds to his son, the defendant Owen Sydney Parry, during his life and upon his death in trust absolutely both as to capital and income in equal shares for the sons of the said Owen Sydney Parry (subject however to restrictions of a religious character) and if there should be only one such son the whole to be in trust for such one son.

The testator died on Sept. 3, 1936, and on Oct. 23, 1936, his will was duly proved by the executors therein named. The testator's widow is still living and is a lady of some 80 years of age. The defendant Owen Sydney Parry has had one child only, namely, the infant defendant Richard Owen Parry.

The whole of the testator's debts (except one comparatively small one) have been paid as also have been the legacies bequeathed by his will and his funeral and testamentary expenses have been discharged. The testator's estate was a large one and it included many investments which were of a non-trustee character and not authorised by the investment clause in his will. I will refer henceforth to these investments as "the unauthorised investments." Some of the unauthorised investments were realised by the executors during the first year after the testator's death, some were realised subsequently, whilst others are still retained by the trustees in exercise of their power to postpone conversion. The unauthorised investments did not include any wasting assets such as leaseholds.

In these circumstances, the first question raised by the present summons is whether the whole of the actual net income of the testator's residuary personal estate ought to be treated as income as between the persons interested in the income and the capital respectively of such estate or whether the rule in *Howe* v. *Lord Dartmouth* (1), or the corresponding rule applicable where there is a trust for sale, ought to be applied. As to this, counsel for the first two defendants (the tenants for life) admitted that, in view of authority which is binding upon a court of first instance, they were unable to argue before me that the rule in

Howe v. *Lord Dartmouth* (1) did not apply to the present case. They reserved, however, the right to contend before a higher tribunal that the rule has no application, and ought not to have been applied in the past, to cases such as the present where a testamentary trust for sale is coupled with a power, exercisable in the discretion of the trustees, to postpone conversion for an indefinite period.

I approach then the second question raised by the summons on the footing that the rule in *Howe* v. *Dartmouth* (1) does in principle regulate the rights of tenant for life and remainderman in relation to the income of the testator's residuary personal estate. Upon this assumption, the point which was first argued under question 2 of the summons was whether the value of the unauthorised investments should be based on their respective values as at the testator's death; or, in the case of those still retained at the expiration of a year after the death, the values as at that date; or, in the case of those realised during the said year, the net proceeds of realisation thereof; or upon some and what other basis of valuation or values. The importance of these questions to the parties in the present case arises out of the fact, proved in evidence, that the unauthorised investments greatly increased in value during the first year after the testator's death.

In *Re Wareham* (2), Farwell, L.J., said ([1912] 2 Ch. 312, at p. 316):

> The rule in *Howe* v. *Dartmouth* (1) was laid down to give effect to the true intention of testators in cases where there was a gift to one or more tenants for life with remainders over. Lord Cottenham in *Pickering* v. *Pickering* (3) shows that it is not a mere artificial rule, but a beneficial rule for effectuating the intention of testators: "How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund."

The rule, however, is not confined to the mere settlement of residuary personalty, but was applied at an early stage to cases where the settlement was operated through the medium of an express trust for sale. The will now under consideration contains such an express trust, but it is qualified by an ample discretion, vested in the trustees by the testator, to postpone conversion. There have been at least five cases of this character reported during the present century, and it would, I think, be convenient to refer to them at once.

In *Re Woods* (4) the testator's residuary personal estate, which he settled by way of successive interests, included certain shares in another estate which comprised mining property and this property was under lease to lessees who worked the coal and minerals and paid rents and royalties. The trustees of the testator's will, in the exercise of the discretion conferred on them, refrained from converting their interests in this mining property and retained the same as an investment and they received periodically from the trustees of the other estate sums of money as the share of the testator's estate in the mining rents and royalties. It was held by Kekewich, J., that the tenant for life was entitled to 3 per cent. interest on the value of the rents and royalties, such value (and this is the important point for present purposes) being taken as at the testator's death. In the course of his judgment the judge said ([1904] 2 Ch. 4 at p. 12):

> It has been decided in *Brown* v. *Gellatly* (5) and in other cases that the proper thing to do in a case of this kind is to value the securities as at the time when they ought to have been converted—that is to say, immediately after the testator's death, if he has so directed, or at the expiration of a year from his death if he has given no direction, and, taking the value at that time, to give the tenant for life interest on that value in lieu of profits or royalties, so that he may have such a proportion as is equivalent to the value of his interest.

In *Re Chaytor* (6) the estate which was settled included assets which were not of a wasting character but which were not authorised by the investment clause in the will. There was no express gift of the income pending conversion. Warrington, J., after asking himself what is the general principle which is applied in cases where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and where there is no express gift of the income pending conversion, said ([1905] 1 Ch. 233, at p. 238) :

> As I understand it, the general rule is that the tenant for life is entitled to the income of authorised securities, but not entitled to the income of unauthorised securities. In the latter case he is only entitled to interest, which is now fixed at the rate of 3 per cent., on their value at the testator's death.

Then, after referring to a decision of Kekewich, J., in *Re Thomas* (7) and to *Re Woods* (4), Warrington, J., continued (*ibid.*, at p. 239) :

> In order that the tenant for life should not lose income altogether, the court steps in and says for the proper administration of the estate the value of these investments at the testator's death shall be taken as the value of the proceeds of sale. As these unauthorised securities cannot be kept as part of the estate, the tenant for life gets the income of them as notionally converted at the testator's death. That appears to be the rule laid down with the object of preventing the discretion of the trustees from operating to the prejudice of the tenant for life or the remainderman.

In *Re Owen* (8), Neville, J., expressed himself as follows ([1912] 1 Ch. 519, at pp. 523, 524) :

> The question depends upon the conventional rule which has been adopted by the court in cases where a testator has disposed of his property to trustees upon trust for sale with a discretionary power to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life with remainder over, but has not provided that until sale the tenant for life shall have the benefit of the actual income produced by the unauthorised securities . . . The court in such a case has adopted a rule of taking the estimated capital value of the unauthorised securities at the death of the testator and allowing to the tenant for life 4 per cent. interest upon the estimated amount and directing that in regard to the surplus income arising out of the unauthorised investments there should be accumulation and capitalisation of that income.

That principle had, in fact, been applied by an order made in earlier proceedings, and the summons before Neville, J., was issued for the purpose of obtaining further directions in relation to that order.

In *Re Beech* (9), Eve, J., quoted the rule as stated above by Neville, J., in *Re Owen* (8) and applied it to the case before him. In *Re Baker* (10), Russell, J., stated that where part of a residuary estate, held upon trust for conversion with a discretionary power of postponement, consisted of an investment in an unauthorised security, the court had been in the habit of allowing the tenant for life a percentage on the capital value, ascertained at the testator's death, of the unauthorised investment. Finally, in *Re Fawcett* (11), Farwell, J., in giving elaborate administrative directions which included a valuation of retained unauthorised investments at the end of one year from the death of the testatrix twice pointed out that the trust for sale in that case was not qualified by any power to postpone and intimated that in cases where there was such a power different considerations might arise.

Having regard to the above decisions, it would appear at first sight that the rule or principle which was applied by each of them should equally be applied, and in its entirety, to the case which is now before me, saving only, it is said, the question as to rate of interest, to which I will refer hereafter. Counsel for the life tenants object to that part of the rule which fixes the date of the death as the appropriate time for valuing the unauthorised investments. The proper time for valuing the investments which were retained unsold, they say, was the first anniversary of the testator's death. Their argument is that from the first appearance of the rule which is now usually referred to as the rule in *Howe* v. *Dartmouth* (1), and the companion rule referable to trusts for sale, nobody even thought of the testator's death as being the proper time for valuing unauthorised investments until it occurred to Lord Cairns to do so in 1867 in *Brown* v. *Gellatly* (5) ; and that confusion was thereby introduced into what had become settled practice. Apart from this, they say that Kekewich, J., took the wrong turning in *Re Woods* (4), and that this deviation resulted in the judges who decided the subsequent cases being led astray. The point was not, it is contended, precisely argued in any of those cases, and, as they have given rise to an anomaly, they should not, so far as the point now in issue is concerned, be allowed to prevail. I propose, accordingly, to consider as briefly as possible the earlier history of the matter with a view to discovering whether the modern practice of valuing unauthorised investments at the testator's death in cases where there is a trust for sale with power to postpone conversion is really at variance with anything that was formerly established and whether it can fairly be said that such practice grew up, as it were, *per incuriam*.

The rule in *Howe* v. *Dartmouth* (1) was not brought into being for the first time in that case nor was it given then its complete and ultimate form. The courts were for a long time troubled with the problem of doing justice as between tenant for life and remainderman where a testator gave residuary personalty to successive takers and where such residue included assets of a wasting or hazardous character. In cases where, on construction, the beneficiaries were intended to enjoy the assets *in specie*, either permanently or for a time, no difficulty arose. The difficulty presented itself where such an intention was absent. In cases where there was a trust for sale, testators frequently made the problem all the more troublesome by using language which, on a strict reading, gave the life tenant nothing until conversion and reinvestment had been effected. A further problem which received much and rather varied treatment was what (if anything) the tenant for life should receive during the first year after the testator's death.

In 1841, as appears from *Taylor* v. *Clark* (12), it was still possible for a tenant for life in cases where there was a trust for conversion of residue, followed by a settlement of the proceeds, to present a three-fold argument and to cite high authority in support of each contention. One was that he was entitled to the income of the residue during the first year after the testator's death, without reference to the investment in which he found it. An alternative argument was that he was entitled to the income accruing during the first year after the testator's death on such parts of the testator's estate as were invested at his death upon authorised investments and on such parts as were afterwards so invested during the same year, but not to the income of property not so invested. A third alternative was that he was entitled during that year to a notional income consisting of the dividends on so much 3 per cent. stock as would have been produced during the year by the conversion of the property at the end of the year. Of these alternatives, the third had been adopted by Lord Lyndhurst, C., in *Dimes* v. *Scott* (13), and this was the one which, after (apparently) considerable doubt, Wigram, V.-C., applied in *Taylor* v. *Clark* (12). Wigram, V.-C., rejected the remainderman's contention (which would probably have prevailed some years earlier) that no income at all was payable to the tenant for life during the first year. *Dimes* v. *Scott* (13) was followed also on many subsequent occasions and it would seem that that case is the true parent of the rule, now well established, that where residue is subjected to a trust for conversion (whether express or implied) and there is a settlement of the proceeds, the right of the life tenant is to have the retained, but unauthorised, investments valued as at a year from the death and to receive interest from the death on such value.

In *Morgan* v. *Morgan* (14), decided in 1851, it seems to have been contended on behalf of the life tenant that the rule in *Howe* v. *Dartmouth* (1) did not apply at all—principally (although small indications of intention were also relied upon) on the ground that the will there in question contained no trust for sale. This contention failed, Sir John Romilly, M.R., observing that the rule was unquestionably the law and could only be displaced by language showing a contrary intention on the part of the testator. In applying the rule, he also adjusted the rights of tenant for life and remainderman in accordance with the principle enunciated in *Dimes* v. *Scott* (13). Counsel for the life tenants is, therefore, I think, right in saying that by the time Lord Cairns decided *Brown* v. *Gellatly* (5) the general practice was—both in cases where there was and in cases where there was not a trust for conversion—to treat retained investments of an unauthorised character as converted at the expiration of a year from the testator's death, and to give the life tenant interest on the notional proceeds of such conversion starting from the date of the testator's decease. That being so, it is relevant to inquire why this point of time was chosen rather than the date of the death or some other time.

The first case to which I need refer on that point is *Sitwell* v. *Bernard* (15). In that case the testator directed that his residuary personal estate should "with all convenient speed" be laid out in the purchase of land and that the interest of such residue should accumulate and be laid out in lands

to be settled in like manner as he had directed the residue of his personal estate. The testator then directed the limitations of the estates so to be purchased, which were (in effect) limitations in strict settlement in favour of his sons successively and their issue. Delay occurred after the testator's death in the calling in and conversion of the personalty. Proceedings were instituted by the first tenant for life under the limitations declared by the will of the estates directed to be purchased and one of the questions raised was as to the plaintiff's
A right to interest on the unconverted personal estate. The case came before Lord Eldon, L.C., in 1801 which was some years before it became finally recognised that life tenants in the position of the plaintiff in that case were entitled at all events to some interest from the date of the testator's death. Indeed, no such claim seems to have been advanced or argued for the plaintiff, the contention of counsel on his behalf being that he was entitled to the interest of the personal estate from the end of a year after the testator's death, whilst the remaindermen,
B founding themselves largely upon the direction in the will for accumulation of interest, argued that until the residuary personalty was laid out in land, no person was to have any usufruct. Lord Eldon decided in favour of the plaintiff. In the course of his judgment he referred to the fact that two alternative views had been judicially expressed in cases comparable to that which was before him. He said (6 Ves., 520, at 537):

> C Lord Rosslyn seems to think, there is a principle in the justice of the court requiring him to consider that as done, when it was ordered to be done; differing from Lord Thurlow, who considered it as ordered to be done from the death of the testator. Lord Rosslyn considering it as done from the date of the decree, procured by the providence of the party himself. From these decisions, therefore, it is uncertain what is the true period in the case of a person having discretion enough to file a bill, and the case of an infant: Whether the death of the testator, or the decree, if a suit was instituted; or, whether the court would say, that was a convenient period for this
> D purpose, which for other purposes is determined to be convenient; though it does not often hit the real justice of the case, *viz.*, a year from the death of the testator.

Later he said (*ibid*, at p. 539):

> Where an estate is given in various legacies, and the residue is given, it is a rule of convenience, that authorises this court to say, for there is no language in the will for it, that those legacies shall be payable at the end of a year from the death of the testator; because, as a general rule it may be taken, that the personal estate may be collected
> E within a year; though in many instances that falls enormously to the prejudice of the residuary legatee. The same convenience has made the court say, the residuary legatee shall not claim till the end of the year.

After stating that the plaintiff could take nothing for the first year, Lord Eldon expressed his conclusions on the question whether the plaintiff should be kept waiting beyond the year in the following passages (*ibid.*, at pp. 542, 543):

> F The court is therefore driven either to take the end of the year upon the principle of general convenience, or to examine in each particular case, what convenient speed and reasonable diligence would have done; what negligence or the law of the country or other circumstances have prevented; and make those inquiries at the hazard of obtaining no clear result. I am, therefore, disposed to say, justice requires, that the plaintiff should have the interest from the end of the year. . . I am justified upon the whole, though I have had great difficulty upon it, in saying, the construction ought to be that, which will give the tenant for life the interest from the period, at which in
> G the contemplation of this court the residue would be formed as residue, *viz.*, the end of the year, conceiving it hard upon him to take the time of the decree; recollecting, that the former decree directs an inquiry, as to what had been done, without directing the money to be called in; which certainly it ought upon that principle.

In *Gibson* v. *Bott* (16) there was a general residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently might be and the proceeds were settled. The executors managed the farm
H for some months after the testator's death and then sold it, together with the stock, which had substantially increased in value. Certain other leaseholds, which formed part of the testator's estate, could not be sold because of defects in title. Questions arose as to the respective rights of tenant for life and remaindermen both in relation to the farm and stock and in relation to the leaseholds remaining unconverted. As to the former, Lord Eldon, in the course of an interim judgment, followed his previous decision in *Sitwell* v. *Bernard* (15), and pointed out the disadvantage attending any departure from the general rule which he had there applied. He added (7 Ves. 89, at p. 95):

> The point is, what is advantageous, not to the sole owner of the property, but to all persons interested, and as to that regard must be had to what in such cases is practicable. The course is an account, and the tenant for life to take the interest from the end of the year.

In dealing with the same subject matter in a further judgment delivered on the following day, he said (*ibid.*, at p. 97):

> The utmost that can be contended by the plaintiffs is, that what is directed to be done shall be considered as done. They can only, therefore, claim interest upon the capital, as it was at the death. But here the capital is much increased. When a testator gives interest of a fund, to be created by a sale as soon as conveniently can be, he means only the interest from the time the property can conveniently be sold. The whole practice of the court is against such special directions as to the value at the time of the death. A

Lord Eldon then expressed his opinion with regard to the unsold leaseholds as follows (*ibid.*, at pp. 97, 98): B

> As to the leasehold premises, that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain *in specie*; upon that I think the plaintiffs may have interest upon the value from the death; for there is a consideration for that. The best decree in this cause will be to declare, that the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties, that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at 4 per cent. upon that value from the death of the testator. C

The relevant part of the decree, made in conformity with this judgment is as follows (see 1 Y. & C. Ch. Cas. 320, note (*a*)):

> His Lordship . . . doth order and decree it to be referred to the master to set a value on the leasehold property of the said testator remaining unsold, as the same was at the time of the death of the testator, and compute thereon at the rate of £4 per cent. per annum from that time. D

Howe v. *Lord Dartmouth* (1) came before Lord Eldon three days after he had disposed of *Gibson* v. *Bott* (16). There was no trust or express direction for conversion in *Howe* v. *Dartmouth* (1), but successive interests were created by Lord Strafford's will in his general personal estate. The testator died in 1791, and the first life tenant, Lady Anne Connolly, died some years later having received in her lifetime the full annual produce of the estate. Her right to do so was contested before Lord Eldon on behalf of the remaindermen on the ground that the tenant for life of such funds as bank annuities and long and short annuities was not entitled to the enjoyment of them *in specie*, but there was a standing rule of the court for the benefit of all parties interested that those funds should be laid out in the more equal fund, the 3 per cents., and that no party ought to suffer by the circumstance that what ought to have been done, and what the court would have directed to be done, immediately on the testator's death, was not done. The rights of the parties must be the same as if the testator had converted the property immediately before his death. Lady Anne's executors argued in the first place that, as a matter of construction, the gift of the personalty was a specific bequest and that she, as life tenant, had been entitled to enjoyment *in specie*—a contention, however, which Lord Eldon rejected. As an alternative they contended that there was no fixed principle that executors were bound of necessity to make the conversion at the testator's death or any given time afterwards. The period of the conversion in that case, they said, was not the time of the testator's death, but the year 1796, when an order for sale had been made in the proceedings. Lord Eldon pointed out (7 Ves. 137, at p. 148), the equity of the general rule (designated nowadays by the name of that case) operating, as it does, equally on property in reversion as on assets in possession: E F G H

> As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that of which, if it remained *in specie*, he might never receive anything, is brought in; and he has immediately the interest of its present worth.

Further extracts from the judgment of Lord Eldon, C., more relevant to the point immediately under consideration, are as follows (*ibid.*, pp. 149-152):

> . . . the purposes, for which [the personal estate] is given, are those, for which it is

> admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital, bearing interest. I was astonished, when that was doubted, from general recollection. I had considered the practice to be, that the first moment the observation of the court was drawn to the fact, the court would not permit property to be laid out or to remain upon such funds under a direction to lay it out in government securities; but would immediately order it to be converted into that, which the court deems for the execution of trusts a government security . . . If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide . . . if the principle is, that the court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as converted when it could be first converted . . . The account therefore must go . . . from the time, at which it would have been converted if the observation of the court had been drawn to the fact that the executors were possessed of those funds.

What that hypothetical moment of time actually was is not indicated either by LORD ELDON himself or by the report. As, however, he had expressly negatived the relevance of the date of the decree, and having regard to his former judgments in *Sitwell* v. *Bernard* (15) and *Gibson* v. *Bott* (16), I think it is reasonably clear that he intended the notional conversion to operate from a year after the testator's death.

In *Dimes* v. *Scott* (13) residuary personalty was given on trust for conversion and the proceeds were settled for successive interests. The executors permitted a 10 per cent. security, part of the personal estate, to remain outstanding for several years and paid the whole interest received to the tenant for life. LORD LYNDHURST, L.C., in holding that the executors had misconceived their duties, said (4 Russ. 195, at p. 207):

> The directions of the will were most distinct; and according to the case of *Howe* v. *Lord Dartmouth* (1), and the principles of this court, it was the duty of the trustees to have sold the property within the usual period after the testator's death. If they neglected to sell it, still, so far as regarded the tenant for life, the property was to be considered as if it had been duly converted.

By the phrase "within the usual period after the testator's death" LORD LYNDHURST meant, as is indicated by his further observations (*ibid.*, at p. 209), within the period of a year.

Finally I should refer to two observations from the judgment of SIR JOHN ROMILLY, M.R., in *Morgan* v. *Morgan* (14)—which was a true *Howe* v. *Dartmouth* case, in that there was a settlement of residuary personalty without any express direction to convert. SIR JOHN ROMILLY, M.R., said (14 Beav. 72, at pp. 82-84):

> The rule laid down in *Howe* v. *Dartmouth* (1) is, that where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person, in succession, the dividends of the fund . . . the . . . absence of any direction to convert . . . cannot be treated as an expression of intention on the part of the testator that his property was not ever to be converted; it would, I think, be unreasonable if it were so held. By law, the property must be converted; a testator may not unreasonably be supposed to be cognisant of that law, and to have given no direction on the subject, because he may have supposed that it would be mere surplusage so to do.

The conclusions to be drawn from these authorities are, I think, as follows. Where residuary personalty was settled by will, and there was no sufficient indication that the testator intended the income beneficiaries to enjoy the property *in specie*, the court sought to do justice between all parties and to preserve that balance which the testator presumably intended and would have expressly directed had his mind been addressed to the question. As an essential element in this endeavour it was early recognised that a hypothetical conversion of hazardous or wasting property into safe and lasting securities should be assumed in cases where it had not been converted in fact. There was no difficulty as to this in cases where there was an express trust for sale. The testator himself had contemplated and directed conversion, his personal representatives were bound to effect it, and the period of a year (the "executors' year") was taken as that within which this duty could reasonably and normally be performed. In other words, as it was necessary to have some general working rule governing the time of notional conversion, the fixing of that time became naturally related to the performance by the personal representatives of their administrative obligations and to the time within which they could usually be expected to perform them. I think it is reasonably clear from the judgments which I have quoted that this was the reason why the expiration of 12 months from the testator's death was taken as the time from which notional conversion should take effect, rather than the date of the death itself, or the date of the court's own order decreeing a sale. Where there was no trust for sale, the same point of time was selected by parity of reasoning. As stated by Sir John Romilly, M.R., in *Morgan* v. *Morgan* (14) "by law the property must be converted" in such cases and an obligation is thereby cast upon the executors to satisfy the law's requirement. That being so, no distinction could legitimately be drawn in this regard between cases where there was an express obligation to convert on the one hand and cases where the obligation was implied on the other. The conjunction of an obligation, and of a reasonable period for its performance, furnished, I think, in both classes of case, the real reason for selecting, as the time of notional conversion, the expiration of 12 months from the testator's death.

It now becomes necessary for me to refer to *Brown* v. *Gellatly* (5) which I have mentioned earlier on in this judgment. In that case the testator, who died in Mar., 1862, left all his property to two named executors :

> . . . giving them full power, except as [thereinafter] provided, to realise the same when and in such manner as they [might] see fit, without being personally responsible for such realisation—to sail [his] ships for the benefit of [his] estate until they [could] be satisfactorily sold, without being responsible for any loss on any voyage—to sell [his] ships by public or private sale, and for the following purposes [which he then set out].

The testator then settled the residue of his estate for successive interests. The will contained an investment clause which was of a rather limited scope but which empowered the executors to retain investments. At the time of his death the testator possessed investments some of which were within the investment clause whilst others were outside it. He was a shipowner and some of his ships were at sea and others sailed after his death and a considerable profit was made from the enterprises in which they were engaged. Questions arose between tenant for life and remaindermen in respect of the various properties, and administration proceedings were instituted. These came before Lord Cairns, L.J., by way of appeal from the Master of the Rolls. Lord Cairns in his judgment and by his order drew a clear-cut distinction between the general unauthorised investments (*viz.*, those outside the investment clause) on the one hand and the ships on the other ; and it is that distinction which makes the case an important one for present purposes. As to the unauthorised investments he said (2 Ch. App. 751, at p. 759) :

> . . . it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year, but I think that the rights of the parties must be regulated as if they had been so converted.

With regard to the ships, the tenants for life argued that they were entitled to the whole of the profits earned subsequent to the death. Lord Cairns rejected that contention, observing that there was no indication of an intention that the ships were to remain unconverted for any specific time. He then proceeded (*ibid.*, at pp. 757, 758) :

> The testator, who had been engaged in the shipping business, knew perfectly well, and shews that he knew, that some time would necessarily be taken in converting the ships, and therefore he very wisely provided that until they were sold the executors should have a power which otherwise they would not have possessed, namely, the power to sail the ships for the purpose of making profit, but, in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers. I think, therefore, that with regard to the ships, the testator put them simply in the position of property which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which, when converted, was to be invested, and when invested, to be enjoyed as the residue of his estate. In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir James Parker in the case of *Meyer* v. *Simonsen* (17) and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have

4 per cent. on such value, and the residue of the profits must, of course, be invested, and become part of the estate.

And an order was made accordingly.

In *Meyer* v. *Simonsen* (17), which was a case of a settlement of residuary personalty without a trust for sale, SIR JAMES PARKER, V.-C., mentioned three classes of case to which the principle of *Howe* v. *Dartmouth* (1) applies (5 De G. & Sm. 723, at p. 726):

> Firstly, where the subject-matter of the bequest is . . . invested [already] . . . in some security of which the court approves . . . [secondly] where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman [which SIR JAMES PARKER, V.-C., described as partial conversion] . . . [thirdly] where property is so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate . . . there, the rule is not to convert the property, but to set a value upon it, and to give to the tenant for life £4 per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman.

The reasoning of LORD CAIRNS, L.J., in *Brown* v. *Gellatly* (5) confirms me in the conclusions which I have already expressed upon a consideration of the earlier authorities. He recognised the existence of a duty upon the executors to sell the testator's unauthorised investments but he limited this duty to such of the assets as could in fact be sold without sacrifice to the estate. In relation to such assets he accordingly made an order in accordance with the principle established by *Dimes* v. *Scott* (13). With regard to the ships, however, which could not be sold except with care, he applied quite a different principle. The ships, he said, had been sailed for the benefit of the estate as a whole and were in the nature of property which was to be converted cautiously and as to which there was no breach of trust in the executors delaying to convert it. It is clear that the treatment which LORD CAIRNS accorded the ships, and the reasons which he gave for it, are by no means inapplicable to the case of property given on trust for sale with an unfettered power of postponement vested in the executors. In the latter case, as in the former, if the executors retain assets in their existing condition they do so for the benefit of the estate as a whole; and no breach of duty is committed in refraining from selling—provided, of course, that in so refraining they act *bona fide*.

It was submitted before me in argument, however, that LORD CAIRNS' decision was wrong, so far as the ships were concerned, that it was inconsistent with the general trend of all the earlier decisions, and, in particular, was inconsistent with the views of SIR JOHN ROMILLY, M.R., as expressed in *Yates* v. *Yates* (18), and *Re Llewellyn's Trust* (19). As to the earlier decisions they were founded, in my judgment, as I have already indicated, on the existence of a duty and on the recognition that a reasonable period of time was required to perform it. They are, therefore not applicable, of necessity, to a case in which that duty is absent.

In *Yates* v. *Yates* (18) SIR JOHN ROMILLY, M.R., said (28 Beav. 637, at p. 639):

> Where a testator gives property to trustees, with an absolute trust for conversion, and with a discretion as to the time at which the conversion shall take place, if, from any causes whatever, arising from the exercise of the discretion and judgment of the trustees, the conversion is delayed, then the tenant for life is not to be prejudiced by that delay, but is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the testator, which is usually fixed at 12 months from that period.

In *Re Llewellyn's Trust* (19) a testator settled his real and personal estate on his wife for life with remainder to his children and authorised his trustees, at their discretion, with a view to facilitating the ultimate division of his property, to convert into money his residuary personal estate and to sell his real estate, "at such times and in such manner, in all respects, as they may deem necessary or advisable." His estate, at his death, comprised certain wasting or hazardous assets, including an interest, repayable to the estate by instalments, in a partnership. SIR JOHN ROMILLY, M.R., held that the widow was not entitled to enjoy leaseholds and perishable property *in specie*, but, so far as these assets were concerned, applied the principle of *Dimes* v. *Scott* (13). With regard to the partnership interest, SIR JOHN ROMILLY, M.R., expressed himself as follows (29 Beav. 171, at p. 174):

> It appears there are certain assets which cannot be realised instantly, that is to say, the purchase money for the partnership in which the testator was engaged, his share of which, with interest, is payable by instalments from time to time. With respect to that, the rule laid down in *Meyer* v. *Simonsen* (17), by the Vice-Chancellor PARKER, must be followed, namely, that it must be treated as if the whole were realised at once, and the tenant for life allowed 4 per cent. upon the value; because the court cannot A realise it, like mere outstanding personal estate, and it is for the benefit of the estate that the instalments should be paid in the manner arranged. They are payable, with interest at 5 per cent.; but the tenant for life will not be entitled to the whole interest, but only to 4 per cent. The period for ascertaining the value of the property will be 12 months after the death of the testator, but the tenant for life will get her income as from the testator's death.

So far as the point now in issue is concerned, it is certainly difficult to reconcile B these views, expressed and acted upon by SIR JOHN ROMILLY, M.R., with the decision of LORD CAIRNS as to the ships in *Brown* v. *Gellatly* (5). I am inclined, however, to prefer the latter case to *Yates* v. *Yates* (18) and *Re Llewellyn's Trust* (19), for more than one reason. In the first place, it was later in date, and, having regard to the fact that the principles now in question were somewhat laboriously built up by the process of trial and error over a long period of time, C this consideration is not without weight. Secondly, there can be no certainty that SIR JOHN ROMILLY had present to his mind, as LORD CAIRNS assuredly had to his, the contrast between cases where trustees had an immediate duty to convert and cases where they had not. Thirdly, LORD CAIRNS's treatment of the ships was in entire accord with the order of LORD ELDON, L.C., in relation to the retained leaseholds in *Gibson* v. *Bott* (16). Fourthly, *Brown* v. *Gellatly* (5) has been frequently approved and was cited without any adverse comment D by the Privy Council in *Wentworth* v. *Wentworth* (20). And, finally, not only was the order regarding the ships not inconsistent with previous authority, but it seems to me that it was plainly right. Notional conversion is very understandable when the executors are under a duty, express or implied, to sell; such a duty readily lets in the doctrine that equity regards that as done which ought to be done, and the notional conversion arising from the doctrine (subject only to a year's grace) acted as a convenient medium for preserving a balance E between life tenant and remainderman. If no duty exists, however, the medium is not available, and another has to be found in its place. If there is no duty upon the executor to sell at once, or within a year, or at any other time, I can see no reason for assuming a notional conversion at once, or within a year, or at any other time. The essential equity, however—the balance between the successive interests—remains equally compelling even where there is no F immediate obligation to convert and property is retained for the benefit of the estate as a whole. It is accordingly rational, and indeed obvious, to substitute a valuation of the testator's assets in the place of a hypothetical sale; and, if so, it is difficult to think of a better date for the valuation than the day when the testator died and the assets passed to his executors.

In my judgment, accordingly, *Brown* v. *Gellatly* (5) is not legitimately open to attack on this point and afforded a satisfactory foundation for the orders G in *Re Woods* (4) (though the judgment in that case is not in every respect easy to follow), *Re Chaytor* (6), *Re Owen* (8), *Re Beech* (9) and *Re Baker* (10). Although such is my view, and I have thought it right to express it, it would really be enough for me to say that the cases relied on by the tenants for life are, in my opinion, quite insufficient to support the suggestion that the five authorities to which I have just referred were, so far as the present point is concerned, contrary to established practice and should now be disregarded. H

One other case was cited which does undoubtedly support the argument of counsel for the first defendant. That was *Re Lynch Blosse* (21). STIRLING, J., is reported to have directed a valuation as at a year after the testator's death of residuary estate settled through the medium of a trust for sale with power to postpone conversion. There is no note of the argument in that case and practically none of the judgment and I cannot regard it as a guide of any value. There may well be other decisions also bearing on the question, for there is a mass of authority on the growth, development and application of the

Howe v. *Dartmouth* rule. Upon the best consideration that I can give, however, to the cases which were cited in argument by either side—and I have looked at one or two others since—I find no sufficient ground for departing from the *Re Woods* (4) line of decisions and I do not propose to do so.

I will accordingly declare that the valuation of all the unauthorised investments should be based on their respective values as at Sept. 3, 1936, which was the date of the testator's death.

The next question with which I have to deal is as to the rate of interest which ought to be allowed to the life tenants upon the value of the unauthorised investments. For some years prior to *Re Beech* (9) the rate allowed had been 3 per cent., but EVE, J., in that case, raised the rate to 4 per cent., and that is the rate which has prevailed ever since. Counsel for the remaindermen has invited me to say in the present case that, having regard to the reduced rate of interest now obtainable on trustee investments, the time has arrived to revert to the old rate, or, at all events, to say that not more than 3½ per cent. should be allowed now. I have had the advantage of certain evidence on this question, *viz.*, an affidavit of Mr. Sydney Daly, who is an experienced stockbroker and has been a member of the London Stock Exchange for upwards of 45 years. He says that he has gone closely into the question of the yield which might have been obtainable in Sept., 1936, and 1937, from investment at those dates in a miscellaneous list of investments authorised by law for the investment of trust moneys and in his opinion a fair average yield obtainable in Sept., 1936, would have been £3 12*s*. 2*d*., and in Sept., 1937, £3 16*s*. 1*d*. He then exhibits a document which gives particulars of how investment on those dates in five types of trustee investments would have produced those average yields. A reference to that document shows that the yields varied in Sept., 1936, from a minimum of £3 5*s*. 6*d*. to a maximum of £3 19*s*. 6*d*. The question whether the conditions which now prevail, in 1946, require a revision of the 4 per cent. rate re-introduced by EVE, J., in *Re Beech* (9) is not before me. The only question I have to decide is whether the conditions which existed at the testator's death, namely, Sept., 1936, would have required such a revision then, had the matter been brought before the court. In *Re Beech* (9) EVE, J., said ([1920] 1 Ch. 40, at p. 44) :

> . . . a departure from a salutary rule in matters of this kind—introducing as it does an element of uncertainty in practice and administration—can only be justified if the changed conditions on which it is founded continue at least as constant as those upon which the rule was itself framed.

It is true that on Dec. 1, 1932, the interest rate of 5 per cent. war stock was reduced to 3½ per cent. redeemable at option of the Government on or after Dec. 1, 1952, and this, no doubt, had its effect on the rate of yield from other trustee investments. Nevertheless, I am not satisfied that the court, in Sept., 1936, would have regarded the conditions as having changed so materially, and for so long, as to justify an alteration in the 4 per cent. rate. Further, FARWELL, J., in *Re Fawcett* (11), whilst directing that the unauthorised investments should be valued as at Jan., 1935, said ([1940] Ch. 402, at p. 407) :

> The general, although not the universal, rule is now to allow 4 per cent. and I see no reason in the present case to depart from that modern practice.

In these circumstances, I will declare that the rate of interest to be allowed upon the value of the unauthorised investments, when ascertained as aforesaid, should be 4 per cent. per annum.

Declaration accordingly.

Solicitor : *J. J. Hurdidge* (for all parties).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

ALEXANDER KORDA FILM PRODUCTIONS, LTD. AND ANOTHER *v.* COLUMBIA PICTURES CORPORATION, LTD. AND ANOTHER.

[Chancery Division (Romer, J.), July 16, 17, 1946.]

Practice—Writ—Service of concurrent writ out of jurisdiction—Misnomer of defendants—Conditional appearance—Summons to set aside order for service of writ, writ, and all subsequent proceedings—Misnomer trivial—Validity of writ—Correct procedure to be adopted by defendants—R.S.C., Ord. 11, *r.* 1 *—R.S.C., Ord.* 12, *r.* 30*—R.S.C., Ord.* 70, *rr.* 1, 2, 3.

In an action by the plaintiffs for an injunction to restrain certain companies from reproducing and performing in public a certain film, the second defendants were described in the writ, issued on Sept. 4, 1945, as "Columbia Pictures Incorporated." On learning that the second defendants were an American company, on Dec. 13, 1945, the plaintiffs obtained an order for a concurrent writ and leave to serve notice of it out of the jurisdiction. This writ was addressed to "Columbia Pictures Incorporated" and notice thereof was served in New York City on Feb. 5, 1946, on A.S., vice-president of an American company, the correct name of which was "Columbia Pictures Corporation." The American company entered a conditional appearance and then issued a summons under R.S.C., Ord. 12, r. 30, asking that the order of Dec. 13, 1945, for service of the notice of the writ, the writ itself and all subsequent proceedings be set aside on the ground that the writ was irregular, in that the American company was wrongly described therein:—

Held: (i) the writ was not void by reason of the misnomer, and it ought not to be set aside on the ground of invalidity.

Zuccato v. *Young* (1) *and Smith* v. *Hammond* (2) *applied.*

(ii) since the misdescription was trivial and the American company, in spite of the misnomer, knew that they were the parties whom the plaintiffs intended to sue, the company took a wrong course in entering a conditional appearance and issuing this summons. The correct method of procedure would have been to have entered an appearance in their own name, stating in the memorandum that they were sued in the wrong name.

(iii) the misnomer did not invalidate the order of Dec. 13, 1945, or the service of the notice of the writ.

[**EDITORIAL NOTE.** This case discusses the correct procedure to be adopted when a writ contains a trivial misnomer of the defendant. In such a case it is inequitable that the plaintiff should be put to the trouble and expense of commencing afresh, as would happen if the original proceedings were set aside under R.S.C. Ord. 12, r. 30.]

As to Setting Aside Writ, see HALSBURY, Hailsham Edn., Vol. 26, p. 36, para. 52, and p. 40, para. 60; and for Cases, see DIGEST, Practice, pp. 265, 266, Nos. 35-37, and pp. 383, 384, Nos. 907-914.]

Cases referred to:

(1) *Zuccato* v. *Young* (1890), 38 W.R. 474; Digest Practice 266, *36*.
(2) *Smith* v. *Hammond*, [1896] 1 Q.B. 571; Digest Practice 266, *37*; 65 L.J.Q.B. 477; 74 L.T. 590.
(3) *Rust* v. *Kennedy* (1839), 17 L.J. Ex. 85.
(4) *Perry* v. *St. Helen's Land and Construction Co., Ltd.*, [1939] 3 All E.R. 113; Digest Supp.

Summons by the second defendants under R.S.C., Ord. 12, r. 30, asking that an order for service of a notice of a writ out of the jurisdiction, the writ and all subsequent proceedings be set aside on the ground that the writ was irregular. The facts are fully set out in the judgment.

Andrew Clark, K.C., and *Gilbert Dare* for the applicants (the defendants in the action).

S. Pascoe Hayward, K.C., and *F. E. Skone James* for the respondents (the plaintiffs in the action).

Romer, J.: This is a summons issued in an action brought by Alexander Korda Film Productions, Ltd. and London Film Productions, Ltd. as plaintiffs against Columbia Pictures Corporation, Ltd. and an American company described as Columbia Pictures Incorporated.

The summons was issued on the application of Columbia Pictures Corporation, sued as Columbia Pictures Incorporated and it asked :

> . . . that the order dated Dec. 13, 1945, the writ of summons issued pursuant thereto [which was, in fact, a concurrent writ], the service thereof, and all subsequent proceedings, be set aside with costs to be taxed and paid by the plaintiffs to the defendants Columbia Pictures Corporation on the ground that the writ of summons is irregular in that the second-named defendants are described therein as "Columbia Pictures Incorporated", and that in the meantime all further proceedings herein be stayed.

The original writ in this action was issued on Sept. 4, 1945, and it is addressed to Columbia Pictures Corporation, Ltd., whose registered office is situate at No. 18, Bloomsbury Square, London, and Columbia Pictures Incorporated, described as of 139, Wardour Street, London. The action relates to a certain film. The plaintiffs are asking for an injunction to restrain the defendants from reproducing and performing that film in public, together with ancillary relief. The plaintiffs apparently were a little bit in the dark at first as to the American company whom they were suing, or whom they wanted to sue, and on Sept. 4, 1945, they wrote to the solicitors who were acting for the first defendants inclosing :

> . . . original and two copies of the writ of summons herein which we have to-day issued and shall be obliged if you will return the original duly indorsed with your acceptance of service and undertaking to appear on behalf of the defendants.

Wright & Webb, the first defendants' solicitors, wrote back acknowledging the letter :

> . . . for which we thank you and return herewith (i) the original writ duly indorsed with acceptance of service on behalf of the first named defendants, and (ii) the additional copy which you have sent us in respect of Columbia Pictures Incorporated, whose address is given as 139, Wardour Street, W.1. For your information, we would inform you so far as we are aware there is no such company at that address or carrying on business in this country.

On Sept. 7, the plaintiffs' solicitors wrote again to the solicitors to Columbia Pictures Corporation, Ltd., saying :

> We have now ascertained that the second named defendants are Columbia Pictures Incorporated of 729, 7th Avenue, New York City, and we shall be obliged if you will inform us if you are the solicitors acting for them in this country and whether you have instructions to accept service on their behalf.

Wright & Webb replied on Sept. 11. :

> Your letter of Sept. 7 to hand, for which we thank you and have no instructions to accept service of proceedings on behalf of Columbia Pictures Incorporated who do not carry on business in this country.

The plaintiffs then issued a summons for leave to issue a concurrent writ and to serve notice thereof on Columbia Pictures Incorporated, and on Dec. 13, 1945, Master Holloway made an order in the following terms :

> Upon the application of the plaintiff and upon reading the affidavit of John Smeaton filed Dec. 10, 1945, leave to issue a concurrent writ and to serve notice thereof on the defendants, Columbia Pictures Incorporated, at No. 129, Seventh Avenue, New York City in the United States of America or elsewhere in the United States of America. The time for the defendants to enter an appearance to be within 56 days after service.

Notice of that writ was, in fact, served, as is stated in an affidavit sworn by Abraham Schneider, describing himself as :

> . . . of 729, Seventh Avenue, New York in the United States of America, vice-president and treasurer of Columbia Pictures Corporation of New York aforesaid and duly authorised by them to make this affidavit make oath and say as follows : (i) On Feb. 5, 1946, a notice of concurrent writ in lieu of service to be given out of the jurisdiction in the above matter was served upon me. (ii) The name of the company of which I am vice-president and treasurer is Columbia Pictures Corporation and has been so named at all material times and so far as I am aware has never been described otherwise.

Upon that, Columbia Pictures Corporation, who are referred to as the American company, entered a conditional appearance on Mar. 29, 1946. Their appearance was expressed to be conditional and :

> . . . without prejudice to an application to set aside the order dated Dec. 13, 1945, the writ of summons issued pursuant thereto, the service thereof, and all subsequent proceedings.

That is how the matter stood until the American company issued the summons that is before me to-day. It is said on behalf of the applicants, the American company, that they took the only course that was reasonably open to them in entering this conditional appearance and issuing this summons. They say that they could not safely ignore the writ, notwithstanding the misdescription and the fact that the name of the American company did not appear upon it. They say that, although there was a misdescription, it was reasonably obvious that it was intended for them and they acted on that footing; that being so, they could not ignore it and allow the matter to proceed without any action on their part. I was referred to the Rules of the Supreme Court and to certain statements in The Annual Practice, 1945, as showing that that was a proper course to adopt, and that if they had entered an unconditional appearance, it would have been too late for them to have raised any objection hereafter.

In The Annual Practice, 1945, p. 105, there is a note to R.S.C., Ord. 11, r. 1, which says:

> An application to set aside the service or order for service may be made after entering, or without entering, a conditional appearance . . .

R.S.C., Ord. 12, r. 30, provides:

> A defendant before appearing shall be at liberty, without obtaining an order to enter, or entering a conditional appearance, to take out a summons in the King's Bench Division and in any other Division to take out a summons or to serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorising such service.

In The Annual Practice, 1945, p. 150, there is a note below this rule saying:

> This means before entering an unconditional appearance . . . After unconditional appearance it is too late to object to any irregularity in the service or issue of the writ of which the defendant had knowledge, for appearance is a "fresh step" within Ord. 70, r. 2.

Then in The Annual Practice, 1945, p. 153, there is a note saying:

> Applications under this rule are not in practice confined to setting aside the service, but both in the Chancery Division and the King's Bench Division include applications to set aside the writ for irregularity, or for irregularity in the issue thereof, or for the irregularity of an order for issue and service thereof abroad, as well as for defective service of the writ or notice.

The applicants say that, having regard to the practice as so set out and to the circumstances of the case, in which a gentleman found himself presented with a writ on behalf of a company which was misdescribed, the best thing to do was to enter a conditional appearance and then issue a summons to have the writ and the order which authorised the writ set aside. The plaintiffs, on the other hand, say, in the first place, that the American company could have safely ignored this writ, because they were not mentioned in it, or, alternatively—and this, they say, is the course which the American company ought to have adopted—they ought to have entered an appearance in their correct name, stating in the memorandum of appearance that they had been sued by the wrong name. That mode of procedure is recommended in Daniell's Chancery Practice, 8th edn., p. 293, where the following statement appears:

> If a defendant has been sued by a wrong name, he should appear by his right name, stating in the memorandum of appearance that he was sued by the wrong name; and the plaintiff should proceed to amend the writ, for the judgment must accord with the writ.

An obvious qualification which is implicit in that statement is that the defendant has reasonable grounds for supposing that he is the person the plaintiff intended to sue. There may be cases where the misdescription is of such a character as to make plain, or reasonably plain, that the person who is served with the writ is not the right person at all. In that case, probably he would make up his mind not to enter an appearance; but in ordinary cases the practice which is suggested in Daniell's Chancery Practice commends itself to one as being a reasonable course to adopt. In The Annual Practice, 1945, p. 135, there is a note which appears to be to much the same effect. It is a note to R.S.C., Ord., 12, r. 1, which is the rule dealing with appearance, and the note, which is headed "Misnomer," is as follows:

> A defendant may by his appearance correct any mistake in the names by which

he is sued, so long as it is clear that he is the defendant sued. Where a defendant is sued in a trade or business name, *e.g.*, " *Madame James*," appearance should be entered as follows : " *Enter an appearance for Madame James whose real name is Anne Smith, but who is known* (*or trades*) *as Madame James*." This correction does not relieve the plaintiff from the necessity of amending his writ, if the alteration of name is material.

That is the alternative procedure which the plaintiffs say was open to the American company and which they ought to have adopted ; and, for my part, A I would add, as a yet further possible course in cases such as the present, that the misdescribed defendant, if he knows with all reasonable certainty that he is the person intended to be sued, can write to the solicitors for the plaintiff and acquaint them of the position.

It is clear, of course, that an irregularity has occurred, because a writ of summons, in order to comply with the procedural requirements of this court, has to bear upon its face the correct names of the plaintiff and of the defendant. B This concurrent writ (or, indeed, the original writ) errs in that respect, and the question (and, I think, the only question) I have to decide is whether, in view of the irregularity, the American company has adopted a proper course in entering a conditional appearance and issuing this summons in the form and shape which it bears.

The plaintiffs say, in the first place, that it is a trumpery irregularity, and that it has not led to any real misconception, or, indeed, any misconception, C on the part of anybody. They say that it has never been the practice of the court to regard a mere misnomer as invalidating proceedings, and such authority as there is on that topic goes the other way. I was referred to *Zuccato* v. *Young* (1) the headnote of which is :

> The writ in an action described the defendant as " J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate Hill." The defendant who was not D in fact carrying on the business, entered an appearance as " J. L. Young sued as J. L. Young, carrying on business as the Edison Mineograph, Co., at No. 60, Ludgate Hill, but who denies that he is carrying on business as the Edison Mineograph Co., at No. 60, Ludgate Hill aforesaid or elsewhere." *Held*, on motion by the defendant to set aside the writ and subsequent proceedings on the ground of irregularity, that there was no irregularity in the writ, and that the mistake had been set right by the form in which an appearance had been entered by the defendant ; and the motion was refused.

E NORTH, J., said (38 W.R. 474, at p. 475) :

> I do not think there is any irregularity in the writ. The effect of the evidence is that the defendant is not carrying on business as the Edison Mineograph Co., but it is not denied that he did what he is alleged to have done. It is the same thing as if a defendant named John had been sued as James, in which case the mistake could be easily corrected in all subsequent proceedings, as the mistake has been corrected in the present case. In this case matters have already been set right by the form in which the appearance has been entered by the defendant. If the amended title is used in the subsequent F proceedings, they will be perfectly regular, and the defendant will be in no way prejudiced. I must refuse the motion, the costs to be costs in the action.

I read that statement of his with reference to John and James as being of perfectly general application, notwithstanding the fact that there was a difference between that case and the present on the ground that an appearance had been entered by the defendant, thus in effect waiving the irregularity.

G That view of NORTH, J., was quoted without disapproval in *Smith* v. *Hammond* (2). There the headnote is :

> The defendant applied to set aside a writ of summons, which had been issued and served upon him in England, on the ground that by the writ the defendant was incorrectly described as of Lytham in the county of Lancaster, whereas his only place of business and address was at Londonderry in Ireland. *Held*, refusing the application, that the incorrect statement of the defendant's address did not vitiate the writ, and it was H good.

POLLOCK, B., after reading the writ, said ([1896] 1 Q.B. 571, at p. 572) :

> That no doubt is an incorrect description, but it really is not very different from an ordinary case of misnomer, as if, for instance, as NORTH, J., said in *Zuccato* v. *Young* (1), " a defendant named John had been sued as James."

He took, therefore, the same view, apparently, of cases of mere misnomer as NORTH, J., had taken in *Zuccato* v. *Young* (1). Then I was referred to *Rust* v. *Kennedy* (3) which was a decision under the Civil Procedure Act, 1833, s. 11, which did away with pleas of abatement in cases of misnomer. That case shows that in those days the cases of misnomer were not regarded as of sufficient gravity to invalidate the proceedings in which they occurred.

The matter, however, does not rest there, because in R.S.C., Ord. 70, r. 1, there is an order of general application in these terms:

> Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit. A

It is clear, I think, on the authority of the cases to which I have referred, as also on the language of R.S.C., Ord. 70, r. 1, that the writ which is being impeached on this application is not void and ought not to be set aside on the ground of invalidity. What, then, is the course which the American company ought to have adopted? Not, I think, the summons which they have issued,—unless no other course of a less drastic nature was reasonably open. The B purpose of such a summons would be to set aside the whole of the proceedings under which the writ was issued and the writ itself, and it would result in the plaintiffs having to start all over again, with the attendant cost and delay which would be entailed. I do not say that the American company should immediately have written, informally perhaps, to the plaintiffs when they became cognisant of the mistake under which the plaintiffs were labouring; although, perhaps, it would have saved a good deal of trouble and expense if C they had. Nor do I suggest that the American company ought to have ignored the whole matter. There are cases where a person is so wildly misdescribed that, coupled with other circumstances, it may be perfectly apparent that he is not the person intended to be sued at all, and then he might well take no notice of the matter and allow the plaintiff to proceed, if he chose to, in default. But here the misdescription was not of a very serious kind. "Columbia Pictures" was right; it was "Incorporated" that was wrong. I do not think D that anybody on behalf of the American company had any doubt—at all events, it has not been suggested that they ever had—but that they were the persons whom the plaintiffs intended to sue. Indeed, in the summons itself they describe themselves as "Columbia Pictures Corporation sued as Columbia Pictures Incorporated." Having regard to all the circumstances, and the comparative triviality of the error. I feel that the method of procedure suggested E in Daniell's Chancery Practice, p. 293, and in The Annual Practice, 1945, p. 135, is the right one, and should have been adopted by the defendants in this case, namely, entering an appearance in their own name and stating in the memorandum that they were sued by the wrong name. It seems to me that that would have amply protected them and would have clarified the position with the minimum of expense and trouble to all concerned. The alternative which they selected, had it been successful, would have caused a F great deal of trouble, expense and delay, without, as far as I can see, achieving any real object or advantage which it was necessary or desirable that the American company should achieve. Surely it is so necessary now, as always, to reduce the costs of, and delay in, litigation insofar as they can be reduced; and if there are two alternative methods open to a litigant, it is so very much to be desired that he should adopt that alternative which obviates expense and delay rather than an alternative which obviates neither. G

Accordingly, so far as the summons is founded on the irregularity of the writ itself, having regard to the misnomer of the American company, in my judgment the American company took a wrong course, which can not be allowed or sanctioned.

It is to be observed that the summons also asks that the order of Dec. 13, 1945, under which the summons was issued, together with the writ itself

> . . . the service thereof, and all subsequent proceedings, be set aside with costs to be H taxed . . . on the grounds that the writ of summons is irregular in that the second named defendants are described therein as "Columbia Pictures Incorporated" and that in the meantime all further proceedings herein be stayed.

Applications of this kind to set aside proceedings for irregularity are governed by R.S.C., Ord. 70, r. 3, which says:

> Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

In THE ANNUAL PRACTICE, 1945, p. 1592K, there is a note to this rule, saying:

> Where this rule was not complied with, no costs were allowed to the applicants, though successful; and applicant is confined to the objections stated.

I believe that to be a correct statement, and I propose to apply it to the present case.

The grounds stated are that the writ of summons is irregular in that the second-named defendants are wrongly described. Whether the "writ of
A summons" there means the original writ or the writ issued in pursuance of the order of Dec. 13, 1945, I am not altogether clear, but whichever it is, I cannot see that that irregularity in itself invalidates either the order of Dec. 13, 1945, or the service of the writ. The writ itself has been attacked, and I have dealt with that, but insofar as the application deals with the order under which the writ was issued, and all proceedings following upon that order, I cannot see that
B the misnomer in the writ is a ground for upsetting the order. Other grounds might be suggested connected with the misnomer, but the misnomer does not appear to me to be a ground on which the order itself can be impeached. But on the footing that it is, or that one can read sufficient into the summons to satisfy the language of R.S.C., Ord. 70, r. 3, it was suggested by counsel for the plaintiffs that the whole of this summons was misconceived on the ground that it ought to have been by motion.

C The position is this. The order was made by a master, and, if either side is dissatisfied with the order of a master, the ordinary course (which of course was not available here) is to have it adjourned forthwith to a judge. But if it is not done in that way, the undoubted practice in the Chancery Division is to launch a motion before the court for the purpose of discharging it. As Master Holloway's order became in effect the judge's order when it was drawn up, counsel for the plaintiffs says that the defendants' only recourse was to move
D to discharge it in accordance with the practice which I have stated, and which was recognised by the Court of Appeal in *Perry* v. *St. Helen's Land and Construction Co., Ltd.* (4). Counsel for the plaintiffs says that there is nothing in the Rules of the Supreme Court which disturbs the practice so far as this application is concerned, and he referred me to the Judicature Act, 1925, s. 62, which is to this effect:

> E Subject to the provisions of this Act with respect to appeals in matters of practice and procedure, every order made by a judge of the High Court in chambers, except orders as to costs only which by law are left to the discretion of the court, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the practice of the Division to which the cause or matter in which the order was made is assigned.

Counsel for the plaintiffs says that, under this section, the practice of the
F particular Division has to be followed; therefore, since this is a case in the Chancery Division and the practice in the Chancery Division is what I have stated it to be, the application should be made by motion. Counsel for the defendants agrees to that, but he points out that sect. 62 is "Subject to the provisions of this Act," and that, he says introduces the rules made under the Act. He says that R.S.C., Ord. 12, r. 30, which I have already read, is a provision which expressly deals with the particular subject matter now
G under consideration, and that therefore the ordinary practice obtaining in this Division is ousted so far as the subject matter of this application is concerned.

As to which of those two views is the right one, I do not express a concluded opinion. Inasmuch as I have come to the conclusion that the grounds of objection stated in the summons itself do not go to the invalidation of the order at all, I do not have to decide that question, and I refrain from doing so.
H On the whole matter, I dismiss the summons with costs.

Summons dismissed with costs. Leave to appeal refused.

Solicitors: *H. S. Wright & Webb* (for the applicants, the defendants in the action); *Slaughter & May* (for the respondents, the plaintiffs in the action).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

HIRSCH AND ANOTHER *v.* SOMERVELL AND OTHERS.

[Court of Appeal (Morton, Tucker and Asquith, L.JJ.), July 5, 30, 1946.]

Practice—Pleading—Striking out statement of claim—Action for false imprisonment brought by enemy aliens against Home Secretary—Statement of claim containing arguable point—Question whether acts done in pretended exercise of statutory powers, if not justifiable under such powers, justifiable in the alternative and ex post facto under the royal prerogative. A

In an action for false imprisonment brought by enemy aliens against the Home Secretary, the statement of claim alleged that the plaintiffs had been wrongfully arrested and detained under the Trinidad Defence Regulations, 1939, that they had been sent to England and detained in England pursuant to orders made by the Home Secretary, and purported to be made pursuant to the Defence (General) Regulations, 1939, reg. 18BA, and that the regulations did not apply to the case. The Home Secretary B applied to have the statement of claim struck out on the ground that it contained no reasonable cause of action. It was contended on his behalf that, since the plaintiffs were enemy aliens, they had no remedies whatever against the Crown or its servants; their detention was a legitimate exercise of the powers of the Crown; and even if the acts in question could not be justified under the Defence (General) regulations, 1939, reg. 18BA, they C could be justified under the royal prerogative, which the Emergency Powers (Defence) Act, 1939, s. 9, expressly saved. On behalf of the plaintiffs it was contended that, since the acts in question had not been done under the royal prerogative but in purported exercise of statutory powers, if they could not be justified under reg. 18BA, they could not be justified in the alternative and *ex post facto* under the royal prerogative :—

Held : the statement of claim contained a point which was arguable, D and it should not be struck out.

Decision of Roxburgh, J. (p. 27, *ante.*) *reversed on other grounds.*

[**EDITORIAL NOTE.** This case raises a further point in the group of matters which have recently been before the courts in which enemy aliens have attempted to escape from deportation to their native land. In *Netz* v. *Chuter Ede* (1) it was held that Netz, being an enemy alien, was permitted under the royal prerogative to remain in the United Kingdom only under licence from the Crown which could be withdrawn at any time, and, therefore, an order by the Home Secretary for his deportation was an Act of State which could not be challenged in the courts. In *R.* v. *Bottrill, Ex parte Kuechenmeister*, (*post* p. 434) it was decided that an enemy alien who is interned by the Crown during time of war is not entitled to a writ of *habeas corpus* to test the validity of his detention. In the present case the point which is held to be arguable is whether, where acts have been done in purported exercise of powers conferred by the Defence Regulations, those acts, if they prove not be justifiable under the statutory powers invoked, can still be justified *ex post facto* under the royal prerogative. E F

As to Jurisdiction of Court to Strike out Pleadings, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420 ; and for Cases, see DIGEST, Pleading and Practice, pp. 71-76, Nos. 623-648, and pp. 82-84, Nos. 691-703.

For R.S.C., Ord. 25, r. 4, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 401, and Supplement.]

Cases referred to : G

(1) *Netz* v. *Chuter Ede*, [1946] 1 All E.R. 628 ; [1946] 1 Ch. 224 ; 115 L.J.Ch. 197 ; 174 L.T. 363.

(2) *Thurn & Taxis* (*Princess*) v. *Moffitt*, [1915] 1 Ch. 58 ; 2 Digest 156, *259* ; 84 L.J.Ch. 220 ; 112 L.T. 114.

(3) *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508 ; 11 Digest 546, *499* ; 89 L.J.Ch. 417 ; 122 L.T. 691.

(4) *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613 ; Digest Pleading 85, *714* ; 75 L.J.K.B. 418 ; 94 L.T. 858. H

Interlocutory Appeal by the plaintiffs from an order of Roxburgh, J., dated Apr. 30, 1946, and reported (p. 27, *ante*). The facts are fully set out in the judgment of Morton, L.J.

G. O. Slade, K.C., and *Harold Brown* for the appellants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *H. O. Danckwerts* for the respondents.

Cur. adv. vult.

Morton, L.J.: The statement of claim in this action was delivered on Jan. 23, 1946, and on Apr. 30, 1946, Roxburgh, J., ordered that it be struck out on the ground that it disclosed no reasonable cause of action. From that order the plaintiffs appeal. The defendants submitted before the judge, and before this court, that the statement of claim ought to be struck out either under R.S.C., Ord. 25, r. 4, or under the inherent jurisdiction of the court. The court has, of course, an inherent jurisdiction to strike out pleadings which are vexatious or frivolous or in any way an abuse of the process of the court.

Para. 1 of the statement of claim is as follows:

> Until the entry of the Germans into Austria in 1938 the plaintiffs were Austrian nationals. Since then their nationality has been undertermined save that they now claim to be Austrian nationals as formerly. At all material times during the appropriate period of his appointment each defendant was His Majesty's Secretary of State for Home Affairs.

For the purposes of this appeal, but for no other purpose, counsel for the plaintiffs is willing to admit that this country is still in a state of war with Germany and Austria, and that the plaintiffs are, and at all material times have been, enemy aliens. He is also willing to admit, for the same purposes, that in doing the acts whereof complaint is made in the statement of claim, each of the three defendants was acting in his official capacity as His Majesty's Secretary of State for Home Affairs and was not pursuing some private end of his own.

Para. 2 of the statement of claim is as follows:

> In or about Sept., 1941, the plaintiffs were passengers in the Spanish S.S. Cabo de Hernos bound from Bilbao to the Argentine. Such ship anchored some 10 miles off Port-of-Spain, Trinidad, and whilst at such anchorage British officials boarded the ship and took off the plaintiffs and landed them in Port-of-Spain whereupon by order of the second defendant directed to the Governor of Trinidad, the plaintiffs were arrested and detained in purported pursuance of powers contained in the Trinidad Defence Regulations, 1939.

It is be observed that the plaintiffs are said to have been arrested and detained in purported pursuance of powers contained in certain Defence Regulations, and for the purposes of an application under R.S.C., Ord. 25, r. 4, that statement must be assumed to be correct.

Para. 3, 4 and 5 are as follows:

> 3. The male plaintiff was arrested and detained as aforesaid pursuant to an order dated Sept. 30, 1941, signed by one Eric Hazelton purporting to make and sign the same for the Acting Colonial Secretary. The female plaintiff was arrested and detained as aforesaid pursuant to an order dated Oct. 18, 1941, signed by one J. F. Nicholl, purporting to make and sign the same for the Acting Colonial Secretary. 4. On or about Nov. 5, 1941, the plaintiffs were sent to England under orders made by the second defendant. Such orders were in writing and dated Oct. 23, 1941, and purported to be made pursuant to powers conferred on such defendant by the Defence (General) Regulations, 1939, reg. 18BA. 5. Since their arrival in England the plaintiffs have been detained pursuant to such orders by the defendants and each of them during the currency of their respective appointments as His Majesty's Secretary of State for Home Affairs.

The last sentence of para. 4 is to be observed, and it will be noted that in para. 5 it is alleged that the detention of the plaintiffs in England has been "pursuant to such orders."

In para. 6 it is alleged that the arrest and detention of the plaintiffs were without legal justification and were wrongful, and particulars are given which I need not read. Para. 7 is as follows:

> The first and third defendants or one or other of them have or has threatened without any or any sufficient or lawful reason to deport the plaintiffs and each of them from England to Germany.

As to this paragraph, counsel for the plaintiffs stated that, while he relied upon this paragraph as setting out a good cause of action, he would not wish this appeal to succeed on this point alone and if this court thought that the statement of claim disclosed no other cause of action, he would not ask us to allow the appeal.

The plaintiffs claim:

> A. A declaration that the plaintiffs are of Austrian nationality, or alternatively

that they are not of German nationality. B. Damages for trespass and false imprisonment. C. An injunction to restrain the third defendant from deporting the plaintiffs or either of them or from sending them or either of them to Germany. D. An injunction to restrain the third defendant from imprisoning or detaining the plaintiffs or either of them. E. An order that the plaintiffs be set free. F. Further and other relief; [and costs].

The point which counsel for the plaintiffs says is an arguable point may be summarised as follows. He conceded that if all the three defendants purported to be acting in exercise of the royal prerogative, enemy aliens would have no right to maintain an action against them by reason of any detention which they might have ordered. (See, for instance, *Netz* v. *Ede* (1)). He submitted, however, that even in time of war enemy aliens are not deprived of every remedy in the courts of this country; they can sue for civil wrongs (see *Princess Thurn & Taxis* v. *Moffitt* (2)); and (says counsel for the plaintiffs) they can even sue a Secretary of State for an injunction and damages if he purports to act in pursuance of certain regulations which do not in fact apply to the case. This is so, counsel submits, even if the acts in question would have been quite unassailable if they had been done by the Secretary of State in exercise of the prerogative. No case, he says, has decided the contrary, though he admits that an enemy alien could not apply for a writ of *habeas corpus* against the Secretary of State in time of war.

The Attorney-General has directed our attention to the Emergency Powers (Defence) Act, 1939, s. 9, which provides as follows:

> The powers conferred by or under this Act shall be in addition to, and not in derogation of, the powers exercisable by virtue of the prerogative of the Crown.

The reply of counsel for the plaintiffs is that this section does not affect his argument, since he concedes that the acts in question could have been done in the exercise of the prerogative, but it is alleged in the statement of claim that they were in fact done in purported exercise of powers contained in the Defence (General) Regulations, 1939, made pursuant to the provisions of the 1939 Act and that the regulations in question did not cover the case. He contends further that it would not be open to any defendant who had purported to exercise these powers, but had in fact exceeded these powers, to change his ground and to allege at the trial that he acted in exercise of the prerogative. In this connection, he relies upon the *dicta* of Lord Moulton ([1920] A.C. 508, at pp. 549 and 554) in *A.-G.* v. *De Keyser's Royal Hotel* (3). These acts were not, says counsel for the plaintiffs, "Acts of State" according to the true meaning of that phrase, and the courts of this country can and will inquire into this matter. (See *Salaman* v. *Secretary of State for India* (4), *per* Fletcher Moulton, L.J., ([1906] 1 K.B. 613, at the middle of p. 639)).

I express no opinion as to the probability of this line of argument succeeding at the hearing of the action, but I think that the case is not one in which it is so plain and obvious that the statement of claim discloses no reasonable cause of action that the court should exercise the jurisdiction given it under R.S.C., Ord. 25, r. 4.

Nor do I think that the case is one in which the statement of claim is plainly shown to be frivolous or vexatious or an abuse of the process of the court. On this branch of the case evidence is admissible, and there was read to us an affidavit by a principal assistant to the Treasury Solicitor, Mr. Lawton. In substance the statements in the affidavit are covered by the admissions of counsel for the plaintiffs, and I do not find anything in the affidavit to displace my view that the plaintiffs should have an opportunity of presenting at the trial of the action the argument put forward by counsel. This argument was not, I think, presented in its present form to Roxburgh, J., and I refrain from making any observations in regard to his judgment, not out of any disrespect for that judge, but because I think it is undesirable that I should express any view upon any question of law which may be involved, thinking, as I do, that the action must proceed. For the same reason, I refrain from making any observations on para. 7 of the statement of claim, which might involve a consideration of the judgment of Wynn-Parry, J., in *Netz* v. *Ede* (1). I understand that the argument of counsel for the plaintiffs under this paragraph raises a point which was not argued in that case.

For these reasons I am of opinion that this appeal should be allowed.

TUCKER, L.J.: I agree.

ASQUITH, L.J.: This is an interlocutory appeal from a decision of ROXBURGH, J., whereby he struck out the plaintiffs' statement of claim. It raises questions of some constitutional interest. The two plaintiffs sue civilly for damages of false imprisonment and for other cognate relief. The defendants are the successive occupants of the office of Secretary of State for Home affairs from 1941 to July 2, 1945.

The question involved has been narrowed and simplified by three concessions made in this court by counsel for the appellant plaintiffs. These concessions were made for the purposes of the present appeal, and for those purposes only. (i) That at all material times the plaintiffs were German nationals, and, as such, enemy aliens; (ii) that, in respect of the acts complained of against them, the defendants were acting, not in their private capacity, but in their character as successive occupants of the office of Secretary of State for Home Affairs; (iii) that if the acts in question were what can properly be called "Acts of State," the statement of claim must be taken to disclose no cause of action, and the appeal must be dismissed.

The decision of ROXBURGH, J., was made on an application to strike out the statement of claim under R.S.C., Ord. 25, r. 4. But on such an application the judge can also act under the inherent jurisdiction of the court to strike out a pleading which is frivolous or vexatious. Under R.S.C., Ord. 25, r. 4, the court has to consider whether the pleading should be struck out, by reference solely to the allegations on the face of the pleading. Under the inherent jurisdiction the court may exceed this ambit and also take into account extraneous relevant matter contained, for instance, in affidavits. There is in this case an affidavit by the Principal Assistant to the Treasury Solicitor, but I do not think in the circumstances of this particular case that that affidavit adds anything material or makes any difference to the decision which the court would have arrived at in its absence. My Lord has analysed the statement of claim, and I do not think it is necessary to repeat that analysis.

On an application to strike out a statement of claim the question for the court is not whether the action is more likely to fail than succeed, but whether the claim is so incontestably bad that the action should not be allowed to come to trial at all. The judge who made the order appealed from proceeded on this basis, and so do we. We have, however, the advantage of concessions made on behalf of the plaintiffs in this court and not made below.

The main arguments for the appellants may be summarised as follows: (i) The original arrest of the plaintiffs, whether they were enemy aliens or not (and it is admitted that they were) on a neutral ship on the high seas, by agents of His Majesty's Government, was illegal and cannot be justified under the Defence (General) Regulations, 1939, reg. 18BA. (ii) Their deportation to England and detention in England was similarly unjustifiable; and so would be their deportation from England to Germany if it occurred. (iii) None of these acts would or could amount to "Acts of State" within any sense of that term which would deprive the plaintiffs of a civil cause of action in tort as opposed to proceedings for *habeas corpus*, to which last remedy it was conceded the status of the plaintiffs as enemy aliens would be a bar. (iv) That if and so far as the acts complained of, or any of them, were done in pretended exercise of powers under the Defence (General) Regulations, 1939, reg. 18BA, they were an invalid exercise of such powers; and that, if they could not be justified under that regulation, the defendants could not justify them in the alternative and *ex post facto* under the royal prerogative or any powers exercisable by the Crown apart from statute. (It was conceded that the Emergency Powers (Defence) Act, 1939, s. 9, provided that the powers exercisable by regulations made under that statute should be additional to, and not in derogation of, the royal prerogative). (v) That an enemy alien in this country has all the civil rights of suit enjoyed by British subjects, with the solitary exception that *habeas corpus* is not available to him.

For the defendants the Attorney-General argued: (i) that the arrest on the high seas and forcible transfer to this country of the plaintiffs was an entirely legitimate exercise of the powers of the Crown, whether under the prerogative or otherwise; (ii) that the detention and internment of the plaintiffs in the United Kingdom was equally a legitimate exercise of such powers; (iii) that assuming for the sake of argument that the enemy alien in this country had the same civil rights of suit as a British subject against private individuals in this country, yet he had no remedies whatever against the Crown or its servants in respect of his said detention; (iv) that all the acts complained of were "Acts of State"; (v) that even if the action of the Crown or its servants in the first instance professed to be taken under the Defence (General) Regulations, 1939, reg. 18BA, and even if it could not be justified under that regulation, yet it was open to the Crown to justify its action under the royal prerogative (which, *ex concessis*, the Emergency Powers (Defence) Act, 1939, s. 9, expressly saves).

I am of opinion that the last-mentioned question is susceptible of argument; that the answer is not so patent (in a sense adverse to the plaintiffs) as to justify this court in taking the extreme course of striking out a statement of claim which raises it along with other questions. It seems undesirable for the court to indicate any opinion it may have formed on those other questions. To do so might be seriously to embarrass the trial, which, in consequence of our decision, will proceed.

I agree that the appeal should be allowed.

Appeal allowed. Costs to be the plaintiffs' costs in any event.

Solicitors: *Waller, Neale & Houlston,* agents for *Marsh & Ferriman,* Worthing (for the appellants); *Treasury Solicitor* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

R. v. BOTTRILL: *Ex parte* KUECHENMEISTER.

[Court of Appeal (Scott, Tucker and Asquith, L.JJ.), July 19, 22, 23, 30, 1946.]

Crown Practice—Habeas corpus—Interned enemy alien—Availability of writ—Declaration of government as to state of war—Whether conclusive.

Public Authorities—Act of State—Declaration of government—State of war—Continued existence of country as a state—Whether conclusive.

Aliens—Internment—Habeas corpus—Availability of writ.

In an application for a writ of *habeas corpus* by an interned German national, who had resided in England for some time but had never been naturalised, a certificate was produced from the Secretary of State for Foreign Affairs which stated (*a*) that the allied powers had assumed supreme authority with respect to Germany including all powers possessed by the German government and other German authorities; (*b*) that Germany still existed as a state and German nationality as a nationality; and (*c*) that no treaty of peace or declaration of the allied powers having been made terminating the state of war with Germany, His Majesty was still in a state of war with Germany:—

Held: (i) That the certificate of the Foreign Secretary given on behalf of the Crown as to the existence of a state of war involving His Majesty was conclusive and binding on the court, whether questions of fact or law were involved therein, and, consequently, the applicant was still an enemy alien.

(ii) *habeas corpus* did not lie against the Crown at the instance of an enemy alien interned for the safety of the realm in time of war by an order of the executive government acting within its discretionary authority on behalf of the King, and, therefore, the court had no power to grant a writ.

Decision of the Divisional Court (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.) ([1946] 1 All E.R. 635) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal uphold the court below, and approve the decision of the Divisional Court in *Liebmann's* case (1). The question whether the right to a writ of *habeas corpus* depends upon the internee being a prisoner of war is discussed, but it is held that this does not affect the matter.

As to Declarations of the Crown as Acts of State, see HALSBURY, Hailsham Edn., Vol. 26, p. 247, para. 557; and for Cases, see DIGEST, Vol. 38, pp. 5-8, Nos. 3-16.

As to the Availability of a Writ of Habeas Corpus to Aliens, see HALSBURY, Hailsham Edn., Vol. 9, p. 703, para. 1202; and for Cases, see DIGEST, Vol. 16, p. 253.]

Cases referred to:

(1) *R.* v. *Vine Street Police Station Superintendent, ex p. Liebmann*, [1916] 1 K.B. 268; 2 Digest 141, *162*; 85 L.J.K.B. 210; 113 L.T. 971.

(2) *Ex p. Weber*, [1916] A.C. 421; 2 Digest 141, *161*; 85 L.J.K.B. 944; 114 L.T. 214.

(3) *A.-G. for Canada* v. *Cain*, *Same* v. *Gilhula*, [1906] A.C. 542; 2 Digest 193, *541*; 75 L.J.P.C. 81; 95 L.T. 314.

(4) *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284; 2 Digest 156, *261*; 85 L.J.K.B. 374; 113 L.T. 949.

(5) *Duff Development Co., Ltd.* v. *Kelantan Government*, [1924] A.C. 797; 38 Digest 7, *14*; 93 L.J.Ch. 343; 131 L.T. 676.

(6) *R.* v. *Knockaloe Camp (Commandant), Ex p. Forman*, [1917] 87 L.J.K.B. 43; 2 Digest 198, *563*; 117 L.T. 627.

(7) *Thurn and Taxis (Princess)* v. *Moffitt*, [1915] 1 Ch. 58; 2 Digest 156, *259*; 84 L.J.Ch. 220; 112 L.T. 114.

APPEAL by the applicant from a judgment of the Divisional Court of the King's Bench Division (LORD GODDARD, C.J., CROOM-JOHNSON and LYNSKEY, JJ.), dated Apr. 3, 1946, and reported [1946] 1 All E.R. 635, where the facts are fully set out.

John G. Foster for the appellant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *H. L. Parker* for the Crown.

Cur adv. vult.

July 30. The following judgments were read.

SCOTT, L.J. [read by ASQUITH, L.J.]: The Divisional Court has held that the applicant, one Kuechenmeister, is not entitled to a writ of *habeas corpus* and the ground of the decision is that he is an enemy alien and as such lawfully detained by the Crown. The motive for the application for the writ is undoubtedly the intimation spoken to in the applicant's affidavit that he is to be deported to Germany. I postpone for the moment consideration of the relevancy of this intimation, and assume that the applicant's purpose in asking for the writ is merely to challenge the Crown's right to intern him in the United Kingdom.

In support of this contention counsel for the applicant made two main points, although he sub-divided his second point. First he submitted that the applicant, who was admittedly still an alien, was not an enemy alien. On this his essential proposition was that the declaration at Berlin of June 5, 1945, by the United Nations ended the war, with the result that the applicant, who was a natural born German and had never lost that nationality, although he had lived in England for many years, married an English wife and had children by her, ceased thereupon to be an enemy alien. That contention had much theoretical support in international law in that the central German government of Germany was thereupon displaced, and its place completely taken by a government composed of the four United Nations. War predicates at least one other state against which the war is waged, and the declaration at Berlin ended Germany, for the time being, as a separate State. In support of that proposition he argued that a sovereign State which has no sovereign government is a contradiction in terms; and even if such a state be possible in international law, a State which has no national government cannot wage a war, or be at war. He further contended that although the Secretary of State for Foreign Affairs had, on Apr. 2, 1946, certified in the present case that the war was still continuing, and although he conceded that *prima facie* such a certificate was on well recognised principles normally binding on the court, it was not binding on the facts of the present case, because the declaration at Berlin was the act of the King, and that act was conclusive that the King's Secretary of State for Foreign Affairs had no authority thereafter to certify that the war was still going on. This argument as first sight seems formidable, but in my opinion it rests on a fallacy, which can be stated thus. In the British constitution, which is binding on all British courts, the King makes both war and peace, and none the less so in the eyes of the law that he does so as a constitutional monarch upon the advice of his democratic Cabinet. If the King says by an Act of State that the commonwealth of countries over which he reigns are at war with a particular foreign state, they are at war with that state and the certificate of the Secretary of State is conclusive; and I do not deviate in order to consider the constitutional position of Eire, which I regard as anomalous. When the King makes peace with an enemy state that war comes to an end, but it does not come to an end before that peace is made. Whether international law has a different rule is irrelevant; for international law is only binding on our courts in so far as it has been adopted and made part of our municipal law; and the above propositions go, in my opinion, so far as our municipal law has gone.

It follows, therefore, that the certificate of the Secretary of State for Foreign Affairs, which says in terms that we are still at war with Germany, is binding at least in our municipal law, and therefore on all the King's courts. Had it been otherwise, I should have been disposed to hold that the authority of the A
Secretary of State for Foreign Affairs at any date subsequent to His Majesty's declaration made through his plenipotentiaries at Berlin in June, 1945, was limited by that declaration; but for the reasons I have given I am satisfied that an inference from the declaration, that the King had then brought to an end the state of war, would be erroneous. In our municipal law, whether it differs from international law or not, a state of war can continue, and the war with Germany is continuing in spite of the fact that Germany then ceased to B
have any independent central government.

The above was the point on which the applicant's appeal mainly rested, and on it I am satisfied that the judgment of the Divisional Court is right, for the reasons stated in the judgment of Lord Goddard, C.J. The applicant's alternative argument, put in more ways than one, was in effect this. He conceded that in this court the decided cases made it impossible for him to argue that a prisoner of war had, as against the executive, any right to a writ of *habeas* C
corpus, in order to vindicate his right of freedom of residence within the United Kingdom; but he contended that the mere fact of enemy nationality was no bar to that writ, and that internment in a camp by the executive did not of itself make an enemy alien a prisoner of war. This point had in effect been decided against counsel's contention by a Divisional Court in *Ex p. Liebmann* (1), but he submitted that that decision was wrong. In my opinion it was right, D
and I think that the decision of the Court of Appeal in *Ex p. Weber* (2), an appeal from which, on the issue of the applicant's nationality, was dismissed by the House of Lords in the following February, was rightly treated by Bailhache and Low, JJ., in the Divisional Court in *Ex p. Liebmann* (1) as justifying their decision.

The King, under our constitution, is under no obligation to admit into the United Kingdom, or to retain here, when admitted, any alien. Every alien in the United Kingdom is here only because his presence has been licensed by E
the King. It follows that at common law the King can at will withdraw his licence and cause the executive to expel the alien, whether enemy or friendly; see *A.-G. for Canada* v. *Cain* (3), where Lord Atkinson said ([1906] A.C. 542, at p. 546):

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly F
> alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests.

That legal position is not affected by the political consideration, for which this country has in past history justly gained a good reputation, that it is our practice both to welcome alien visitors, and indeed to give asylum to political refugees. How far the common law position is affected by the series of statutes passed G
about friendly aliens, it is unnecessary to consider, for the Prerogative was not affected by them as regards enemy aliens. Even an enemy alien may live here in perfect freedom under the King's license, as was pointed out by Lord Goddard, C.J., in his reasons for the judgment appealed from. But on withdrawing that license, the King may intern, or even expel, the enemy alien. If in time of war he decides through his appropriate officers of state—primarily the Home Secretary—that considerations of public safety make that course H
necessary, I think that the enemy alien so interned, *ipso facto*, becomes a prisoner of war; but, in my opinion, the establishment of that status is not a condition precedent to the power of the King to expel any enemy alien. Whether the applicant was or was not, is or is not, a prisoner of war is irrelevant in the present appeal. In truth I can see no half-way house cognisable by the common law between a complete discretion vested in the royal prerogative and a concession to enemy aliens of rights equivalent to those of British subjects of the King at common law, or of friendly aliens granted to them by statute; and in

their case it must be remembered that the necessity for control measures called for legislation and defence regulations. What measures should in time of war be taken by the executive in the case of enemy aliens must, it seems to me, necessarily rest in the discretion of the executive, and the courts must not be tempted into finding reasons for controlling the executive by the possibility of hardship which may be present in an individual case or can easily be imagined.

Some argument was addressed to us on the footing that aliens residing within the realm under the license of the King, whether friendly or enemy, enjoy the normal rights of subjects of the King in his courts, because they are here within his protection, and therefore owe to him some degree of allegiance. If then an enemy alien may so sue and be sued, why should he not be entitled to his writ of *habeas corpus* ? The answer is plain. As against a subject, or another alien, or any *persona juridica,* there is no disqualification ; but if he seeks the writ in order to vindicate his own freedom from control by the executive, he is necessarily challenging the very right to control him which is vested under our constitution in the discretion of the King. The argument is, therefore, wholly beside the point. It follows that in my opinion the judgment of LORD GODDARD, C.J., was right, and that *habeas corpus* does not lie against the Crown at the instance of an enemy alien interned for the safety of the realm in time of war by an order of the executive government acting within its discretionary authority on behalf of the King. Neither in the above conclusions nor in the reasoning by which it is reached do I touch on the *locus standi in judicio* of an alien enemy, whether free or intended, in regard to his legal rights other than the one claim put forward in the present proceedings, that is to say, for the grant of a writ of *habeas corpus* against the King's executive for the purpose of challenging the King's prerogative to intern or expel an enemy alien.

The appeal must be dismissed with costs.

TUCKER, L.J. : I agree that this appeal fails.

The first submission of counsel for the applicant was that the certificate given by the Secretary of State for Foreign Affairs, dated Apr. 2, 1946, was ambiguous and that it required further elucidation before the court could be satisfied that a state of war still exists between His Majesty and Germany. His argument was based on the proposition that war can only take place between two sovereign independent states and that the declaration of unconditional surrender referred to in the certificate showed that Germany no longer existed as a sovereign independent state. In my opinion, there can, on the authorities, be no question but that the certificate of the Foreign Secretary given on behalf of the Crown as to the existence of a state of war involving His Majesty is conclusive and binding on this court, and this is so whether questions of fact or law are involved therein. I can see no ambiguity in the certificate in this case and I think that it is conclusive against the applicant.

As to the second point, *viz.*, whether the applicant who is an enemy alien interned by executive action in time of war has a remedy by way of *habeas corpus* in respect of such detention, I also agree that in the circumstances disclosed in the present case he has made out no case for the issue of the writ. It is, however, I think, open to question as to the precise grounds on which he is precluded from this remedy. It was decided by this court in *Schaffenius* v. *Goldberg* (4) that an enemy alien resident in this country in time of war, even though interned, has a right to pursue his ordinary civil remedies in the King's courts against the King's subjects, and that the internment of a registered alien enemy does not operate as a revocation of the licence to remain in this country which is implied in registration.

On the other hand, in *R.* v. *Superintendent of Vine Street Police Station, Ex p. Liebmann* (1), a Divisional Court upheld a preliminary objection by the Solicitor-General that the court had no jurisdiction to entertain the application on the ground that the applicant was a prisoner of war. He was not a combatant, but an interned enemy alien civilian. BAILHACHE, J., after referring to the presence of spies and modern methods of warfare which would now be described as "total" war, said ([1916] 1 K.B. 268, at p. 275) :

> I have come to the conclusion that a German subject resident in the United Kingdom, who in the opinion of the executive government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or spy.

He was accordingly held to be ineligible for a writ of *habeas corpus* on the authority of the cases dealing with combatant prisoners. Although the actual decision was given on the preliminary objection, the case was heard on its merits before judgment was delivered, and after dealing with the preliminary objection, Bailhache, J., proceeded (*ibid.*):

> As the preliminary objection succeeds it is unnecessary to say more: but these courts . . . owe that duty not only to the subjects of His Majesty, but also to all persons within the realm who are under His Majesty's protection and entitled to resort to these courts to secure for them any rights which they may have, and this whether they are aliens or alien enemies. I think it right, therefore, to add that, deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that when the internment of an alien enemy is considered by the executive government, charged with the protection of the realm, desirable in the interests of the safety of the realm, and the government thereupon interns such alien enemy, the action of the government in so doing is not open to review by the courts of law by *habeas corpus*.

For myself, I should prefer this reasoning as the basis for the refusal of the writ, as it shows that the real objection is that an alien enemy cannot be heard to complain as against the Crown or its officers in respect of acts done under and within the limits of the prerogative, whereas the preliminary objection based on the status of prisoner of war appears to me to be open to doubt, and, moreover, to suggest that as a prisoner of war he could not even have *habeas corpus* against a private citizen who was imprisoning him without any pretence of authority from the Crown. *Ex p. Weber* (2) is not, I think, conclusive either way as to the precise ground for refusal of the writ.

It does not appear to me to be necessary to pursue this matter further since I am satisfied that in the result *Liebmann's* case (1) was rightly decided, and the present case appears to me to be indistinguishable therefrom. Assuming the applicant's right to be heard, his affidavit, in my view, discloses no case for the issue of the writ, the mere statement that he has been advised by his solicitors that it is the intention of the Home Office to deport him to Germany does not, in my opinion, establish even a *prima facie* case of excess or abuse of power under the prerogative.

For these reasons I agree that the appeal fails.

Asquith, L.J.: I agree, but would add something in deference to the dexterous and erudite argument of counsel for the appellant.

His first and more important point is that there is now no war between His Majesty and Germany; hence Kuechenmeister cannot be an enemy alien, that term having lost its meaning through the cessation of hostilities. The argument is that in May or June, 1945, Germany was so obliterated and extinguished that she ceased to be a state or to have a government, and that His Majesty can only be at war with another state or government which is in being. The difficulty with which this argument is faced is, of course, the certificate of the Secretary of State for Foreign Affairs, which asserts in terms that the German state and German nationality still subsist, and that that state is still at war with His Majesty. Such a certificate is normally conclusive on matters both of fact and law, and I think counsel for the appellant admits that, if the certificate in this case had confined itself to asserting that there is a German state with which His Majesty is still at war, its production would have been fatal to his argument. But he contends: (1) that this certificate refers to, and quotes, the allied declaration of June 5 on the unconditional surrender of Germany, and as regards its second paragraph at least—the paragraph in which the continued existence of the German state and German nationality are affirmed—appears to base this affirmation on the terms of that declaration; (2) that these terms themselves are quite inconsistent with the continued existence of Germany as a state after the summer of 1945.

Speaking for myself, I doubt if these terms are so inconsistent. But I will assume the contrary. On this assumption the answer to counsel's argument seems to me to be that if, in a certificate of this sort, the conclusions are unqualified and unambiguous, it does not matter whether those conclusions are combined with, or even professedly based on, materials apparently inconsistent with them. *Duff Development Co.* v. *Government of Kelantan* (5) seems to me a direct authority in support of this proposition. The final paragraph of the certificate—which,

in that case, was given by the Secretary of State for the Colonies—asserted in substance that the Sultan of Kelantan was a sovereign (or an independent sovereign; they are the same thing). But an earlier paragraph had recited a treaty between the Sultan and His Majesty whereby the Sultan had seemingly surrendered some of the ordinary adjuncts or incidents of sovereignty. This was held not to invalidate the conclusion that he was a sovereign. So, in my view, here, it is the conclusion which is operative, even if—which I do not
A concede—it be a *non sequitur* from a preamble or premise which, in the certificate, precedes it. The conclusion is that His Majesty is still at war with a still existing German state.

The other point taken by counsel, which proceeds on the assumption that Kuchenmeister is an enemy alien and has been interned under the prerogative, is whether he can sue out *habeas corpus* against the Crown or its agents. On this point I entirely concur with the conclusion of my Lords, that he cannot
B do so. Speaking for myself only, I would go further and advance the following general propositions as warranted in law: (1) It is beyond dispute that the Acts of Parliament relating to the detention of enemy aliens, both in the 1914 and 1939 wars, expressly preserved any powers which might exist under the royal prerogative in that regard. (2) Kuechenmeister was, and is, detained under those prerogative powers. This appears from the affidavit of the Home Secretary.
C (3) The Crown is entitled, in virtue of its prerogative to detain an enemy alien. There is no authority which decides the contrary, and *R.* v. *Commandant of Knockaloe* (6), *Liebmann's* case (1), and *Weber's* case (2) support the proposition, though in the latter case it was rather assumed than debated. (4) Whether or not such detention constitutes the detainee technically a prisoner of war —which in my view it well may—he is left free to maintain a civil action in contract against a British subject (*Schaffenius* v. *Goldberg* (4)), and possibly
D in tort (*Princess Thurn and Taxis* v. *Moffitt* (7)). Internment does not revoke his licence for this purpose, though in the nature of the case it revokes his licence to remain at large. (5) Whether or not such a detainee is a prisoner of war, he is disentitled to the remedy of *habeas corpus* against the Crown or its agents in respect of his detention by them (*aliter* possibly in respect of detention by a private individual). In *Liebmann's* case (1), in which the detainee was indeed held to have the status of a prisoner of war, BAILHACHE, J.—as TUCKER, L.J.,
E has pointed out—laid down a wider principle which I believe to be well founded. (6) Detention by the Crown of an enemy alien may well be an Act of State; such Acts, in my opinion, are by no means limited to acts done abroad, in cases at least where the complainant is an enemy alien.

I would say in conclusion that I am unconvinced by counsel's attempted distinction between *Liebmann's* case (1) and the present one. He urged that in the case of *Liebmann* (1), decided in 1915, there was not merely a war techni-
F cally proceeding between Germany and His Majesty, but active hostilities, and that those hostilities were "total" war in the sense that any German civilian in this country was a potential spy. If, which I question, this was the sole foundation of the *Liebmann* decision, it may well, in my view, be more, rather than less, applicable today, when, the combatant forces of Germany having been utterly defeated, no means remain to her for pursuing the struggle beyond
G underground agencies in allied countries, acting by way of espionage, propaganda and the like.

I agree that the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the appellant); *Treasury Solicitor* (for the Crown).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

POPE *v.* ST. HELEN'S THEATRE LTD.

[King's Bench Division (Sellers, J.), Aug. 9, 1946.]

Negligence—Invitee—Theatre—Ceiling damaged by enemy bomb blast—Failure to maintain premises—Member of audience injured by fall of ceiling—" War injuries "—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *ss.* 3, 8.

In September 1940, a bomb, dropped from an enemy aircraft, exploded 150 yds. from the defendants' cinema, a 40 years old structure the roof of which was properly constructed with adequate strength and rigidity. In January, 1941, it was observed that part of the ceiling was displaced, presumably as a result of blast. Plasterers repaired the damage visible and accessible to them, but no examination of the ceiling was made subsequently. On July 4, 1945, during a performance, a portion of the ceiling fell on the audience, and the plaintiff sustained physical injuries :—

Held : (i) the defendants had failed to take reasonable care, by themselves or their agents, to maintain the premises, since they had known of the defective condition of the ceiling and had failed, during the period from 1941 to 1945, to have any inspection made of it. They had, therefore, failed in their duty to see that the theatre was suitable and safe for the purposes for which it was used, and, consequently, the plaintiff was entitled to damages.

(ii) although the damage to the ceiling was caused either by the discharge of a missile or the use of an explosive within s. 8 (" War injuries," (*a*) (i) and (ii)) of the Personal Injuries (Emergency Provisions) Act, 1939, the physical injuries of the plaintiff were caused by the negligence of the defendants, and, therefore, the plaintiff's claim was not barred by s. 3 of the Act. *Greenfield* v. *London & North Eastern Ry Co.* (4) applied.

[**EDITORIAL NOTE.** This case is an interesting illustration of injury caused by blast from the explosion of a bomb combined with the negligent failure to inspect premises affected thereby. The judge finds that in the particular circumstances considered this is not a war injury, as some years had elapsed since the explosion, which distinguishes the case from *Greenfield* v. *L.N.E.R.* (4).

As to Duty to Invitees, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858 ; and for Cases, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.

For the Personal Injuries (Emergency Provisions) Act, 1939, ss. 3, 8, see HALSBURY'S STATUTES, Vol. 32, pp. 1063, 1065.]

Cases referred to :

(1) *Maclenan* v. *Segar*, [1917] 2 K.B. 325 ; 29 Digest 9, *120* ; 86 L.J.K.B. 1113 ; 117 L.T. 376.

(2) *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501 ; 42 Digest 908, *49* ; 10 B. & S. 950 ; 39 L.J.Q.B. 291 ; 23 L.T. 466.

(3) *Adams* v. *Naylor*, [1946] 2 All E.R. 241 ; 175 L.T. 97 ; 62 T.L.R. 434.

*(4) *Greenfield* v. *London & North Eastern Ry. Co.*, [1944] 1 All E.R. 438 ; [1945] K.B. 89 ; 171 L.T. 337.

Action for damages for negligence. The facts are fully set out in the judgment.

Edward Wooll, K.C., and *G. N. England* for the plaintiff.
F. E. Pritchard, K.C., and *A. E. Baucher* for the defendants.

Sellers, J. : In this case I have formed the opinion that the plaintiff is entitled to succeed. On July 4, 1945, the plaintiff was one of an audience which had attended the defendants' cinema, the Theatre Royal, Corporation Street, St. Helens. She was seated in the stalls, and soon after 6 o'clock, when the performance was commencing, part of the ceiling over the stalls fell upon the plaintiff and others seated beneath. The pieces of ceiling which fell injured some fifteen people so seated, including the plaintiff, and I understand the injuries proved fatal in two cases. The plaintiff's damages in this case, subject to liability, were agreed at £75, and this action has been brought to establish whether the defendants are to be held responsible for the injuries caused by reason of this unfortunate occurrence. The theatre was built in 1901. An architect of standing and experience, called by the plaintiff, made some slight criticism of the construction of the roof, but I find that the roof was properly constructed, with adequate strength and rigidity. It had withstood all that a building could be expected to withstand, for about 40 years, and I do not think that the construction of the roof contributed to the accident in any way. In order to provide the ornamental ceiling, two octagonal wooden frames, or carcases, were suspended from the trusses or girders of the roof. The ornamental ceiling consists of plaster-work, painted and embellished, and this is held in position by being attached to the carcases. The plaster mould has some wooden supports, or stiffeners, in its structure, and to these, and I think to the mould itself, were attached wads, consisting of hessian, fastened to the mould at one end and secured by nailing to the carcase, or roof structure, at the other end, and this was covered by, or supported by, plaster. In addition to this method of attaching the mould to the framework, there were some pieces of wood, known as wooden hangers, and I find nothing negligent or improper in the use of wads of this type for the suspension of this plaster ceiling. It may be that it could have been made more secure, and that the span in some places could have been less, but I think it was fit and safe for such stresses as were reasonably to be expected. In Sept., 1940, however, something occurred which buildings are not normally constructed to withstand; on the night of Sept. 5-6, of that year, a bomb exploded in Charles Street, St. Helen's, some 150 yds. from the north-west corner of the cinema. In January, 1941, when some decorations were being done to the ceiling, it was observed that part of the ceiling was displaced—it was an inch or two lower than the rest of the ceiling—and such displacement was approximately in the area which subsequently fell on to the audience on July 4, 1945. Some plasterers named Jackson were called in, and they did some repairs and made some examination of the ceiling. The question arises in this case whether that examination and that work was adequate.

Before I deal with that I propose, after that short statement of the facts and description of the construction of the ceiling, to refer now to the pleadings and to the way in which this action is framed. The statement of claim alleges that the plaintiff was on this day, July 4, 1945, at the invitation of the defendants, seated in the stalls of their theatre, when part of the roof or ceiling fell upon her and it is alleged that the fall of the roof or ceiling was in breach of the defendants' warranty, implied from the admission of the plaintiff to their theatre for reward, that on the said day the said theatre should be as safe for her attendance as it could be made by reasonable skill and care on the part of any person concerned with the construction, alteration, repair or maintenance of the said premises. It is further alleged, in the alternative, that the defendants knew or ought to have known of the dangerous condition of the said roof and in breach of their duty to the plaintiff failed properly or regularly or at all to inspect, alter or repair the same. On those allegations the claim for damages is based.

The defence which is put in denies that the roof or ceiling fell by reason of any breach of warranty, or negligence, on the part of the defendants. It pleads that if, which is not admitted, the plaintiff suffered the alleged or any injuries or damage, the same were not caused by any breach of warranty or negligence or by any lack of care or skill on the part of the defendants, their servants or agents, in the construction, repair or maintenance of the said theatre. The defendants further say that in consequence of the blast and suction arising from the exploding of a bomb or bombs in close proximity to the said theatre during an enemy air attack in or about the month of Sept., 1940, the structure of the said theatre including the roof and ceiling thereof became the subject of abnormal strain and consequent reversal of normal stresses, with resulting fracturing and deterioration of the fibrous plaster hangers and the scrim and plaster wads, of which they were composed, in the said roof and ceiling, and which strains, reversal of stresses, fracturing and deterioration were not apparent to and could not have been discovered by reasonable care and skill on the part of the defendants, their servants or agents, and became manifest only after the said roof or ceiling had fallen.

Then they further allege that by reason of the matters set forth, the alleged injuries to the plaintiff amounted to a "war injury" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, and that the plaintiff is by reason of the provisions of the said Act unable to recover in this action.

Before me, it was admitted by both sides that the plaintiff went to the defendants' cinema for reward, and that the duty imposed upon the defendants was

that set forth so clearly by McCardie, J., in his judgment in *Maclenan* v. *Segar*
(1), and in particular where he says ([1917] 2 K.B. 325, at p. 332) :

> Where the occupier of premises agrees for reward that a person shall have the right
> to enter and use them for a mutually contemplated purpose, the contract between the
> parties (unless it provides to the contrary) contains an implied warranty that the
> premises are as safe for that purpose as reasonable care and skill on the part of any
> one can make them. The rule is subject to the limitation that the defendant is not to be
> held responsible for defects which could not have been discovered by reasonable care
> or skill on the part of any person concerned with the construction, alteration, repair A
> or maintenance of the premises ; and the headnote to *Francis* v. *Cockrell* (2) must
> to this extent be corrected. But subject to this limitation it matters not whether
> the lack of care or skill be that of the defendant or his servants, or that of an independent
> contractor or his servants, or whether the negligence takes place before or after
> the occupation by the defendant of the premises.

It was further conceded by counsel for the defendants that the fact that
the ceiling had fallen placed the onus upon him of satisfying the court that the B
duty imposed in the circumstances upon the defendants had been performed,
and evidence was directed by the defendants to that end, and some expert
evidence on the construction of the theatre and the cause of the falling of the
ceiling was given also by the plaintiffs.

The fact is clearly established that on the night of Sept. 5-6, 1940, a bomb
did fall some 150 yards from this cinema, and I have come to the conclusion
that the explosion of the bomb did cause some damage to this theatre, including C
damage to the wads attaching this ceiling to its framework, which damage became
apparent, I think, in Jan., 1941. There is no indication that any examination was
made by reason of the bomb having fallen, before that ; but in what was, I understand,
ordinary routine painting, some people named Critchley, who were
painting this ornamental ceiling somewhere about Jan., 1941, or the end of 1940,
observed the displacement of the part of the ceiling to which I have made D
reference, and in consequence two plasterers named Jackson were asked to put it
right. There does not seem to be any indication in the evidence that the Jacksons
were particularly asked to investigate for safety, or give any certificate
or any report, but because the ceiling was out of place to some extent, they
were called in as plasterers to put it right. Jackson and his son did some work,
but that work was not very extensive ; a bill has been put in, showing that the
total sum expended was only £8 3*s*. 0*d*. What was done appears to have been E
this. The damage was in a somewhat inaccessible position, right up in the
roof, which is illuminated to some extent, I think, by electric light ; this framework
is suspended over a number of girders or trusses, and to get at it one has
to be something of an acrobat, particularly in order to get over the beams to
some of the wads, but the younger Jackson said he did examine the position as
best he could. He found some four or five—at this distance of time he is not sure
how many—wads which were damaged to the extent that they required replacing, F
and he says that he replaced those four or five damaged wads by putting a similar
type of wad, I apprehend, of hessian and plaster, in their place. I think it is
common ground that the replaced wads were in the locality of the part of the
building which fell upon the plaintiff. In addition to that, Jackson said that he
examined as best he could all the accessible wads ; he examined them by first
brushing the dust off them—I imagine this is a very dusty place ; the building G
has been up for over 40 years, and I do not suppose this part would normally get
cleaned at all—and then he used a torch where he could, got hold of the wads
with his hand, and tested them in that way ; he says that apart from the four
or five which he replaced, he did not find any other defective wads. He says,
however, that there was quite a substantial number—perhaps a quarter of all
the wads, which may amount to something like 200, although I do not think
anybody had any precise idea how many—which he could not reach at all ; they H
were not accessible, the ceiling having been constructed not only from above,
but from down below as well, from scaffolding. Therefore there were some
wads which had not been examined.

It is urged upon me by the plaintiff that that examination and that repairing
was quite inadequate, and was a breach of duty on the part of the defendants
towards such people as subsequently were attending their theatre for reward,
this damage having been found. There is undoubtedly some evidence which
would justify, I think, a finding that more might have been done by the Jacksons

at that time—or at any rate by the defendants—in that they might have had a more careful examination, and where the wads could not be reached and seen, some complete replacement of the ceiling might have taken place; but on the whole, I am not inclined to find that the Jacksons were negligent in the circumstances which then prevailed. It was Jan., 1941, and things were difficult enough then; it was not at all certain how long a theatre in St. Helen's or elsewhere would remain standing, or whether it would not be the subject of further A enemy attention. They do seem, as far as they had access, to have left the ceiling in a satisfactory condition for the time being, and therefore I do not find that there was negligence at that time in the Jacksons' failing to do more or to examine further, but what I do think emerges from this is that, having regard to the fact that they found some damage there, the defendants were called upon to have an inspection of that ceiling thereafter from time to time, and I do not think it would be putting it too harshly against them B to say that they should have had an inspection within 6 months or so from Jan., 1941, and then, if that had revealed nothing, a further inspection later on, and succeeding inspections, until they were satisfied that the roof was in a proper condition.

What appears to have happened by reason of the explosion of the bomb some 150 yds. away is, from the evidence, inferences and probabilities, that the force of the explosion had caused a crack in the wads somewhere about the C centre. At first, probably, there was only an irregular crack of but just a hair's thickness, a crack which would not initially affect more than perhaps just the outside of the plaster and would not tear or destroy in any way the hessian which was the backbone, so to speak, of the rope attachment. Then, as time progressed, this crack would grow a little bigger with the strains and stresses, or at any rate with the effect of the atmosphere eating into it and D into the hessian, the hessian would gradually become destroyed, and the whole wad would progressively deteriorate so that it ultimately lost its strength and was incapable of holding up the ceiling. That was, on the evidence as I find it, the cause of the collapse of this ceiling; the wads became progressively insecure and inadequate for holding up the ceiling, and in those circumstances, an examination from time to time would have revealed that progressive deterioration—an examination even of the character of that E which had taken place in Jan., 1941, made by the Jacksons; but in fact no such examination did take place. This was notwithstanding the fact that in the neighbouring town of Manchester there had been a fall of a cinema roof in 1943, I think, and again in 1944. It is pointed out, perhaps accurately, that there is no evidence that those falls were brought to the knowledge of anyone on behalf of the defendants. That may be; I do not think the evidence does show that they knew—but one would have thought that in the cinema world F this was a matter which they ought to have known, and probably did know. It is the sort of thing which would, of course, be of some interest in the cinema world. Whether that is so or not, another matter cropped up in 1945 which is not unimportant. In April, 1945, the defendants' stage manager, in his business about the theatre, discovered some sixty broken windows. That would appear to indicate that there had been some damage from blast—and the only bomb G that seems to be accountable for that is the one in Sept., 1940. Notwithstanding that fact—which one would have thought would have put the defendants, or ought to have put them, on some inquiry as to what was the extent of the damage their building had received, and reminded them that they had received the damage to the ceiling discovered in Jan., 1941—even at that date nothing more was done with regard to the ceiling, and we find that on July 4, 1945, part of the ceiling fell. When the plaintiff alleges, as she does allege here, that H the fall of the ceiling was due to a breach of warranty, or a breach of duty, by the defendants, I have formed the view that the allegation is established —that the defendants have failed to take reasonable care, by themselves or their agents, to maintain those premises; they have failed, during all that period from 1941 to 1945, to have proper inspection, or to have any inspection, in the light of the circumstances which preceded that fall. They had known of the defective condition of the ceiling, brought about, as I think it must inevitably be inferred, from the explosion of a bomb in 1940, and they had left the ceiling unattended during the whole of that period. Therefore, if this were a case standing without the plea, which the defendants raise, of the Personal Injuries (Emergency Provisions) Act, 1939, at this stage I should be prepared to give judgment for the plaintiff for the amount which has been agreed. It seems to me that this is an ordinary case of theatre proprietors inviting people to their theatre for reward and failing in their duty to see that the theatre is suitable and safe for the purposes of performance and invitation of the plaintiff there. But the defendants raise the Act, and they say it is a bar to the plaintiff's claim, notwithstanding a finding, as I understand it, that there has been established by the facts, apart from the provisions of the Act, a liability to compensate the plaintiff.

That leaves me, then, to consider that allegation and the provisions of the Act. The long title of the Act is:

> An Act to make provision as respects certain personal injuries sustained during the period of the present emergency.

Sect. 1 reads as follows:

> The Minister may make a scheme, with the approval of the Treasury and in accordance with the provisions of this Act, providing for the making of payments in respect of the following injuries sustained during the period of the present emergency, namely, (*a*) war injuries sustained by gainfully occupied persons . . .

It is common ground that there has been a scheme—that there was in operation at the time of the plaintiff's injuries a scheme—made under this Act by the Minister for making payments in respect of war injuries sustained by gainfully occupied persons, and it is further common ground that the plaintiff was at that time a gainfully occupied person.

The section relied upon by the defendants is sect. 3, headed:

> Relief from liability to pay compensation of damages.

That section is so phrased:

> (1) In respect of a war injury sustained during the period of the present emergency by any person . . . no such compensation or damages shall be payable, whether to the person injured or to any other person, as apart from the provisions of this subsection . . . (*b*) would . . . by virtue of any enactment . . . be payable (i) in the case of a war injury by any person . . . on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

That section leads on to the consideration of the interpretation section, sect. 8, which defines a war injury. It defines it in this way:

> "War injuries" means physical injuries (*a*) caused by (i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other noxious thing; or (iii) the doing of any other injurious act; either by the enemy, or in combating the enemy or in repelling an imagined attack by the enemy; or (*b*) caused by the impact on any person or property, of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

It is said on behalf of the defendants that the physical injuries received by the plaintiff were war injuries, and, therefore, sect. 3 applies and no compensation or damages are payable, notwithstanding any decision that the injury in question was attributable to some negligence or breach of duty on the part of the defendants.

Recently, in the House of Lords, in *Adams and Others* v. *Naylor* (3), VISCOUNT SIMON, in his speech, has made some general observations with regard to this Act, and he says ([1946] 2 All E.R. 241, at pp. 242, 243):

> Its long title is: "An Act to make provision as respects certain personal injuries sustained during the period of the present emergency," and its primary object was to authorise the making of a scheme under which payments might be made out of public funds in respect of war injuries sustained by defined classes of persons. Some such arrangement was obviously called for, since otherwise victims of German air raids (to take one example) would, generally speaking, have no claim for any payment or compensation. The statute [by sect. 1 (1) (*a*)] provided that the war injuries which would attract payment under the scheme should be such as were ". . . sustained by gainfully occupied persons (with such exceptions, if any, as may be specified in the scheme) and by persons of such other classes as may be so specified . . ."

And then he deals with the scheme as it was then applicable.

The statute was enacted for the purpose of giving rights which would not otherwise be available, and the question now arises in this case whether it can be said that the statute operates as a bar where, apart from the provision of the Act, I would, as I have already indicated, be prepared to find that there was a liability in the defendants. Now, I am taken back in consideration of this matter—or taken at once—to the definition of a war injury. " War injuries " means physical injuries, and that means here the physical injuries of the plaintiff. Were the physical injuries of the plaintiff in this case " caused by the discharge of any missile . . . or the use of any weapon, explosive or other noxious thing ; or "—and this is relied upon by counsel for the defendants more particularly—caused by the impact on any person or property of " anything dropped from an aircraft " ?

The findings I have already made are to the effect that the damage to the ceiling supports—*i.e.*, the damage to the property or building—was, in my view, caused by the explosion of the bomb, and I think it may well be said that the bomb which there discharged and exploded was something which dropped—although there is no direct evidence of this, I think I can infer it—from an aircraft ; in those days I do not think anybody suggested that they came from anywhere else, although nobody has given any evidence about it. Counsel for the plaintiff, in dealing with this definition of " war injuries," has contended, as far as (*b*) is concerned, that although it may have been a bomb dropped from an aircraft which fell in the vicinity of Charles Street, 150 yards away, the damage to the ceiling in the Theatre Royal was not caused by the impact of anything dropped from such aircraft ; he says it was the blast which caused the damage and not the impact of anything dropped. Counsel for the defendants says that cannot be the effect of this definition of " war injuries," but that it was the impact of the bomb, which on impact did explode and destroyed two houses and did other damage to surrounding property, including the damage to the Theatre Royal, St. Helen's. I am inclined to think that that is the more appropriate view to take, and that it was the impact of the bomb which caused this damage to the supports of the ceiling ; at any rate, I think the damage to the ceiling was caused by the discharge of the " missile " under (*a*), (i), or by the use of an " explosive " by the enemy under (*a*) (ii). That was the cause of the damage to the building, but that is not sufficient to make this a war injury. I have to consider what caused the physical injuries to the plaintiff.

I have found already that the physical injuries to the plaintiff were caused by a breach of duty by the defendants in failing to take reasonable steps to have their premises reasonably safe for the purpose of people attending there, and I do not find it possible, concurrently with that finding, to say that here the injuries were caused by the bomb which fell in Sept., 1940 ; and, therefore, I do not find that there has been here, in respect of this plaintiff, a " war injury."

Counsel for the defendants pressed me to say that the missile or explosive which caused the damage to the ceiling, or more particularly to the wads which held the ceiling, continued to operate month after month through the years, and that when the ceiling fell it was the cause of the physical injury to the plaintiff. I have considered that submission, but I do not find myself able to accept it. I think the physical injuries here to the plaintiff were not so caused, but are properly to be held to have been caused by the breach of duty by, and negligence of, the defendants as I have indicated.

Reliance was placed by counsel for the defendants not only on the definition of " war injuries " but also on such assistance as can be obtained from sect. 3 of the Act which does seem to contemplate cases where there may be war injuries—that is, there may be physical injuries—caused by an explosion or impact within the definition, and at the same time it may be held that the physical injuries were caused in such circumstances that they could be " attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible." Well, there may be cases where such a finding is possible and in such a case the Act would appear to relieve a defendant from liability to pay damages. Some negligence prior to or some negligence concurrent with, or possibly, although I find it hard to visualise a satisfactory illustration, some negligence after, for example, a bomb explosion may justify a finding that the negligence and the bomb explosion were the joint cause of a plaintiff's injuries. Here I find the negligence alone was the effective cause and the operating cause of the damage claimed. Therefore, I have come to the conclusion that the Personal Injuries (Emergency Provisions) Act, 1939, does not give relief to the defendants in the way that is claimed by counsel.

There are several authorities which have been referred to; the case in the House of Lords, to which I have referred, seems to turn on another point, which does not arise here—that of combating the enemy. *Greenfield* v. *London & North Eastern Ry. Co.* (4) is perhaps of the greatest assistance. The head-note ([1945] 1 K.B. 89) reads as follows:

> A bomb dropped from an enemy aircraft at 9.10 p.m. made a crater on a railway line. At 9.45 p.m. the engine of a train overturned in the crater and the engine-driver who was "proceeding at caution" on a direct order (admittedly negligent) from his employers, was killed:—*Held*, that the injury to the engine-driver was not "caused by the impact on . . . property" of an enemy bomb, and, therefore, was not a "war injury" within the meaning of s. 8 subs. (1) of the Personal Injuries (Emergency Provisions) Act, 1939.

McKinnon, L.J., in that case says this (*ibid.*, at p. 92; [1944] 2 All E.R. 438, at p. 440):

> It is true that the hole into which the engine fell was caused by a bomb from an enemy aeroplane, and that Greenfield's injury was caused by his engine falling into the hole, but I cannot think that his injury was caused by the impact of the bomb on the defendants' railway line. If, while his engine was on its way, a German bomb had fallen on or close to it, and Greenfield had been killed by the explosion, he would clearly have suffered a war injury under para. (*a*) of the subsection. [No such contention could, of course, be made here, that there was any physical injury caused to the plaintiff by the explosion in the way that MacKinnon, L.J., interprets it there. The judgment goes on:] If, while the engine was proceeding, a German bomb had fallen on a bridge and shattered it, so that parts of the bridge fell on Greenfield and injured him, then, I think, he would have, under para. (*b*) of the subsection, suffered an injury "caused by the impact on . . . property" of something dropped from an enemy aircraft. In my view, the addition in para. (*b*) of the words "impact on any property" to the words "impact on any person" is to cover the case of a bomb which does not hit a person, but hits something near him (*e.g.*, a house) which thing, or parts of which thing, in their fall or dissolution, injure the person.

MacKinnon, L.J., does not in terms say so, but it would appear from that that he was not dealing with a case where there was any great length of time between the hitting and the injury to the person; other factors must inevitably arise then, as they do in this case, where there is added deterioration of the condition, and also opportunity to inspect and repair.

Before I leave MacKinnon, L.J., I might add the few words which appear later, towards the end of his judgment. He says there:

> The only question in the present case is: What is the meaning of the apparently simple words "physical injuries *caused* by" certain acts? So far as those cases do assist me, I think they support my conclusion that the injury to Greenfield was not *caused* by the impact on him, or on any property of anything dropped from an enemy aircraft.

Lawrence, L.J., says this (*ibid.*, at p. 93; [1944] 2 All E.R. 438, at p. 441):

> We have, however, not to consider the subject of legal causes in general, but the particular words of sect. 8, subsect. (1). Those words all relate to acts which are not continuing, but immediate—"the discharge of any missile," "the use of any weapon," "in combating the enemy or in repelling an imagined attack by the enemy," "the impact . . . of anything dropped from any such aircraft." Such acts may be contemporaneous with acts of negligence and, jointly with those acts of negligence, may cause injury, but where, as here, the impact of the bomb, *qua* impact, is over and done with, the impact cannot truly be said to cause injury. It is the crater, not the impact of the bomb, which directly causes the injury. It may be that the crater will cause an injury years after the impact.

Cassels, J., expresses a view which does not seem to be dealt with by the other two members of the court. He says (*ibid.*, at p. 95; [1944] 2 All E.R. 438, at p. 442):

> Though in the history of the events leading up to the accident there may be an enemy act, some negligence independent of the enemy act may be the effective cause. The facts of one case do not always assist in determining the legal effect of the facts in another case, and I am not sure that illustrations serve a very useful purpose, but, if the negligent driver of a motor-car, by high speed and failure to keep a proper look-out, overturns his vehicle into a hole, which he might, by the exercise of reasonable

care, have avoided, and this injures his passenger, to whom he owes a duty to take care, I should find it difficult to believe that the effective cause of the passenger's injuries was enemy action which had made the hole some time before the accident, and not the negligent driving.

That case, subject to various distinctions which have been indicated before me, does I think support me in the view I have taken here, and I find it, on these facts, not possible to say that the physical injuries to the plaintiff were caused by the enemy action on Sept. 5-6, 1940.

In these circumstances, the damages having been agreed at £75, I give judgment for the plaintiff for that sum, with costs.

Judgment for the plaintiff, with costs.

Solicitors: *Frank H. Henri*, Liverpool (for the plaintiff); *A. W. Ross*, Liverpool (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

NEWCASTLE-UNDER-LYME CORPORATION *v.* WOLSTANTON, LTD.

[CHANCERY DIVISION (Evershed, J.), May 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, June 3, July 25, 1946.]

Gas—Local authority owing gas pipes laid under public highways by virtue of statutory powers—Exclusive right to occupy space in soil taken by pipes and soil on which pipes rest—Damage to pipes from movement of surface land caused by mining operations—Nuisance—Right of gas authority to damages——Public Health Act, 1875 (*Support of Sewers*) *Amendment Act,* 1883, (*c.* 37), *s.* 5.—*Gasworks Clauses Act,* 1847 (*c.* 15), *s.* 6.

By virtue of an order made in 1931, pursuant to the Local Government Act, 1929, s. 46, the plaintiff corporation became the gas undertakers for a certain district. Their predecessors as gas undertakers for that district had acquired the undertakings by virtue of various private Acts to which the Gasworks Clauses Acts, 1847 and 1871, applied. In exercise of the general power conferred by sect. 6 of the 1847 Act, gas pipes and mains had been laid under public highways, and were now vested in, and the property of, the corporation. Owing to mining operations by W., Ltd., substantial damage had been done to the corporation's pipes. Long before the gas pipes had been laid the surface of the area in question had been severed from the subjacent mines in circumstances which had been held to give to the surface an unqualified right of support from the minerals. The corporation brought an action against W., Ltd., for damages in respect of damage to the pipes laid under the public highways. :—

HELD: (i) upon the true construction of the Gasworks Clauses Act, 1847, s. 6, from which the statutory powers exercised in regard to the laying and maintenance of the pipes in question were derived, the section did not confer any right of ownership of the land affected, nor did it create any tenancy or easement, or interest analogous to an easement. The position of the corporation was that they had, by force of the statute, the exclusive right to occupy as licensees for the purposes of their statutory undertaking the space in the soil taken by the pipes and that (subterranean) part of the soil on which the pipes rested; but such right (which continued so long as the corporation carried on their undertaking) did not depend upon, or vest in the corporation, any legal or equitable estate in the land.

(ii) since the corporation had such right of possession, they were entitled to recover damages as for a nuisance in respect of the damage flowing from a wrongful interference with the natural right of support for the land.

(iii) *semble*, on the hypothesis of the corporation's right to support in respect of some of their pipes before 1883 depending on their Sanitary Acts, they had failed to prove that, at the passing of the Act, no compensation was recoverable in respect of the right, and so had not satisfied the condition for the preservation of such right in the second part of sect. 5 of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. On the construction of the section, the corporation, to bring themselves within it, must either show that, compensation having been assessed, the whole sum had been paid at the date of the passing of the Act, or, in the absence of any assessment, that no compensation could, in any event, properly have been awarded.

[**EDITORIAL NOTE.** This case decides a question on which hitherto there has been no authority, namely, what is the true nature of the interest in, or relating to, the land of persons or corporations authorised by statute in the terms of sect. 6 of the Gasworks Clauses Act, 1847, and of other comparable statutes, to lay pipes or cables under highways. It is now held that the position of these persons or corporations is that of licensees, enjoying an exclusive right of occupation of the land through which their pipes or cables pass which enables them to sue as for a nuisance in the event of unlawful interference with the land over which the right extends. A subsidiary point is the construction of sect. 5 of the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, which takes out of the operation of the Act cases where " no compensation is at the passing of the Act recoverable " in respect of a right of support acquired before the passing of the Act. It is held that the words quoted mean that, at the date of the Act either compensation has been fully paid or that no compensation, in any event, could properly be awarded.

As to Right of Occupiers to Maintain Action for Nuisance, see HALSBURY, Hailsham Edn., Vol. 24, pp. 79-81, paras. 138-140 ; and for Cases, see DIGEST, Vol. 36, pp. 209, 210, Nos. 516-528.]

Cases referred to :

(1) *Hilton* v. *Granville* (*Lord*) (1844), 5 Q.B. 701 ; 34 Digest 703, *923* ; 1 Dav. & Mer. 614 ; 13 L.J.Q.B. 193 ; 2 L.T.O.S. 419.

(2) *Wolstanton, Ltd., and Duchy of Lancaster* v. *Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101 ; [1940] A.C. 860 ; 109 L.J.Ch. 319 ; 163 L.T. 187.

(3) *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.*, [1913] A.C. 11 ; 11 Digest 153, *353* ; 82 L.J.Ch. 76 ; 107 L.T. 625 ; *affg.* S.C. *sub. nom. London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

(4) *Wath-upon-Dearne Urban District Council* v. *Brown* (*John*) *& Co., Ltd.*, [1936] Ch. 172 ; Digest Supp. ; 105 L.J.Ch. 81 ; 154 L.T. 295.

(5) *South Staffordshire Waterworks Co.* v. *Mason* (*R.*) *& Sons* (1886), 56 L.J.Q.B. 255 ; 11 Digest 153, *354* ; 57 L.T. 116.

(6) *Re Dudley Corporation* (1881), 8 Q.B.D. 86 ; 11 Digest 158, *381* ; 51 L.J.Q.B. 121 ; 45 L.T. 733.

(7) *Normanton Gas Co.* v. *Pope & Pearson, Ltd.* (1883), 52 L.J.Q.B. 629 ; 11 Digest 154, *359* ; 49 L.T. 798.

(8) *Schweder* v. *Worthing Gas Light & Coke Co.* (*No.* 2), [1913] 1 Ch. 118 ; 25 Digest 472, *16* ; 82 L.J.Ch. 71 ; 107 L.T. 844.

(9) *New Moss Colliery, Ltd.* v. *Manchester Corpn.*, [1908] A.C. 117 ; 11 Digest 154, *356* ; 77 L.J.Ch. 392 ; 98 L.T. 467.

(10) *Charing Cross, West End & City Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K.B. 442 ; 38 Digest 50, *289* ; 83 L.J.K.B. 116 ; 109 L.T. 635 ; *affd.*, [1914] 3 K.B. 772.

(11) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 20 Digest 210, *72* ; 37 L.J.Ex. 161 ; 19 L.T. 220.

(12) *Jary* v. *Barnsley Corpn.*, [1907] 2 Ch. 600 ; 41 Digest 36, *265* ; 76 L.J.Ch. 593 ; 97 L.T. 507.

(13) *R.* v. *Bath Corpn.* (1811), 14 East 609 ; 38 Digest 449, *166* ;

(14) *R.* v. *Brighton Gas Light Co.* (1826), 5 B. & C. 466 ; 38 Digest 443, *140*.

(15) *R.* v. *Chelsea Waterworks Co.* (1833), 5 B. & Ad. 156 ; 38 Digest 451, *183*.

(16) *R.* v. *Mersey & Irwell Navigation Co. of Proprietors* (1829), 9 B. & C. 95 ; 38 Digest 469, *308* ; 4 Man. & Ry. K.B. 84 ; 2 Man. & Ry. M.C. 106 ; 7 L.J.O.S. M.C. 70.

(17) *Westminster Corpn.* v. *Southern Ry. Co., Railway Assessment Authority and Smith & Son, Ltd., Westminster Corpn. & Kent Valuation Committee* v. *Southern Ry. Co., Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322 ; [1936] A.C. 511 ; Digest Supp. ; 105 L.J.K.B. 537.

(18) *R.* v. *West Middlesex Waterworks* (1859), 1 E. & E. 716 ; 38 Digest 450, *171* ; 28 L.J.M.C. 135 ; 32 L.T.O.S. 388.

(19) *Holywell Union & Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117 ; 38 Digest 424, *7* ; 64 L.J.M.C. 113 ; 71 L.T. 818.

(20) *Read* v. *J. Lyons & Co., Ltd.*, [1945] 1 All E.R. 106 ; [1945] 1 K.B. 216 ; 114 L.J.K.B. 232 ; 172 L.T. 104.

(21) *Malone* v. *Laskey*, [1907] 2 K.B. 141 ; 36 Digest 14, *55* ; 76 L.J.K.B. 1134 ; 97 L.T. 324.

(22) *Hill* v. *Tupper* (1863), 2 H. & C. 121 ; 38 Digest 413, *1024* ; 2 New Rep. 201 ; 32 L.J.Ex. 217 ; 8 L.T. 792.

(23) *Nicholls* v. *Ely Beet Sugar Factory*, [1931] 2 Ch. 84; Digest Supp.; 100 L.J.Ch. 259; 145 L.T. 113.

(24) *Paine & Co.* v. *St. Neots Gas & Coke Co.*, [1939] 3 All E.R. 812; Digest Supp.; 161 L.T. 186; *affg.*, [1938] 4 All E.R. 592.

(25) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 19 Digest 7, *4*.

(26) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; 19 Digest 196, *1497*; 66 L.J.Ch. 529; 76 L.T. 584.

(27) *Jones* v. *Chappell* (1875), L.R. 20 Eq. 539; 31 Digest 353, *4952*; 44 L.J.Ch. 658.

A (28) *Edinburgh etc. Water Trustees* v. *Clippens Oil Co., Ltd.* (1902), 4 F. (Ct. of Sess.) (H.L.) 40; 43 Digest 1070, *q*; 87 L.T. 275; 39 Sc. L.R. 860; 8 S.L.T. 447.

ACTION by Newcastle-under-Lyme Corporation against Wolstanton, Ltd., claiming a declaration that the defendant company were not entitled to mine or otherwise work any coal, ironstone or other minerals under or near to the plaintiffs' gas mains laid within the township of Wolstanton or elsewhere in the B borough of Newcastle-under-Lyme, in such manner as to let down, destroy or injure any of such gas mains. In the circumstances mentioned in the judgment, the claim resolved itself into one for damages only. The facts are fully set out in the judgment.

Charles E. Harman, K.C., and *Wilfrid Hunt* for the plaintiffs.

Andrew E. J. Clark, K.C., and *J. B. Herbert* for the defendants.

Cur. adv. vult.

C July 25. EVERSHED, J., read the following judgment. The plaintiff corporation sue as the gas undertakers in respect of a considerable area of the township of Wolstanton, the damages claimed being in respect of the gas pipes laid under the streets and pavements in that area. The plaintiff corporation became the gas undertakers for this area by virtue of the Newcastle-under-Lyme Extension Order, 1931 (made pursuant to the Local Government Act, D 1929, s. 46), which had the effect of abolishing the Wolstanton United Urban District Council and vesting in the plaintiff corporation all the property of that council and all its powers, duties and liabilities as gas undertakers.

The Wolstanton United Urban District Council itself became the gas undertakers for the relevant area by virtue of the Wolstanton United Urban District Council Gas Act, 1906. Briefly, the effect of that Act, which incorporated (subject to immaterial exceptions) the Gasworks Clauses Acts, 1847 and 1871, E was that the Wolstanton council became the compulsory purchasers of the gas works, mains, pipes and other the gas undertakings (so far as related to that area) of the Newcastle-under-Lyme Corporation and of the Burslem Corporation (see sects. 9 and 10), with power to continue and maintain in the area the gas works and gas undertakings of the two corporations mentioned.

The two local authorities whose gas undertakings within the Wolstanton district were acquired by the last-mentioned Act had in turn derived their powers F from two Acts passed in 1877, *viz.*, the Newcastle-under-Lyme Corporation Act and the Burslem Local Board Gas Act. These two Acts are (as would be expected from their respective titles) somewhat dissimilar in form but nothing turns on the dissimilarity. In each case the local authority acquired the gas undertaking previously carried on by the local gas company known (in the one case) as Newcastle-under-Lyme Gaslight Co., and (in the other) as Burslem and G Tunstall Gas Co.; in each case (with immaterial exceptions) the Gasworks Clauses Acts, 1847 and 1871, applied; in each case certain powers to acquire easements by agreement were conferred; in each case the township of Wolstanton was included in the area covered. In order to complete the history it is sufficient to refer to the Newcastle-under-Lyme Gaslight Act, 1855, and to the Burslem and Tunstall Gas Company's Act, 1857, as amended by a further Act in 1868, which Acts incorporated and regulated the gas companies respectively H taken over by the Acts of 1877 above mentioned. The township of Wolstanton was within the limits of both companies; the Gasworks Clauses Act, 1847, applied to both; both were empowered to maintain, repair, etc., the then existing works and were placed under an obligation, if required by the relevant local board so to do, to light streets as therein respectively mentioned.

It is unnecessary to refer in any greater detail to the relevant statutory provisions affecting the present matter. It is clear, in the circumstances of the present case (i) that all pipes and mains with which we are here concerned were laid under public highways, including footpaths; (ii) that until recent years the pipes and the gas supplied in the town of Wolstanton were derived from Burslem or (to some extent) from Chesterton and not from Newcastle-under-Lyme ; (iii) that all the relevant pipes were laid in exercise of the general power contained in the Gasworks Clauses Act, 1847, s. 6*, or in pursuance of the provisions of corresponding clauses in one or other of the private Acts cited, there being no evidence of any exercise for the purpose of any powers to acquire easements or other proprietary interests by agreement ; and (iv) that the pipes and mains in question have been since 1931 vested in, and the property of, the plaintiff corporation, having prior thereto been successively vested in and the property of the plaintiff corporation's predecessors in title.

The defendant company was incorporated in 1928 and acquired the residue of a lease of certain seams of ironstone and coal granted in 1917 to the defendant company's predecessors by the Crown in the right of the Duchy of Lancaster. Shortly after its incorporation the defendant company began to work the seams and it has continued since so to do. No trouble arose between the plaintiff corporation and the defendant company until 1934, but from that year up to the date of the issue of the writ substantial damage was admittedly done to the plaintiff corporation's gas pipes as a result of the movement of the surface land attributable to the defendant company's mining operations.

The severance of the surface of the area in question from the subjacent mines was effected very many years ago—long before any of the gas works or pipes here in question were made or laid. Both surface and minerals appear originally to have been part of the copyhold land of the manor of Newcastle-under-Lyme. After the severance, the Crown in the right of the Duchy claimed that they, and those entitled through them to work the mines, enjoyed the benefit of a customary right to extract the minerals so as to let down the surface and without any obligation to pay compensation for surface damage. This assertion was successfully challenged by a surface proprietor as long ago as 1844 before the Court of Queen's Bench in *Hilton* v. *Earl Granville* (1). But the Duchy, and those interested in the minerals through the Duchy, appear to have been undeterred by this reverse, and continued to assert the right to let down the surface land without payment of compensation until the plaintiff corporation, acting as owners of a fire station, again challenged the validity of the alleged custom. On this occasion the litigation proceeded to the House of Lords : see *Wolstanton, Ltd., and Duchy of Lancaster* v. *Newcastle-under-Lyme Borough Council* (2). The House affirmed the view of the Court of Queen's Bench that the alleged custom was unreasonable and finally negatived its existence.

This decision having established that the mineral owners and those claiming through them had no right so to work the minerals as to let down or injure the surface land, and accordingly that the owners of the surface in which the pipes here in question were laid have, and always have had, an unqualified right to the support of the land in its natural state, the defendant company, in order to carry on its undertaking, applied to the Railway and Canal Commission Court. Certain orders have been made by that tribunal—the first on Dec. 17, 1943—empowering the defendant company to work the minerals on terms of payment of compensation for damage caused. Under these orders the defendant company is now admittedly entitled to work the mines so as to let down the surface but upon terms (so far as concerns the plaintiff corporation as gas undertakers) of being liable to pay compensation to them for any damage done to their gas works and pipes. By reason of these orders the plaintiff corporation no longer now ask for the declaration or the injunction mentioned in the writ but have confined themselves to a claim for damages. The writ was issued on May 11, 1942 ; and since the plaintiff corporation concede that the defendant company can invoke the Limitation Act, 1939, to limit its liability, the claim of the plaintiff corporation is now confined to the damage proved to have been occasioned by the defendant company during the period of 6 years immediately prior to May 11, 1942.

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* By sect. 6 of the Gasworks Clauses Act, 1847 : " The undertakers . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act . . . and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same . . . "

Particulars of the damages claimed have been given and are bound with the pleadings in the action. These particulars fall under three heads: (i) damages, equivalent to the cost of repairing a large number of breaks in the gas pipes or mains: the total of these items during the 6 year period above mentioned amounts to £812 7*s.* 9*d.*; (ii) damages, equivalent to the cost of replacing cast-iron pipes with spun-steel pipes where the breaks were such as to render it economically not possible to repair the pipes, or where the risk of further damage was so great as to make it impracticable to maintain iron pipes: the total under this (the largest) head of damage for the period in question is £5,659 10*s.* 8½*d.*; (iii) damages for gas lost; the figures for this item are given in respect of a series of years beginning with Apr. 1, 1936, and the total in respect of the period from Apr. 1, 1936, is £1,938 10*s.* 10*d.* The sum total of the three heads is £8,410 9*s.* 3½*d.* It was agreed that it would not be appropriate to take up time at the trial with investigation of each item of the several heads of damage; but after hearing the evidence it is right for me to say that the plaintiff corporation have satisfied me that substantially the whole of the claim represents loss or damage in fact suffered as the direct result of the defendant company's mining operations.

There remain, however, two matters of fact of less importance, as to the first of which, at any rate, there was a conflict of testimony, including expert testimony, namely, (i) whether in respect of certain of its mining operations the defendant company failed to work in a "reasonable and proper manner" within the meaning of sect. 4 of the Public Health Act, 1875, (Support of Sewers) Amendment Act, 1883 (hereinafter referred to as the Act of 1883 or the 1883 Act); and if not, whether any of the damage suffered by the plaintiff corporation can be attributed to such failures: (ii) whether the plaintiff corporation have proved that any of their damaged gas pipes had been laid prior to Aug. 25, 1883, being the date of the passing of the 1883 Act, so as to give rise to an alternative claim in respect of such pipes under sect. 5 of that Act. These two questions are of a subsidiary nature and I shall, therefore, postpone dealing with them until later in this judgment.

The main question in the action is whether, apart from any rights the plaintiff corporation had or might have had by virtue only of the various Acts of Parliament under which their powers were derived or by virtue of the Act of 1883 and the so-called mining code incorporated therein from the Waterworks Clauses Act, 1847, the plaintiff corporation can assert against the defendant company any right of support, or can otherwise lay the foundation of any claim at law against the defendant company, having regard to the fact that the damage suffered is undoubtedly attributable to the movement of the surface land occasioned by the defendant company's mining operations, and having regard also to the circumstance that the defendant company has been shown to have had no right so to work the mines as to cause injury to the surface land. It should be added that no suggestion has been made that the movement of the surface land was in any way caused or aggravated by the presence of the plaintiff corporation's pipes or mains therein.

Upon this matter certain admissions made by both sides served appreciably to narrow the issue between them. Thus, in regard to the Act of 1883 and the so-called mining code incorporated therewith from the Waterworks Clauses Act, 1847, it was conceded on the part of the plaintiff corporation that, apart from their subsidiary claims under sects. 4 and 5 of the 1883 Act, they could not make any claim against the defendant company under any of the provisions of that Act or of the mining code. On the other hand, it was admitted that, if the plaintiff corporation had prior to 1883 any rights at law apart from any rights conferred upon them only by express terms or by implication under their private Acts, those rights (having regard to the *Howley Park* case (3), and later decisions to the same effect) were not taken away by the Act of 1883. In the circumstances, it is not necessary for me to refer in detail to the terms of the mining code in this case. Its relevant provisions were recently considered in the *Wath-upon-Dearne* case (4) by LUXMOORE, J., who drew attention to the respects in which the material sections of the Waterworks Clauses Act, 1847, differed from the corresponding sections of the Railways Clauses Consolidation Act, 1845—particularly in the use of the phrase, applicable where the undertakers have failed to avail themselves of the provisions of the code, "as if this Act and the Special Act had not been passed."

It is sufficient, in the present case, to state that, the plaintiff corporation having failed to make and keep any of the maps or surveys required by the Waterworks Clauses Act, 1847, s. 19, as amended by sect. 3 of the Act of 1883, it therefore follows from the decision in the *South Staffordshire Waterworks* case (5) that they lost any right to make any claim under the code incorporated in the Act of 1883. It equally follows, in my judgment, having regard to the first part of sect. 4 of the Act of 1883—" Except as in this Act provided, a local authority shall not by reason *only* of anything contained in the Sanitary Act " —that the plaintiff corporation cannot assert any claim which they might have had, according to the principle of the decisions in *Re Dudley Corpn.* (6) and *Normanton Gas Co.* v. *Pope* (7), by implications from any of the provisions of any of the private Acts, (*i.e.*, the Sanitary Acts) applicable.

Counsel for the plaintiff corporation did not, indeed, contend to the contrary. He said that the implied rights which were held to have arisen in those cases did not arise in the present case because the fact of the surface having an unqualified right to support made any such implications unnecessary and, therefore, negatived their existence. But it was alternatively claimed by counsel for the plaintiff corporation that, even though all statutory rights had been lost by the plaintiff corporation in regard to what may be called the 40-yards strip, the plaintiff corporation were, nevertheless, entitled to make a claim either under the common law or by implication from their private or Sanitary Acts in respect of damage arising from mining operations outside the 40-yard limit. In my judgment, no question arises in the present action in regard to the 40-yard strip. Either the plaintiff corporation have a right to recover in respect of all the damage suffered independently of the statutes (including the mining code), in which case no question of the 40-yard limit arises, or the plaintiff corporation, having no such right, have no cause of action at all against the defendant company, apart from the ancillary points arising under sects. 4 and 5 of the 1883 Act already indicated, with which I deal later in this judgment.

The essential question remains upon the threshold of the case—the question which has given me the greatest difficulty —whether, apart from the effect exclusively attributable to their private Acts and to the 1883 Act including the mining code, the plaintiff corporation had and have any claim or right at law against the defendant company. The precise point, as it has been raised in this case, does not appear previously to have been considered by the courts. As I have stated earlier, the property in the mains and pipes, in the chattels themselves, is clearly vested in the plaintiff corporation. But what is the right or interest of the plaintiff corporation in respect of the land, *i.e.*, (*a*) in respect of the space or area occupied by the pipes, (*b*) in respect of the subterranean strip of land on which the pipes rest ? Such right or interest must be one or other of the following : the plaintiff corporation may be owners or proprietors ; they may be tenants ; they may have an easement or some other incorporeal right analogous to an easement ; they may be licensees. Having determined what that right or interest is, the plaintiff corporation will be entitled to prosecute such claims as flow therefrom according to the general law and do not, therefore, arise by reason only of the Sanitary Acts.

The answer to the problem must depend upon the true interpretation and effect of the relevant statutory powers exercised in regard to the laying and maintenance of the pipes by the plaintiff corporation or their predecessors as gas undertakers. And, since all the pipes in question were laid under public highways, these powers are to be found in the Gasworks Clauses Act, 1847, s. 6, incorporated with all the relevant private Acts, or in provisions of those Acts which may for present purposes be taken to be similar to those of sect. 6 of the 1847 Act. By this familiar section, power is given to break up streets, to lay pipes, to repair and remove them, to remove the earth displaced, and to do all other acts necessary for the execution of the preceding powers, the undertakers paying compensation for all damage done in the execution of such powers.

Sect. 7 of the 1847 Act, which is expressed as a proviso to sect. 6, prohibits the laying of pipes in land not dedicated to the public save with the consent of the owner and occupier of such land. By way of interpolation it may be noted that, according to the evidence in the case, the greater part of the pipes in question are laid at a depth of between 2ft. and 3ft. below the surface, *i.e.*, at a depth below the highway itself and below so much of the surface land as would *prima facie* be required for the making and support of the highway itself. But it was decided by Eve, J., in 1913, in the *Schweder* case (8), that pipes laid at such depths as these pipes were laid must for the purposes of sect. 6 be regarded as laid in land dedicated to the public and not in private land to which sect. 7 of the Act would apply.

To the contrast with sect. 6 of the 1847 Act provided by sect. 7 must be added the further contrast provided by sect. 10 of the Gasworks Clauses Act, 1871, giving power to the undertakers as therein provided to acquire easements by agreement; and the latter contrast is reflected in the express powers to be found, for example, in the Burslem Local Board Gas Act, 1877, and the Newcastle-under-Lyme Corporation Act, 1877, to acquire easements by agreement and also (subject to the strict limits imposed) to acquire land. (See, *e.g.*, sects. 10 and 11 of the Burslem Act, and sects. 48 and 49 of the Newcastle Act). I add that the exercise of all the powers to which I have referred must plainly be limited by reference to the purpose of the gas undertakers, *i.e.*, the supply of gas, and would, therefore, come to an end if the undertakers ceased to carry on such undertaking.

In these circumstances, and bearing in mind the general rule that no greater rights or interests should be treated as conferred upon the undertakers than are necessary for the fulfilment of the object of the statute, it seems to me reasonably clear, as a matter of the construction of sect. 6 of the 1847 Act, that the terms of the section are not intended to confer, and are not apt to confer, upon the undertakers any right of ownership or proprietorship of the land affected. Equally, in my judgment, is the language of the section inappropriate to create in favour of the undertakers any tenancy or any easement or interest analogous to an easement. It is true that the rights of the undertakers are the creatures of statute, and that it is within the competence of Parliament to confer or create interests without regard to those incidents which are regarded as requisite to an agreement *inter partes*. Thus Parliament may create an easement in gross as it may, I assume, create a tenancy without provision for the payment of rent and notwithstanding the absence of any term certain. But the absence of the incidents ordinarily appropriate to the existence of a tenancy or of an easement is, at the least, an important consideration for the determination of the question whether, upon the true construction of the statute, the creation of any such interest was intended. It is, indeed, somewhat tempting to conclude that some right in the nature of an easement ought to be inferred: and I have in mind the reference to a wayleave in the speech of Lord Atkinson ([1908] A.C. 117, at p. 124), in the *New Moss* case (9). But, in my judgment, these considerations are insufficient to give to the language of sect. 6 of the Act of 1847 a meaning and intent which that language—particularly in the light of the contrasts to which I have already referred—cannot naturally or properly bear. Reference was made in the course of the argument to that species of property commonly known as "flying freeholds." It is, however, sufficient, in my view, to say that there is no real analogy between flying freeholds and pipes or cables laid under special Acts; and I do not think that any assistance is obtained towards the solution of the problem of the latter by consideration of the former.

It follows that, if I am right so far, the interest of the undertakers must be that of licensees without any title, legal or equitable, in the land itself. This conclusion is consistent with the assumption upon which *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (10) was decided by Scrutton, J., and the Court of Appeal. In that case the question was whether the rule of liability in *Rylands* v. *Fletcher* (11) applied where both plaintiffs and defendants were persons or corporations having statutory rights (analogous to those of the plaintiff corporation or their predecessors in the present case) to lay and maintain cables or pipes in or under public highways. On behalf of the Hydraulic Power Co. it was argued that, since the Charing Cross, Co. were merely licensees in respect of their cables, they had no cause of action against the defendants in respect of the damage admittedly attributable to the defendants' water pipes. In both courts the decision was to the effect, assuming the Charing Cross, Co. to be licensees in respect of their cables, that, nevertheless, that company was entitled to maintain the action. It is true, as counsel for the plaintiff corporation pointed out, that in neither court was it necessary to decide, nor was the question in terms decided, whether the right or interest of the plaintiffs (and of the defendants) was that of licensees merely. But LORD SUMNER said ([1914] 3 K.B. 772, at p. 781):

> . . . it seems to me, therefore, that this is a simple case of two independent persons licensed to pass their apparatus through soil—the ownership of which is not material here—with additional rights of breaking up the superincumbent surface of the highway, ...

A Both the court of first instance and the Court of Appeal proceeded, without any reservation and without any expression of doubt as regards the validity in this respect of the argument for the defendants, upon the view that those empowered—or compelled—by statute to lay cables in or under the public highway could invoke the principle of *Rylands* v. *Fletcher* (11), notwithstanding that they could not assert any right or interest in the land in which their cables were laid. It is, therefore, in my view, not permissible to treat the *Charing* B *Cross* case (10) otherwise than as some authority for the view that the rights of the plaintiff corporation in the present action are those of licensees only—a view to which some support is given in MACSWINNEY ON MINES, 5th edn., p. 222, para. 752:

> In several of the cases the interest vested in the undertakers was not a right of property in land, but a mere right to make and maintain works on land which remained the property of another. C

The cases referred to included the *Dudley* case (6), and the *Normanton* case (7), and also *Jary* v. *Barnsley Corpn.* (12).

Against the effect of the decision in the *Charing Cross* case (10) counsel for the plaintiff corporation relied upon a number of rating cases, *viz.*, *R.* v. *Bath Corpn.* (13), *R.* v. *Brighton Gas Co.* (14), and *R.* v. *Chelsea Waterworks Co.* (15), and to certain observations of the judges in those cases. Thus in *R.* v. *Brighton* D *Gas Co.* (14) it was stated by BAYLEY, J. (5 B. & C. 466, at pp. 470, 471):

> . . . the [gas company's] pipes are laid down so as to become part and parcel of the land . . .

In *R.* v. *Chelsea Waterworks Co.* (15) a quotation from the judgment of PARKE, J., in *R.* v. *Mersey & Irwell Navigation Co.* (16), was made by counsel supporting the rate (5 B. & Ad. 156, at p. 165):

> E No person can be an occupier, unless he has the exclusive right to enjoy some portion of the soil. The companies who have gas pipes have the exclusive right to enjoy a portion of the soil . . .

DENMAN, C.J., concluded his judgment (*ibid.*, at p. 169), with the phrase:

> They [Chelsea Waterworks Co.] appear to us to have the exclusive right in a portion of the soil . . . though for a limited purpose only.

F It is to be observed that in all the rating cases the question before the court was whether the subject sought to be rated was an "occupier of lands" within the meaning of the Poor Relief Act, 1601. As regards the word "lands" the effect of the cases has been to give a wide interpretation to it; and as regards the word "occupier" the effect has been to establish that the question is one of fact—whether (to state the matter briefly and without attempting a definition) the subject sought to be rated was in *de facto* possession to the substantial exclusion of any enjoyment of the land by others and in circumstances importing G some degree of permanence. It has been clearly laid down that the question is not a matter of title and does not depend upon title.

In the words of LORD RUSSELL OF KILLOWEN ([1936] 2 All E.R. 322, at p. 329), in the *Westminster City* case (17):

> . . . it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.

H I cite also the language of WIGHTMAN, J., (1 E. & E. 716, at p. 720) in the *West Middlesex Waterworks* case (18), which was quoted with approval by LORD DAVEY ([1895] A.C. 117, at p. 132) in the *Halkyn Drainage* case (19):

> . . . the first question is whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies

to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute.

I have dealt at some length with this aspect of the matter, since there appears to be in the books no authoritative pronouncement upon the true nature of the interest in, or relating to, the land of persons or corporations authorised by statute in the terms of sect. 6 of the 1847 Act, or of other comparable statutes, to lay pipes or cables under highways. I venture to state my conclusion upon the position of the plaintiff corporation as follows, They have by force of the statute the exclusive right to occupy for the purposes of their statutory undertaking the space in the soil taken by the pipes and that (subterranean) part of the soil on which the pipes rest; but that exclusive right of occupation, which continues so long as the corporation carry on their undertaking, does not depend upon or involve the vesting in the plaintiff corporation of any legal or equitable estate in the land. If the language in Halsbury's Laws of England, Hailsham edn., Vol. 27, p. 355, para. 786, note (*a*), is to be taken to imply that persons or corporations who have laid pipes or cables under statutory powers, similar to those applicable to the plaintiff corporation and their predecessaors in the present case, have an interest in the land of the nature of an easement and that the rating decisions proceed from such a view, I do not think such a conclusion is justified and I find myself unable to accept it.

It follows that the plaintiff corporation cannot, in my judgment, say that there is vested in them any right of support as such, or that they are (as counsel on their behalf put it) the inheritors of the right of support admittedly vested in the owners of the surface land. But does it follow from this proposition that the plaintiff corporation cannot sue for the damage suffered from the unlawful interference by the defendant company with the surface land—unlawful because the mineral owners have no right so to work their mines as to injure the surface? In my judgment, no.

The cause of action which the plaintiff corporation seek to prosecute is for the unlawful interference with the natural right of support of the land, *i.e.*, for nuisance—under the old forms, an action on the case. The answer of the defendant company was, briefly, *damnum sine injuria*; since the right which the plaintiff corporation said that the defendant company had infringed was vested in another, so that the plaintiff corporation were seeking to assert and rely upon a *jus tertii*. It is, therefore, pertinent to see what are the nature and essentials of an action for nuisance. It is undoubtedly of the essence of the matter that the wrong is a wrong done in respect of land; but in respect of what rights or interests in land? In *Read* v. *J. Lyons & Co., Ltd.* (20), Scott, L.J., at the end of an examination of the characteristics of the action, accepted ([1945] 1 All E.R. 107, at p. 114), the definition in Winfield on Torts, 3rd edn., p. 426, s. 129:

> . . . as unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

In my judgment, it would be impossible to say that the rights of the plaintiff corporation, which I have attempted to define, in regard to the land occupied by their pipes or on which their pipes rest, are not comprehended by the last ten words of the definition. But if it be said that for the purposes of his judgment it was not necessary for Scott, L.J., to distinguish, and that he did not distinguish, between the nature of the action, on the one hand, and, on the other, the question who is entitled to sue, further analysis leads, in the present case, to the same result. For though the cause of action may consist in an unlawful interference with land or with property in land, *prima facie* possession is sufficient to maintain the action. As Scott, L.J., observed ([1945] 1 All E.R. 106, at p. 114), immediately before his acceptance of Professor Winfield's definition:

> . . . as against the trespasser or other infringer, the plaintiff's right of possession was as good as right of property, unless the defendant could set up a title in himself.

No doubt mere occupation, in fact, without any right may be insufficient: see, for example, *Malone* v. *Laskey* (21). In that case the plaintiff in the action was the wife of an employee of a company to which the premises in question had been sub-let and her husband was permitted to occupy the house as an incident of his employment. In the circumstances it was held that she could not maintain an action for nuisance in respect of the injury she had suffered in the house. In delivering the leading judgment in the Court of Appeal, Sir Gorell Barnes, P., observed ([1907] 2 K.B. 141, at p. 151), that there was no authority for the view that a person who has "no right of occupation in any proper sense of the term" could maintain an action for nuisance. But, in my judgment, there is no principle involved in this decision or in *Hill* v. *Tupper* (22), (which was also cited), to the effect that the action is only maintainable at the suit of a plaintiff whose possession is referable to some title to the land. A

Normally the plaintiff's possession, if it is not of a merely fleeting or casual character, but attributable to a right, will be referable to some legal or equitable interest in or title to the land. But, in my judgment, there is nothing in logic or authority to disqualify a plaintiff, having by force of statute such right of possession as have the plaintiff corporation in the present case, from suing at common law in respect of the damage flowing from a wrongful interference B with the natural right of support for the land. I am not attempting to assert any general proposition. It is sufficient for me to decide only that, in the particular circumstances of the present case, the plaintiff corporation are entitled to maintain their action. And the particular circumstances to which I allude are the following: (i) that the plaintiff corporation have, by force of statute, the exclusive right (which I have defined) to the possession of so much of the C surface land as is occupied by their pipes and on which their pipes rest; (ii) that the damage suffered by the plaintiff corporation is the direct and inevitable consequence of the defendant company's interference with the natural right of support attaching to the surface land, there being no suggestion that either the subsidence or the damage was in any way attributable to, or aggravated by, the presence of the pipes on or in the land; and (iii) that the interference by the defendant company with the right of support was wrongful or unlawful, D having regard to the fact that the surface land had an unqualified right of support from the subjacent minerals.

I add that the conclusion at which I have arrived is, in my judgment, supported by the text-books. Thus in Salmond on Torts, 10th edn., p. 221, it is stated:

> The generic conception involved in nuisance may, however, perhaps be found in the fact that all nuisances are caused by an act or omission, whereby a person is unlawfully E annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as occupier of such land.

Again, at p. 223:

> There seems no reason why possession without title should not as a general rule be sufficient to enable a plaintiff to succeed in nuisance so that the *jus tertii* cannot be F set up as a defence.

Reference is made to the considerations affecting servitudes, which are considered at pp. 243-245, and it is there suggested that a distinction should be drawn between natural and acquired servitudes, a possessory title being valid in the former case, if not in the latter. The distinction is illustrated by reference to *Nicholls* v. *Ely Beet Sugar Factory* (23), decided by Farwell, J., in G 1931, and *Paine & Co.* v. *St. Neots Gas Co.* (24), decided by Goddard, L.J., sitting as a judge of first instance in 1938, and by the Court of Appeal in 1939.

Since, in the present case, the right interfered with by the defendant company was the natural right of support for the land itself, which was described in *Dalton* v. *Angus* (25) as being among the natural as opposed to the conventional or "acquired" servitudes, it may be useful to make some further reference to the two cases cited in Salmond on Torts. In the *Ely Beet Sugar* case (23) H the plaintiffs sued for damage by pollution done to a several fishery. One of the defences to the claim was to the effect that the river in question was, at the material part, tidal and accordingly that the plaintiff had not proved and could not prove a grant sufficiently ancient in favour of some person through which he claimed, as to vest any title in himself. Upon this defence Farwell, J., following *Fitzgerald* v. *Firbank* (26)—also relating to the natural right to the unpolluted flow of a natural watercourse—held that the plaintiff's possession was sufficient to enable him to maintain the action, being careful (as I wish to be careful in the present action) to limit his decision to the case before him and not to lay down a general rule applicable to all actions for nuisance. Upon this decision WINFIELD ON TORTS, 3rd edn., p. 460, observes :

> It is not obvious why the principle should have been stretched to nuisance of any kind, whether to a fishery or otherwise ; for to commit a nuisance to another person's property does not necessarily constitute a reflection on his title to it (the essence of conversion), and, even if it did, it is quite sufficient for the person who wishes to sue for nuisance to have possession of the property to enable him to bring the action ; in fact, he cannot sue unless he has possession. If that be the law, what has *jus tertii* got to do with the question ?

In the *St Neots* case (24) the plaintiff company's claim was in respect of the pollution of certain springs or sources, the water from which the plaintiff company claimed to be entitled to take by means of a well sunk and pipes laid by them in and over certain common land under a grant made in their favour by four persons purporting to act as, or on behalf of, the commoners. It was held that these persons had no right or title to make any such grant. But the plaintiff company alternatively claimed to be able to rely upon possession without title. It is to be noted that the plaintiff company's claim of possession related not to any part of the land itself (which was common land) but to an interest in the land which was in the nature of an easement, the title to which could only be acquired by grant or prescription. In the court of first instance GODDARD, L.J., held that a possessory title would not support an action for the protection of an easement and expressed the view that in the case of an easement for the support of a *building* the plaintiff must prove a title. The Court of Appeal held that the plaintiff company had in fact failed to prove possession. Upon the point material for present purposes, SCOTT, L.J., accordingly found it unnecessary to express any opinion ; but LUXMOORE, L.J., stated his view ([1939] 3 All E.R. 812, at pp. 823, 824), that, in the case of an easement such as was alleged in that case, a title must be shown, since the nature of the right asserted (*i.e.*, the right to carry water over the land of another) necessarily excluded the possibility of possession of the servient tenement. After referring to the *Ely Beet Sugar* case (23) and to *Fitzgerald* v. *Firbank* (26), he pointed (*ibid.*, at p. 823), to the distinction between an easement of the character with which the appeal was concerned and a *profit a prendre*, the latter being possessory in character and capable of existing in gross.

In my judgment, the *St. Neots* case (24) is wholly distinguishable upon its facts from the present case. Having regard to the nature of the plaintiff corporation's rights, none of the observations of LUXMOORE, L.J., would be applicable to them : nor do I think that the more general language of GODDARD, L.J. (which so far as it related to rights of support was limited to support for a building) could be, or was intended to be, referable to the state of facts in the present action. On the other hand, some support for my own conclusion is, in my judgment, fairly to be obtained on principle from the decision of FARWELL, J., in the *Ely Beet Sugar* case (23).

I refer finally to two passages in POLLOCK ON TORTS, 14th edn. At pp. 322, 323, it is stated :

> In the modern authorities [the conception of private nuisance] includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure.

Reference is made to the observations of SIR GEORGE JESSEL, M.R. (L.R. 20 Eq. 539, at p. 543), in *Jones* v. *Chappell* (27). At p. 341, under the heading "Parties," it is stated :

> As to the person entitled to sue for a nuisance : as regards interference with the actual enjoyment of property, only the tenant in possession can sue . . .

To this passage there is a footnote :

> Not a person who is there merely as a servant or licensee : *Malone* v. *Laskey* (21).

As regards the footnote, I have already referred to *Malone* v. *Laskey* (21), and to the judgment of SIR GORELL BARNES, P., therein.

It is to be observed that the passages which I have quoted from POLLOCK ON TORTS, 14th edn., appear, *totidem verbis*, in the last edition edited by SIR FREDERICK POLLOCK himself—see 8th edn. (1908), pp. 405 and 430 ; and (save for the footnote referring to *Malone* v. *Laskey* (21)) the same language is found in Sir Frederick's original text—see 1st edn. (1887), pp. 328 and 349.

I add two observations upon the above argument. (i) The conclusion at which I have arrived is, at least, satisfactory in the respect that a contrary conclusion would, as it seems to me, have conferred a wholly casual benefit upon the defendant company and their lessors by relieving them of part of their obligation to support the surface; for it is difficult to see how, *quoad* that part of the surface land which is in the exclusive possession of the plaintiff corporation, any one else could maintain an action for interference with the right of support. A (ii) On the view I have taken, I am disposed to agree with the submission of counsel for the plaintiff corporation that there was no room in the present case for the operation of the principle, illustrated in the *Dudley* case (6) and the *Normanton* case (7). The implication might, indeed, be said to be inconsistent with the rights of the plaintiff corporation as I have found them. The implied right of support derived from the Sanitary Acts would have carried with it the duty under those Acts of paying compensation to those entitled to the B minerals, whereas, according to the view I have taken, the plaintiff corporation's right of possession gave them at law and apart from their statutes the right to maintain an action to recover damages caused by any withdrawal of support and, on proof of apprehension of such damage, for an injunction to prevent its occurrence.

If I am right in the conclusion which I have expressed, my decision covers C the whole of the damages claimed by the plaintiff corporation. But having regard to the importance of the case I should, in case I am wrong, express my view on the two subsidiary claims which I have mentioned above. The first of these subsidiary matters may be stated thus, that, notwithstanding the general effect of the 1883 Act, the plaintiff corporation are still entitled, by virtue of the second part of sect. 4 of that Act, to recover such damages as they can prove to have been occasioned by the workings of the defendant company D otherwise than "in a reasonable and proper manner." Sect. 4 provides:

> Except as in this Act provided, a local authority shall not by reason only of anything contained in the Sanitary Act under the authority of which a sanitary work has been or is constructed or maintained be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine; and nothing in such Sanitary Act shall E be deemed to have subjected or to subject any such person to any liability to the local authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a reasonable and proper manner.

It has already been stated by judges that the section is difficult to construe, and I take this opportunity of adding myself to their company. The first part of the section, as far as the semicolon, appears briefly to have the effect of substituting (save as provided by sect. 5), for the right to recover in respect F of the removal of support by virtue of the provisions of the Act under the authority of which the pipes were laid (*i.e.*, "the Sanitary Act"), the rights derived from the so-called mining code contained in the Waterworks Clauses Act, 1847, ss. 18-27, made applicable (subject to the terms of the section) by sect. 3 of the 1883 Act. It is, therefore, difficult to see as a matter of construction how the second part of sect. 4 can have the effect of preserving, still less G of creating by inference, a right of action for damages arising out of the Sanitary Act in respect of unreasonable or improper working.

It is, however, unnecessary for me to attempt any further exposition of the intended effect of the second part of this section since I am not satisfied on the facts that any of the defendant company's workings were not "reasonable" or "proper" within the meaning which I attach to those words in the section, and in any case the plaintiff corporation, if and so far as such workings were H unreasonable or improper, have, in my judgment, not proved that any of the damage suffered by them can be attributed to such workings rather than to the general mining operations of the defendant company. It is not, I think, sufficient to establish that particular workings were unusual or contrary to the normal practice which would be followed in mining. If the workings are to be shown to fail to satisfy the condition of being reasonable, they must, as I think, be shown to have been such as cannot be reasonably explained or justified. Similarly, the workings can only be said not to have been proper if it is shown that in all the circumstances of the case and bearing in mind all the problems facing those responsible at the time, including the obligations of the mining lease, the decision taken was incorrect and such as could not be supported by technical men.

I now pass to the second subsidiary point made by the plaintiff corporation. This turns on sect. 5 of the Act of 1883. The first part of the section is plainly designed to save any rights conferred by express provision in any Sanitary Act or in any agreement or pending proceedings, whether in court or by way of arbitration. The second part of the section is in the following terms:

> Where any right of support has been acquired before the passing of this Act by a local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof, to which such person would not have been entitled if this Act had not been passed.

The argument of the plaintiff corporation was that some at least of their gas pipes were laid before the passing of the 1883 Act, *i.e.*, before Aug. 25, 1883, and that, since no compensation was or could ever have been payable in the circumstances in respect of those pipe-laying operations, the 1883 Act did not take away the rights which had been conferred upon the plaintiff corporation by virtue of the principle of the *Dudley* case (6) and the *Normanton* case (7), under the Sanitary Acts in question or otherwise.

Upon the construction of the material part of sect. 5 I have the guidance of the judgment of PARKER, J. ([1907] 2 Ch. 600, at pp. 616-618) in *Jary* v. *Barnsley Corpn.* (12), from which the present case differs upon the facts in that no assessment of compensation had ever been made. As regards the question of fact it was conceded that it would be sufficient for present purposes if the plaintiff corporation proved that any of their damaged pipes were, in fact, laid before Aug. 25, 1883, and that it would then be a matter for inquiry to investigate further which pipes throughout their whole system had been so laid, including in the inquiry all cases where the pipes originally laid had been replaced *in situ* by other pipes. On the evidence that has been submitted I hold that the plaintiff corporation have proved that some at least of their pipes were laid in their present position before Aug. 25, 1883. The question, however, remains whether it can be said, within the meaning of sect. 5 of the 1883 Act, that at the date of the passing of the Act any " compensation was recoverable " in respect thereof.

It is, of course, plain that if the plaintiff corporation's claims in regard to their pipes depend on rights, as I have found them, independent of their Sanitary Acts, there would have been no compensation payable in respect of those pipes at the material date. But on this view it is obvious that the plaintiff corporation do not require to rely on sect. 5 of the 1883 Act at all. The matter has, therefore, to be considered on the hypothesis that the plaintiff corporation's rights did depend upon the inference to be drawn from their Sanitary Acts by virtue of which the pipes were laid, following, as I have indicated, the principle laid down in the *Dudley* case (6) and the *Normanton* case (7). According to that principle the corporation would obtain a right of support as being necessary to make effective the powers conferred upon them by their Sanitary Acts; but for that right of support they would be liable to pay compensation if those interested in the minerals could successfully contend that they suffered any loss or injury as a result of the implied right of support. It is reasonably clear from the evidence that no proceedings had in fact ever been taken with a view to assessing such compensation. It is not, however, necessary that steps for assessing such compensation should be taken immediately the pipes were laid—a claim could be made and the compensation fixed at any time thereafter.

The argument of counsel for the plaintiff corporation, in the circumstances, was that by reason of the unqualified right of support which the surface owners (as distinct from the gas undertakers) had as against the mineral owners it necessarily follows that upon any proceedings for compensation there must have been an award of *nil*; in other words, that no compensation was ever payable and, therefore, that at the material date, *viz.*, Aug. 25, 1883, no compensation was recoverable. I find myself unable to accept that argument.

Nor do I accept the view that, because no claim was ever made or assessed, I should therefore assume that the mineral owners and those claiming under them must be taken to have abandoned any claim which they might otherwise have had. I have considered whether the use of the word "recoverable" should be taken to import that there must have been, prior to the date in question, an assessment or finding that some compensation was payable and that at the material date the sum awarded or some part thereof was outstanding. My view, however, is that, in order to satisfy the requirements of the section, the plaintiff corporation must either show that, compensation having been assessed, the whole sum had been paid, or, in the absence of any assessment, that no compensation could in any event properly have been awarded.

It is true that, upon the assessment of a claim, an arbitrator might have awarded no compensation or a purely nominal sum. The matter would, however, have been one entirely for the arbitrator's consideration bearing in mind all the relevant circumstances. And if it be correct that (notwithstanding the mineral owners' disregard in 1883 of the decision in *Hilton's* case (1)), the arbitrator must have taken into account the circumstance that, in law, the mineral owners had no right to let down or injure the surface land, he would also, in my judgment, have been entitled to take into consideration that the statutory right of support which the gas undertakers derived from their Sanitary Acts created a new and additional set of obligations for the mineral owners, and had introduced a new and powerful figure to the ranks of those with whom the mineral owners might have to reckon in the course of working the minerals. If counsel for the plaintiff corporation is right in suggesting that the correct award for the arbitrator to have made would have been nothing or a merely nominal sum (as on the assumed premises I greatly doubt), still it cannot, in my opinion, be said that any other award must have been bad or would have been absurd.

In this connection I refer to the observation of LORD ROBERTSON (87 L.T. 275, at p. 279), in *Edinburgh Water Trustees* v. *Clippens Oil Co.* (28) :

> . . . even if the facts . . . enabled the appellants to say that this circumstance reduced the compensation to zero instead of only to a "fractional part," the question would still have been within the arbitration and not outside it.

In that case an argument similar to that of counsel for the plaintiff corporation was put forward by the appellants in respect of certain of their waterpipes. For these pipes the appellants had no right of support other than that implied from their relevant private Acts ; but the pipes were placed in such close juxtaposition to other pipes of the appellants which they were entitled to have supported that damage to the former could not in fact occur, as it was claimed, without unlawful interferences with the latter.

I, therefore, hold, upon the hypothesis of the plaintiff corporation's rights of support prior to 1883 depending only on their Sanitary Acts, that they fail to satisfy the conditions for the preservation of such rights in accordance with the second part of sect. 5 of the 1883 Act. The conclusion of the whole matter is, therefore, in my judgment, that the plaintiff corporation either wholly succeed or wholly fail in the action according as they succeed or fail in establishing a right independent of the statutes. And since, in my judgment, they do so succeed, they are entitled to the relief which they now claim.

If the defendant company desires to investigate further, as it is entitled to do, the individual items of damage claimed, the form of order will be for an inquiry as to damages. But the parties may have agreed the appropriate figure or, if they wish me to do so, I will myself assess the sum to the best of my ability upon the basis of the findings at the beginning of this judgment. In either of the latter alternatives, the form of order will be that the plaintiff corporation do recover from the defendant company the liquidated amount so agreed or determined. As regards costs, the plaintiff corporation should strictly bear the actual cost of making a slight amendment to their particulars which I allowed during the hearing. But in a matter such as the present such costs would be of so trifling a character that I propose to ignore them. I think, therefore, that the defendant company ought to pay to the plaintiff corporation their general costs of the action. But as regards the subsidiary issue whether the defendant company failed to work in a reasonable and proper manner, an issue which called for much expert evidence, I have found in the defendant company's favour. I think, therefore, that the plaintiff corporation must pay the defendant company's costs so far as they relate to that issue. I do not feel any confidence that I can estimate the amount of such costs in relation to the general costs of the action so as to enable me to direct the defendant company to pay some fraction of the total costs. I must, therefore, follow the strict rule. The order as to costs will accordingly be that the defendant company do pay to the plaintiff corporation their taxed costs of the action save such costs as relate to the issue of unreasonable and improper working, but that the plaintiff corporation do pay the defendant company's taxed costs of that issue, with the usual provision for set-off. A

Judgment for the plaintiffs accordingly.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *J. Griffith*, Town Clerk, Newcastle-under-Lyme (for the plaintiffs) ; *Routh, Stacey, Hancock & Willis*, agents for *Ellis & Eills*, Burslem (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

B

PRESTON AND ANOTHER *v.* NORFOLK COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), July 11, 12, 1946.]

C *Agriculture—Agricultural holding—Compensation for disturbance—Notice to quit —Tenant refusing to leave—Judgment for possession—Whether tenant still entitled to compensation—Cost of threshing—Custom of the country—Jurisdiction of High Court to hear Special Case—Agricultural Holdings Act*, 1923 (*c.* 9), *ss.* 12, 16, *Sched. II.*

The claimants were yearly tenants of an agricultural holding owned by the respondents. The tenancy was, in due course, terminated by a notice to quit, during the currency of which the claimants gave notice that they intended to make a claim for compensation under the Agricultural Holdings Act, 1923, s. 12. The premises were not delivered up on the due date, and so a writ was issued and judgment obtained for possession. By an agreement between the parties there were incorporated in the judgment a number of provisions providing, in default of agreement, for reference to arbitration of, *inter alia*, the right of the claimants to compensation for disturbance and the cost of threshing certain crops which the claimants were, by the agreement, permitted to do on condition that the straw was left " free of cost " to the respondents : D E

HELD : (i) the question whether the claimants could claim compensation at all in the circumstances was one which the parties had power to refer to arbitration under the Arbitration Act, as distinct from the Agricultural Holdings Act, and, therefore, the court had jurisdiction to consider a Special Case stated by the arbitrator. F

(ii) as the subsequent judgment for possession was founded on the fact that the notice to quit had been given, the claimants, when they were ejected, left the premises " in consequence of " the notice to quit within the meaning of the Agricultural Holdings Act, 1923, s. 12, and were, therefore, entitled to compensation.

G *Mills* v. *Rose* (6) *followed ; Cave* v. *Page* (5) *discussed.*

(iii) by the agreement in the judgment the parties intended that exactly the same state of affairs should apply as though the arbitration were held at a time when the claimants were going out in the ordinary way without the intervention of the court, and, consequently, in accordance with the custom of the country, the claimants were entitled to the cost of threshing the straw crops.

H (iv) the incorporation in the judgment of provisions for arbitration in certain matters in dispute between the parties was undesirable because none of the issues on those matters had been before the court which was, therefore, made to give judgment upon matters which were not the subject of any action.

[**EDITORIAL NOTE.** This decision, it is submitted, is of wider application than the mere determination of a question of the interpretation of sect. 12 of the Agricultural Holdings Act, 1923. The proposition, to use the words of ATKIN, L.J. in *Mills* v. *Rose*, [1923] W.N. 330, at p. 332, that, although a tenant is put out by a writ of execution, he none the less quits the holding in consequence of a notice to quit, in as much as the landlord's right to a judgment in ejectment depends on the notice to quit, would seem to apply to the general law of landlord and tenant and not only to the law relating to agricultural holdings. Another interesting point is that the court deprecates the incorporation in the judgment of provisions for arbitration in various matters in dispute between the parties.

As to Compensation for Disturbance, see HALSBURY, Hailsham Edn., Vol. 1, p. 361, para. 594; and for Cases, see DIGEST, Vol. 2, p. 48, Nos. 265, 266.]

Cases referred to: A

(1) *Lowther* v. *Clifford*, [1927] 1 K.B. 130; Digest Supp. 95 L.J.K.B. 576; 135 L.T. 200.

(2) *Olive* v. *Paynter*, [1932] 2 K.B. 666; Digest Supp. 101 L.J.K.B. 786; 148 L.T. 65.

(3) *Hendry* v. *Walker* (1927) S.L.T. 333; Digest Supp.

(4) *Donaldson's Hospital (Edinburgh) Trustees* v. *Esslemont* (1926), S.C. (H.L.) 68; Digest Supp.

*(5) *Cave* v. *Page*, [1923] W.N. 178; Digest Supp. 67 Sol. Jo. 659. B

*(6) *Mills* v. *Rose*, [1923] W.N. 330; Digest Supp. 68 Sol. Jo. 420.

Special Case stated by an arbitrator. The facts are fully set out in the judgment.

Percy Lamb for the claimants.

Kenneth Diplock for the respondents. C

Lord Goddard, C.J.: This is a Special Case stated by an arbitrator, but it is necessary to give the history of the matter and how the matter came to go to arbitration at all. Messrs. Prestons, who are the claimants in the arbitration, were tenants of a farm held by them from the Norfolk County Council under an agreement dated Dec. 9, 1921, which conferred upon the tenants an annual tenancy. That tenancy was, in due course, terminated by a notice D to quit from the county council, and that notice to quit was dated Oct. 9, 1941, to have effect on Oct. 11, 1942.

On Sept. 8, 1942, while the notice was current, the present claimants gave notice to the county council that they intended to make a claim for compensation under the Agricultual Holdings Act, 1923, s. 12.* It is not suggested, nor has it ever been suggested, that the notice to quit was given for any of the reasons which in ordinary circumstances would disentitle the claimants to compensation. E They did not, however, give up possession of the farm. I am not concerned with the reasons why they did not give up possession except to say that they apparently, among other things, challenged the validity of the notice to quit. Consequently, on Oct. 13, 1942, a writ was issued to recover possession of the land. A defence was put in which raised certain defences, which I need not particularise because they are quite immaterial for this purpose. The action was tried before Oliver, J., at the Norfolk Assizes, held at Norwich, and judg- F ment for possession was given on June 7, 1943. So far as the judge was concerned, the only judgment that he gave was judgment for possession, and that was the only matter which was raised in the action before him. But after he had given judgment some discussion took place between counsel as to what was to happen with regard to what is commonly called the away going crops, and so forth. Of course, Messrs. Prestons ought to have left this farm in Oct., G 1942, but they held over for some 9 or 10 months after they ought to have quitted. No doubt they had done certain sowings and cultivations and various other matters, and whether they were entitled to payment in respect of those cultivations, as they were holding over and wrongfully holding over, might have been the subject of discussion and decision in another action.

The judge, having given judgment for possession only, the parties then agreed amongst themselves to incorporate in the judgment a large number of provisions H of a somewhat elaborate character providing for arbitration on a large number of points which were never the subject matter of the action at all. Speaking as a judge of this Division, I should like to say that I do not think it is desirable that these matters should be incorporated in the judgment. The parties could have applied to the judge to stay execution if they liked. I do not think the judge would have stayed execution for a moment, but while the matters which were included in this judgment were very necessary to be decided between the parties and very likely the proper subject of an arbitration in one form or another, it does not seem to me that they properly formed part of the judgment because none of the issues on those matters had ever been before the judge at all. Therefore, the court is made to give judgment upon matters which were not the subject of any action.

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* By sect. 12 (1) of the Agricultural Holdings Act, 1923: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section . . ."

I need not say any more about that because following on the terms of this bargain which they made and incorporated in the judgment at great length, an arbitrator was appointed, and among the things which had to be dealt with by the arbitrator was the compensation given by statute to the farmer where an annual tenancy of an agricultural holding is determined, and a variety of other matters which I may refer to shortly as relating to the cultivations. One of the matters was with regard to the compensation provided for in cl. 4 of the judgment. It says:

> The following matters are to be dealt with by valuers appointed by the parties, and, if necessary, by arbitration, the arbitrator stating a case on any point of law at the request of either party, namely, the defendants' claims (*a*) for compensation for disturbance under the Agricultural Holdings Act, 1923, s. 12: (*b*) for the cost of threshing; (*c*) for unexhausted manurial values, and costs to be taxed.

I ought perhaps to have said that the judge is by this judgment made to direct although he did not give directions on the matter, that possession was to be given to the plaintiffs on Oct. 11, 1943, and then a variety of things relating to the cultivations are set out.

That judgment was given on June 7, 1943, and after very considerable delay, with which again I am not concerned, on Dec. 7, 1945, that is 2 years and 6 months after the judgment, the parties seem to have agreed upon a submission to arbitration. No doubt the valuers had been busy meanwhile and had not agreed. The matter went to arbitration and an elaborate submission was drawn up appointing the arbitrator, and he has stated a Case for the opinion of this court.

The first point which arose in the case was a point which I took because it did not seem at all clear to me, until I had had the matter argued, whether I had any jurisdiction in the matter. I was not satisfied at first whether the parties were entitled, in view of the provisions of the Agricultural Holdings Act, to have this form of arbitration and to have a Case Stated for the opinion of this court and not for the opinion of the county court. The Act provides in s. 16:

> Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding . . . shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the second schedule to this Act.

I will just state in passing that one of the provisions in sched. II to this Act is that if a Case is demanded, it must be a Case stated for the opinion of the county court. The opinion of the county court judge is taken on any question of law and then an appeal lies straight to the Court of Appeal from him. Therefore, I required to be satisfied, as there was a claim here by the tenant for compensation, that the arbitrator had any jurisdiction. I had to be satisfied that the parties had got power to refer the matter to the arbitrator under the ordinary Arbitration Acts. If they had got power to refer the matter under the ordinary arbitration Acts, then this court has power to consider the Special Case stated by the arbitrator. The question has never in terms been decided in this country. My attention was called to two cases in which the Court of Appeal has discussed this section, *viz.*, *Lowther* v. *Clifford* (1), and *Olive* v. *Paynter* (2), but neither of those two cases touch the main point which was raised by me in considering whether I had jurisdiction to hear the case. The point which is made here—and both parties were anxious that I should hear this Special Case—is that the amount of compensation, if any, was agreed; what had to be decided was not anything as to the amount of compensation but whether in the circumstances which happened here the claimants were ever in a position to apply for compensation—whether they had a right to compensation. Reliance was placed to some extent upon s. 54 of the Act, which says :

> Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy . . .

It was suggested that the question whether or not the defendants could ever establish that they were persons entitled to compensation under s. 12 was a matter which was outside the Act, or, at any rate, which did not come within s. 16.

I think to a great extent I am relieved from the necessity of discussing this point at length because the researches of counsel for the respondents enabled him to place before me two cases from the Court of Session in which this very point has arisen. The first is *Hendry* v. *Walker* (3). It was a case in the Outer House, which corresponds to a case before a judge of first instance here, and this very point was raised before LORD CONSTABLE. He held that he had authority to hear the case, that an action lay, and that the matter was not one which by the statute was obliged to go to arbitration under sched. II to the Act. He held that the court had jurisdiction to try the question where the question was one precedent to the existence of any statutory claim. It was argued in that case that the respondent Walker had no claim to compensation, and the pursuers in the action sought to restrain him from pursuing his claim. It was said in that case, as I thought at first it might well be said here, that this relates to a question or difference arising out of a claim for compensation, and, therefore, must go to arbitration under the Act. As I say, LORD CONSTABLE held to the contrary, and he founded his judgment largely on a decision of the Court of Session in the division, which is tantamount to the Court of Appeal here, in *Donaldson's Hospital* v. *Esslemont* (4).

I have considered that case as well as *Hendry* v. *Walker* (3), and I think they are clear decisions by the Court of Session that the question which has to be decided in this case, namely, whether the claimants are persons who can claim compensation at all, is a question which can be decided by the court, and, therefore, can be decided by the arbitrator. Without expressing any further opinion on the matter, I shall hold that I have jurisdiction, if for no other reason than that it is eminently desirable that the decisions of the two countries should correspond. It would be an unfortunate thing in this class of legislation (because although the Scottish courts act under the Agricultural Holdings (Scotland) Act, the provisions are exactly the same) if one state of affairs prevailed on one side of the border and another state of affairs prevailed on the other side, just as under the Workmen's Compensation Act it has always been the object of both the Court of Session and the Court of Appeal to keep the decisions in cases tried in one country in accordance with the decisions in the other so that there are corresponding decisions in similar cases. Of course, if I thought a decision was wrong, I should not consider myself bound by the decision of the Court of Session. The arguments in *Donaldson's* case (4) are very strong, and, accordingly, I am satisfied that the parties had power to refer this matter to arbitration under the Arbitration Act as distinct from the arbitration provided by the Agricultural Holdings Act, and, therefore, I have jurisdiction to hear the special case.

The arbitrator, on the first point which arises in the case, states this :

> The respondents contended that the claimants were not entitled to compensation for disturbance : (*a*) Because the claimants had not quitted the holding in consequence of the notice to quit served upon them, which notice they had claimed to be invalid, but had finally given possession of the lands and tenements by reason of the beforementioned judgment of the High Court. (*b*) That the particulars required by the Agricultural Holdings Act, 1923, s. 16 (2), were not given by the claimants before the expiration of two months from the termination of the tenancy . . . It was admitted and agreed that the particulars required by the Agricultural Holdings Act, 1923, s. 16 (2), were given by the claimants by a document dated Nov. 18, 1943.

He, therefore, asks whether the claimants are entitled to any compensation for disturbance.

In short, the argument which is put before me on behalf of the respondents comes to this, that because they held over, as the court found, wrongly, they were from Oct. 11, 1942, trespassers, and were not, therefore, entitled to compensation because, although a notice to quit had been given, they did not quit in consequence of the notice but in consequence of a judgment of the High Court.

The first point (before I come to the authorities) which counsel for the respondents has taken is this. He relies very strongly on s. 57 of the Act of 1923 A in which "holding" is defined and a "tenant" is defined. In that section it says:

> "Tenant" means the holder of land under a contract of tenancy . . . "Holding" . . . means any parcel of land held by a tenant . . .

I do not think I need read any other words because I think those are the only material words. That says "land held by a tenant", and counsel says when the tenancies come to an end, there is no land held by a tenant. If that argument B was followed out to its logical conclusion, it would prevent any tenant getting any compensation after the tenancy had expired, because, of course, directly the tenancy expires, which is the time you make your claim for compensation, there is no holding.

In this particular case, as I have already said, and I think it is not without materiality when one is considering the authorities, on Sept. 8, 1942, during C the currency of the tenancy the claimants did give notice of their intention to claim. In my opinion when one is considering the meaning of the word "holding" in the definition which is given in sect. 57, one must, in these circumstances, read it as meaning "held or which has been held by a tenant." It is a holding of agricultural land, and the Act is dealing with an agricultural holding. Questions may arise with regard to agricultural holdings either during the tenancy or when the tenancy has expired, and in the ordinary course D any question of compensation does not come to be dealt with until after the tenancy has expired when there is no holding in existence. The Act requires in sect. 12, (7) (*b*) that a notice of intention to claim shall be given not less than one month before the termination of the tenancy. Sect. 16 (2), which is dealing with arbitration, provides:

> Any such claim, [that includes a claim for compensation] . . . shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the E landlord, as the case may be, before the expiration of that period.

That, at any rate, shows that the compensation is to be assessed after the land has ceased to be a holding in the sense that the contract of tenancy has expired.

Now the question is: What is meant by the words in s. 12 of the Act of 1923: "and in consequence of such notice the tenant quits the holding"? It seems F to me that the point I have to decide has been the subject of two cases in the Court of Appeal which I find it difficult to reconcile. The first was *Cave* v. *Page* (5). That was not a case under either the Act of 1920 or the Act of 1923. There were very similar, but different, provisions. In that case the appellant, who claimed compensation for disturbance under such rights as were given him by the Act of 1908, *i.e.*, that he had been disturbed without good and sufficient cause, received notice to quit which expired on Mar. 25, 1920. He G did not leave the premises, and proceedings for ejectment were started against him on Oct. 16, 1920, and judgment was given on Nov. 5, 1920, though the warrant was not executed, it being stayed until Jan. 1, on which day he was ejected by the bailiff. He furnished particulars of his claim for compensation, or details, as the report calls them, on Dec. 29, 1920. There is no statement in the report whether he had given notice of intention before. The landlord contended that the claim was not made within 3 months of the time at H which the tenancy was ended. The question asked in the Special Case was whether the tenant was entitled to compensation under sect. 11 of the Act, notwithstanding that 9 months had elapsed between the termination of the tenancy and the furnishing of the claim, and in view of the fact that the claim was made within 3 months of the end of the tenancy. The county court judge answered the question by saying that the tenant was not entitled to the compensation mentioned in the Special Case.

I pause there for a moment to say that it is quite clear what the actual point of the decision of the court in that case was. It was that as he had not furnished the details of his claim for compensation until Dec. 29, 1920—notice to quit having expired on Mar. 25, 1920, and judgment having been given on Nov. 5, 1920—had he or had he not lost his right. SIR HENRY DUKE, said this ([1923] W.N. 178, at p. 179):

> This case turns on the meaning of the words 'the time at which the tenant quits the holding.' In order to ascertain their meaning it is proper to refer to sect. 48 of the Act. 'Holding' means any parcel of land held by a tenant . . . and 'tenant' means the holder of land under a contract of tenancy. When these meanings of 'tenant' and 'holding' are substituted for the words themselves, the proviso to sect. 11 reads thus: "No compensation under this section shall be payable (*d*) if the claim for compensation is not made within three months after the time at which the holder of land under a contract of tenancy quits the parcel of land held by him under the contract of tenancy." From March 25, 1920, onwards the appellant was not holding under a contract of tenancy, and the land which he persisted in occupying unlawfully was not a holding within the meaning of sect. 11. Consequently he fails to bring himself within the benefit of the Act. A B

BANKES, L.J., who agreed, based his judgment on the footing that the expression "quits the holding" does not mean takes his final departure from the holding but means the end of the tenancy—at least, that is as I understand the judgment. He says (*ibid.*):

> It is inconsistent with the policy which must underlie a statute intended to benefit those who keep and not those who break their contracts; secondly, the interpretation section negatives the meaning Mr. Bosanquet would attribute to the words; and, thirdly, sect. 9 uses the similar expressions, 'quits the holding' and 'quitting the holding'; but if Mr. Bosanquet's meaning were given to these expressions it would defeat the object of that section. C

Perhaps before I leave that case I ought to say that in this case there is not only the express finding (because we get that from the various documents which are attached to the case) that the claimants did give notice of their intention to claim in time, but by the terms of the submission to arbitration, it is expressly provided that the arbitrator is to proceed: D

> In accordance with the provisions and terms of the Small Holdings and Allotments Acts, 1908 to 1926, and the Agricultural Holdings Act, 1923, (in so far as the same are applicable) other than the provisions of sect. 16.

Counsel for the repondents has agreed that he cannot in this case rely, in view of the words which expressly eliminate sect. 16 from the consideration of the arbitrator, on the provision in sect. 16 that the particulars of the claim are to be furnished in a particular time, which was the point and the real point in the case to which I have just referred. But he has strenuously argued that those words point towards the construction for which he contends, namely, that it cannot be said that a man who holds over after the termination of the tenancy has any claim because the material time for the particulars of his claim is the time when the tenancy ends, but the case does not say what would have happened if the tenant in that case, that is to say, the appellant Cave, had given particulars of his claim although he did not go out. E F

That case was followed very soon afterwards by *Mills* v. *Rose* (6), a case in many respects similar to the present case. A tenant there had received notice to quit, and no doubt it is right to say on the findings of the arbitrator he intended to go out. He did let his landlord take possession of the property so far as it consisted of land, but because of the illness of his wife he did not leave the house. It may be that his wife was not very ill—I do not know—or it may be that the landlord thought that she had recovered, because the landlord took proceedings against him to recover possession of the house, which was, of course, part of the holding, and he was actually put out by the sheriff. The facts of the case were that on Mar. 23, 1921, the landlord gave the tenant notice to quit on Mar. 25, 1922. On Feb. 18, 1922, that is to say while the notice to quit was current, the tenant gave notice of his intention to claim compensation. He did not go out. On May 18, 1922, the landlord issued a writ and recovered judgment in default of appearance, and on June 28 the writ of possession was executed. Then when he claimed compensation the matter was dealt with by the arbitrator, and the arbitrator stated and purported to find as a fact that by a letter which he wrote the tenant did quit in consequence of the notice to quit. BANKES, L.J., treated this matter very largely as a question of fact. With very great respect, I have some little difficulty in understanding how it was merely a question of G H fact unless what the arbitrator meant, and what BANKES, L.J., thought was the effect of his finding, was that, as the land was given up in accordance with the notice to quit and as the tenant only claimed to stay on and only in fact stayed on because of the illness of his wife, he always meant to give up the place but just stayed on because of the illness of his wife. But the fact remains that he did not give up until he was ejected under the writ of possession.

It would appear from the report of the case that the argument which was A presented to the court was that the tenant did not quit because of the notice to quit; he quitted because of the judgment. I think I had better read the judgment. BANKES, L.J., said ([1923] W.N. 330, at p. 331) :

> On the statement in the arbitrator's letter of Apr. 21 no question of law arose, unless it be the question whether there was any evidence on which the arbitrator could find, as he did, that the tenant quitted the holding in consequence of the notice to quit. It is impossible to say there was no evidence on which the arbitrator could so find. B The Special Case does not enable us to decide whether the tenant did or did not in fact leave in consequence of the notice. It states that the tenancy was determined by notice to quit served by the landlord on the tenant to expire on March 25, 1923. It goes on to state that there is a custom under which the tenant might lawfully remain on after the expiry of the notice; but it does not state what the custom is, whether the tenant may continue to hold the land, or the land and buildings, or the land, the buildings, and the house. It does state that the tenant gave up possession save as under the custom. If he did it can hardly be said that he left otherwise than in con- C sequence of the notice to quit. However, it seems that the landlord issued a writ in ejectment, got judgment, and proceeded to execute it; but that was in consequence of the notice to quit. In my view a tenant, who quits a holding because he has got a notice to quit, quits the holding in consequence of the notice to quit.

Then SCRUTTON, L.J., agreed, and he said that taking the facts most favourable, as he supposes, to the landlord (*ibid.* at p. 332) :

> D . . . . he duly gave notice to quit to the tenant, who quitted part of the holding but held on to the rest till he was ejected by a writ of possession . . . I agree that the proceedings were in consequence of the notice to quit, and I see nothing which would entitle the landlord to any finding other than that the tenant did quit the holding in consequence of the notice to quit.

ATKIN, L.J., puts the case extremely shortly and extremely directly. He says (*ibid.*) :

> E Although the tenant was put out by a writ of execution, he none the less quitted the holding in consequence of a notice to quit, inasmuch as the landlord's right to a judgment in ejectment depended upon the notice to quit.

That case seems to me to apply exactly to the facts of the present case, and in my opinion, although I have some difficulty in reconciling the two cases, just as LORD CONSTABLE did in the Scottish case to which I have already referred, this judgment commends itself to me and I think I ought to hold myself bound F by it. The effect of the judgment, as I understand it, is this, and no more and no less than this. An annual tenancy continues until a notice to quit is served. If the notice to quit is served and that determines the tenancy, then, although the tenant may wrongfully refuse to leave, as the judgment for possession is founded on the fact that the notice to quit has been given, the tenant, when he is ejected, leaves the farm in consequence of the notice to quit. It seems, if I G may say so, not only good law but good sense. I pointed out in the course of the case that the correct pleading in the case would be that the landlord would sue for possession; the tenant would answer by way of defence : " I am in possession under a demise to me for a year. I am tenant from year to year; " and the reply to that would be : " True it is that the land was demised to you from year to year, but that demise has been determined by reason of a notice to quit, and, therefore, I ask for possession." If the landlord gets possession and the H tenant is ejected, he is ejected because effective notice to quit has been given which determines the tenancy.

I prefer to follow the decision in *Mills* v. *Rose* (6) for a number of reasons. The first reason is because it is decided under the Act of 1920 which is exactly reproduced by the Act of 1923, and the earlier case was decided under the Act of 1908. Secondly, the question which arose in the case of *Cave* v. *Page* (5) seems to me to have been entirely a question whether or not a certain notice was given in time, that is to say, within the statutory time after the expiration of the tenancy. No such question arises here. The third point is that in this case, as in the case of *Mills* v. *Rose* (6), the notice of intention to claim is expressly found to have been given during the currency of the notice to quit, and no question in this case can arise with regard to the delivery of particulars because that has been excluded from the consideration of the arbitrator. The fourth reason is because I think the reasoning of ATKIN, L.J., and also of SCRUTTON, L.J., appears to be exactly to the point which arises in this case, and, if I may respectfully say so, commends itself to me much more than any other reasoning which may have influenced the court in the earlier case. Having read it now, I am not altogether satisfied that the court in the earlier case were ever considering the point which I have to decide here. At any rate, I shall hold that I am bound by *Mills* v. *Rose* (6), and even if I were not and if there had not been that case, I am bound to say that it is reasoning which I think I should have come to on my own account, because it does seem to me it is a matter of common sense that the tenant leaves in consequence of a notice to quit if he is ejected because a notice to quit has been given.

At one moment some difficulty occurred to me as to why the words " and in consequence of such notice the tenant quits the holding " were put in unless it meant to afford a defence by saying that it was not in consequence of the notice ; it was in consequence of something else that the tenant quitted the holding. Counsel for the appellants has satisfied me that there is a good reason for those words because he pointed out there may be a case of the tenant buying the freehold. We know these days and for a good many years now it has been usual on the break-up of big estates to give the tenants every opportunity of buying their land, but, of course, as a prelude to it their tenancies have always to be terminated ; I mean, notices to quit have had to be served so that prospective purchasers can outbid the tenants. It would be undesirable to sell the estate while the tenancies were still subsisting. I think the explanation given by counsel is probably the correct one, that it is put in to deal with the case where, although the tenant's holding has been terminated by a notice to quit, the tenant has not in fact quitted the farm but has bought. I, therefore, come to the conclusion in this case that the tenants were entitled to compensation, the amount of which is agreed and with regard to which I need not deal.

I now come to another point, which again is a somewhat curious point. In the judgment, or, rather, in the agreement which is made part of the judgment, it is provided—I think I have already read these words but I will read them again :

> Possession of the remainder of the holding to be given to the plaintiffs on Oct. 11, 1943, subject as follows and as marked on Plan B attached,

and one of the matters to which, apparently, it is made subject is this :

> The defendants to be allowed to thresh and sell off the holding, the peas, wheat and oats now growing on specified fields on condition that the straw is left free of cost to the council.

Then in para. 4 of the judgment it is provided :

> The following matters are to be dealt with by valuers appointed by the parties, and, if necessary, by arbitration, the arbitrator stating a case on any point of law at the request of either party,

And among those things is the cost of threshing.

What apparently happened was that the tenants, the claimants in this case, had left certain crops on the farm and they were unthreshed, and, accordingly, this agreement was provided in order to allow the claimants, although they were ejected from the farm, to return to the farm to thresh these crops, leaving the straw on the premises. Now in the submission to arbitration there is, it seems to me, a most important provision with regard to this. Again, I think I have read it once, but on this part of the case I had better read it again :

> The claimants and respondents hereby further agree and direct that the arbitrator shall determine the said matters in dispute and differences in accordance with the provisions and terms of the Small Holdings and Allotments Acts, 1908 to 1926, and the Agricultural Holdings Act, 1923, (in so far as the same are applicable) other than the provisions of sect. 16 and sched. II of the Agricultural Holdings Act, 1923, and the agreement or agreements of tenancy between the parties relating to the holding and the custom of the country.

That is what the arbitrator is told to do. He has got, in deciding these questions, and this question in particular, to have regard to, and not only to have regard to, but to decide in accordance with, the agreement or agreements of tenancy and the custom of the country. It is said here that neither the agreement nor the custom of the country really have anything to do with it. It is simply a provision made in the terms which were incorporated in the judgment that the landlords are to have the straw free of cost, and, therefore, they cannot be charged with the cost of threshing. I am perfectly satisfied, applying my mind to the construction of this document, and doing what I am entitled to do, *i.e.*, having regard to the surrounding circumstances, that both parties in this case intended that the arbitrator should deal with this matter exactly as though there had been no holding over or no action or anything of that sort, but was dealing with this matter at the end of a tenancy and dealing with it just in the way that an agricultural valuer or agricultural arbitrator deals with a matter between the landlord and tenant when the tenant goes out and hands over the farm to his landlord. To some extent I rather regret that the Norfolk County Council have taken this point because I think it was clearly intended that the arbitrator should decide exactly as he would have done if there had not been this unfortunate action or anything else between the parties and the possession of the land had been given on the contract date. That seems to me to be quite clear. One of the reasons why that impresses me very strongly is this. Observe the words of the agreement "on condition that the straw is left free of cost to the council." I have no doubt the draughtsman of this submission to arbitration copied those words from, or used them because they were in, the agreement, and in the agreement one of the covenants by the tenant is :

> To leave the straw from the last year's crop of corn to be taken free of cost by the council or their incoming tenant in return for the threshing, dressing and delivering of the grain therefrom to any place not exceeding the distance of 10 miles.

Now the arbitrator in his award has stated this :

> The respondents contended that the claimants are not entitled to anything in respect of the cost of threshing because by paragraph 2 (c) of the above judgment the claimants were only allowed to thresh and sell off the holding the crops mentioned in that paragraph on condition that the straw was left free of cost to the respondents and that if the respondents are required to pay for the threshing it could not be said that the straw was being left for them free of cost . . . the question for the opinion of the court is whether, upon the facts, the terms of the submission and the appended documents, the claimants are bound by the terms of the judgment or whether the custom of the country (which would have given them the cost of the threshing) prevailed.

In other words, the arbitrator is saying—I will elaborate this in a moment—"If I am entitled to look at the custom of the country, then whether these words 'free of cost' are there or not, the claimants contend"—that is what he has said—"that under the custom of the country, if this is a mere case between an outgoing tenant and his landlord, the landlord would have to pay, if he is going to take the straw, for the cost of the threshing." Unfortunately the arbitrator has not set out in full what the custom in Norfolk is on this subject, but it was agreed—and I want to make this quite clear in case this matter goes to the Court of Appeal—that although in an ordinary case one is almost always entirely bound by the terms of the Special Case and one cannot go outside it, to prevent this case going back to the arbitrator to ask him to find in full what the custom was to which he refers, it was agreed that we should look at the custom of the country as set out in two books which are well known authorities and are cited to the courts in these matters : JACKSON ON AGRICULTURAL HOLDINGS AND TENANT RIGHT VALUATION, and a book with which I am even more familiar, DIXON'S LAW OF THE FARM. There is no substantial difference between the custom as set out in JACKSON (9th edn., p. 329), and the custom as set out in DIXON (5th edn., pp. 637, 638). The custom in regard to straw is this :

> The incomer threshes and dresses all corn grown during the last year of the tenancy and delivers it within a certain distance, receiving the chaff and straw for so doing. If the outgoer threshes before Michaelmas, he must protect the straw and an allowance is made [*i.e.*, an allowance for the threshing]. Special customs prevail on certain estates.

In DIXON the custom is set out in almost identical words except that he deals a little more elaborately with the customs on the Holkham Estates. Of course, everybody knows what great importance is attached in agriculture to agricultural customs and the great importance which has been attached in Norfolk to anything done on the Holkham Estates.

In substance we have got the finding of the arbitrator that the custom of the country would have given this cost to the tenant if the matter were dealt with at the end of the tenancy. The custom contemplates that the threshing will not have been done by the outgoing tenant but will be done by the incoming tenant, and provides that the straw is to be taken free of cost by the landlord or the incoming tenant in return for the threshing. Counsel for the respondents says with a good deal of force: "It is right to use the words 'free of cost' in that respect because he gets the straw without paying for it though he has to do certain work for it, but in this case he is being asked to pay a sum of money." It seems to me there is little difference whether he has to pay money or give money's worth because he would have to pay the wages of his men who thresh the corn and deliver it, and so forth. Therefore, in no circumstances could it be said, if the custom was the material point, that the landlord would get it free of expense. He may get it in one sense free of cost if he does not have to pay for the straw, but to get the straw he would have to expend time and wages in the threshing and so forth.

In the present case it was agreed that the outgoing tenants were to be allowed to do the threshing. The corn was not threshed by the incoming tenant. The arbitrator says:

> The custom of the country, as I find it, is that under those circumstances the tenant is given the cost of the threshing, that is to say, the outgoing tenant is paid the cost of the threshing.

And then in accordance with the statement of the custom of the country in Jackson, it states that an allowance is made, the allowance which the arbitrator finds is the cost of the threshing.

It is said that this is all done away with by reason of the terms agreed to in the judgment. I do not think it is. I think the judgment, or the agreement in the judgment, fairly construed in the light of the surrounding circumstances, is that it was intended that the tenant should thresh this corn and leave the straw on exactly the same terms as he would if the custom of the country applied, otherwise I do not see the point of including in the submission a direction to the arbitrator that he is to decide the case in accordance with the provisions of the agreement and the custom of the country. I think it is reasonably clear, and in fact I have no doubt about it, that at the time this was drawn, the people acting for the county council borrowed those words "free of cost" from the tenancy agreement and intended that exactly the same state of affairs should prevail in the arbitration as though the arbitration was held at a time when the tenant was going out in the usual way without the intervention of the court or anything else. They do get the straw without paying for the straw; they have to pay for the threshing but they get in return for that the straw. In my opinion the claimants are entitled to succeed on that claim as well.

With regard to the third point which was raised in the case, that deals with small seeds. I had better just refer to it, although no question arises on it now. With regard to (*c*), that arose because in the judgment it was provided that with regard to small seeds—I am afraid I am not enough of a farmer to know what the difference between seeds and small seeds is but I assume it is grass or something of that sort:

> A fair allowance to be made to the defendants towards the cost of guaranteed small seeds sown on 11 acres of field No. 303 on plan in accordance with the condition of the plant at the termination of the occupation.

Those are the material words "in accordance with the condition of the plant at the termination of the occupation."

Here again that is just exactly what an agricultural valuer or arbitrator would take into account if he was valuing between an outgoing tenant and his landlord or an incoming tenant. What the arbitrator finds in this case is that although 11 acres of small seeds was sown, the crop unfortunately failed and, therefore, was valueless and was ploughed in. Therefore, he has awarded nothing and counsel for the appellants has not pressed that point.

The result is this. On the questions submitted by the arbitrator I answer them in this way: With regard to question (*a*), the claimants are entitled to compensation for disturbance and the amount of that compensation is agreed at £212 10*s.* 0*d.* With regard to question (*b*), the claimants are entitled to be paid the amount of £101 5*s.* 0*d.*, the cost of the threshing referred to in the case. With regard to question (*c*), the award of nothing to the claimants in that respect is upheld. The question of costs is dealt with by the arbitrator and it is not a matter for me. The claimants will have the costs of this hearing.

Leave to appeal.

Solicitors: *Tarry, Sherlock & King*, agents for *Blyth & Hornor*, Norwich (for the claimants); *Sharpe, Pritchard & Co.*, agents for *H. Oswald Brown*, Clerk to the Norfolk County Council (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

READ *v.* J. LYONS & CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt), May 13, 14, 15, 16, 20, 21, 23, October 18, 1946.]

Negligence—Dangerous article—High explosive—Shell-burst in ordnance factory—Liability of occupier to invitee.

Nuisance—Principle of Rylands v. *Fletcher—Liability conditioned by elements of " escape " and " non-natural use "—Shell-burst in ordnance factory.*

The respondents, under an agreement with the Ministry of Supply, undertook the operation, management and control of an ordnance factory as agents for the Ministry, and carried on in the factory the business of filling shell cases with high explosives. The appellant was an employee of the Ministry, with the duty of inspecting the filling of shell cases, and, while lawfully in the shell-filling shop in discharge of her duty, was injured by the explosion of a shell. In an action for damages for the injuries sustained no negligence was averred or proved against the respondents. CASSELS, J., who tried the case, considered it was governed by *Rylands* v. *Fletcher* (1), and held that the respondents were liable on the ground that they were carrying on an ultra-hazardous activity and so were under a " strict liability " to take successful care to avoid causing harm to persons whether on or off the premises. The Court of Appeal (SCOTT, MACKINNON and DU PARCQ, L.JJ.) reversed this decision, holding that a person on the premises had, in the absence of any proof of negligence, no cause of action, and that there must be an escape of the damage-causing thing from the premises and damage caused outside before the doctrine of *Rylands* v. *Fletcher* (1) could apply:—

HELD: (i) the manufacture of high explosive shells was not in law an operation which imposed on the manufacturer an absolute liability for any personal injuries which might be sustained in consequence of the operations.

(ii) the appellant was a person present in the factory in pursuance of a public duty, and was, consequently, in the same position as an invitee, and the fact that the work that was being carried on was of a kind which required special care was a reason why the standard of care should be high, but it was no reason for saying that the occupier was liable for resulting damage to an invitee without proof of negligence at all.

(iii) the strict liability recognised by the House of Lords to exist in *Rylands* v. *Fletcher* (1) was conditioned by two elements—the condition of " escape " from a place of which the defendant has occupation or over which he has control to a place which is outside his occupation or control of something likely to do mischief if it escapes, and the condition of " non-natural use " of the land, and, as the essential condition of " escape " was absent in this case, the respondents were not liable.

Decision of the Court of Appeal ([1945] 1 All E.R. 106), *affirmed.*

[**EDITORIAL NOTE.** LORD SIMON utters a warning against any tendency there may be lightly to extend the principle in *Rylands* v. *Fletcher* (1) beyond the strict limits laid down by the House of Lords when that famous case was before it. It is essential, says the Lord Chancellor, that the conditions then declared by the House to be necessary for the existence of absolute liability should be strictly observed, and he

bases his opinion on the fact that the plaintiff has failed to fulfil those conditions. LORD MACMILLAN expresses the view that, in any case, the doctrine in *Rylands* v. *Fletcher* would not extend to an action for personal injuries. In such an action negligence must be proved. He also says that, were it necessary to decide the point, he would hesitate to hold that in these days and in an industrial community it would be a non-natural use of land to build a factory on it and there manufacture explosives. Whether any particular thing is dangerous or a particular use of land is non-natural are, in Lord Porter's view, questions of fact, subject to the ruling of the judge whether the thing is capable of being dangerous or the use non-natural. Lord Macmillan, Lord Simonds, A
and Lord Uthwatt decline to recognise the existence of a category of things and operations dangerous in themselves so that those who harbour such things or carry on such operations on their premises are liable in the absence of negligence for any personal injuries suffered by a person who is lawfully on the premises, or that explosives and their manufacture would come within such a category of dangerous things and operations.

AS TO RULE IN RYLANDS *v.* FLETCHER, see HALSBURY Hailsham edn., Vol. 24, p. 46, para. 83; and FOR CASES, see DIGEST, Vol. 36, pp. 187-199, Nos. 311-388.] B

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; *affg.* S.C. *sub. nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(2) *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 2 Digest 227, *183*; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88.

(3) *May* v. *Burdett* (1846), 9 Q.B. 101; 2 Digest 237, *240*; 16 L.J.Q.B. 64; 7 C
L.T.O.S. 253.

(4) *Besozzi* v. *Harris* (1858), 1 F. & F. 92; 2 Digest 238, *241*.

(5) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547; 38 Digest 23, *125*.

(6) *Charing Cross, West End & City Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K.B. 442; 38 Digest 50, *289*; 83 L.J.K.B. 116; 109 L.T. 635; 77 J.P. 378; *affd.*, [1914] 3 K.B. 772.

(7) *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.*, [1936] D
A.C. 108; Digest Supp.; 105 L.J.P.C. 18; 154 L.T. 89.

(8) *Howard* v. *Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E.R. 781; Digest Supp.

(9) *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; 36 Digest 122, *814*; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P. 791.

(10) *Rickards* v. *Lothian*, [1913] A.C. 263; 36 Digest 28, *143*; 82 L.J.P.C. 42; 108 L.T. 225.

(11) *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.*, [1921] 2 A.C. 465; E
36 Digest 192, *332*; 90 L.J.K.B. 1252; 126 L.T. 70; *affg.* S.C. *sub. nom. Belvedere Fish Guano Co.* v. *Rainham Chemical Works, Feldman & Partridge, Ind, Coope & Co.* v. *Same*, [1920] 2 K.B. 487; 123 L.T. 211.

(12) *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43; 36 Digest 193, *343*; 88 L.J.K.B. 915; 120 L.T. 601.

(13) *Collingwood* v. *Home & Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; Digest Supp.; 155 L.T. 550.

(14) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; 36 Digest 197, *372*; 62 F
L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373.

(15) *Shiffman* v. *Venerable Order of the Hospital of St. John of Jerusalem*, [1936] 1 All E.R. 557; Digest Supp.

(16) *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652; 36 Digest 89, *594*; 78 L.J.K.B. 1063; 101 L.T. 411; 73 J.P. 429.

(17) *Miles* v. *Forest Rock Granite Co. (Leicestershire), Ltd.* (1918), 34 T.L.R. 500; 36 Digest 192, *336*. G

(18) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(19) *Midwood & Co.* v. *Manchester Corpn.*, [1905] 2 K.B. 597; 38 Digest 50, *288*; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348.

(20) *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; 38 Digest 27, *147*; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243.

(21) *Membery* v. *Great Western Ry. Co.* (1889), 14 App. Cas. 179; 36 Digest 93, *613*; H
58 L.J.Q.B. 563; 61 L.T. 566; 54 J.P. 244; *affg.* (1888), 4 T.L.R. 504; *revsg.* 4 T.L.R. 265.

APPEAL from a decision of the Court of Appeal (SCOTT, MACKINNON and DU PARCQ, L.JJ.), dated Dec. 14, 1944, and reported [1945] 1 All E.R. 106, reversing the decision of CASSELS, J., dated Apr. 28, 1944, and reported [1944] 2 All E.R. 98. The relevant facts are set out in the opinion delivered by VISCOUNT SIMON, L.C.

Gilbert J. Paull, K.C., and *J. H. C. Goldie* for the appellant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *H. L. Parker* for the respondents.

The House took time for consideration.

Oct. 18. Viscount Simon, L.C.: My Lords, in fulfilment of an agreement dated Jan. 26, 1942, and made between the Ministry of Supply and the respondents, the latter undertook the operation, management and control of the Elstow Ordnance Factory as agents for the Ministry. The respondents carried on in the factory the business of filling shell cases with high explosives. The appellant was an employee of the Ministry, with the duty of inspecting this filling of shell cases, and her work required her (although she would have preferred and had applied for other employment) to be present in the shell filling shop. On Aug. 31, 1942, while the appellant was lawfully in the shell filling shop in discharge of her duty, an explosion occurred which killed a man and injured the appellant and others. No negligence was averred or proved against the respondents. The plea of *volenti non fit injuria*, for whatever it might be worth, has been expressly withdrawn before this House by the Attorney-General on behalf of the respondents, and thus the simple question for decision is whether in these circumstances the respondents are liable, without any proof or inference that they were negligent, to the appellant in damages, which have been assessed at £575 2*s.* 8*d.*, for her injuries.

Cassels, J., who tried the case, considered that it was governed by *Rylands* v. *Fletcher* (1), and held that the respondents were liable, on the ground that they were carrying on an ultra-hazardous activity and so were under what is called a "strict liability" to take successful care to avoid causing harm to persons whether on or off the premises. The Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.) reversed this decision, Scott, L.J., in an elaborately reasoned judgment, holding that a person on the premises had, in the absence of any proof of negligence, no cause of action, and that there must be an escape of the damage-causing thing from the premises and damage caused outside before the doctrine customarily associated with the case of *Rylands* v. *Fletcher* (1) can apply.

I agree that the action fails. The appellant was a person present in the factory in pursuance of a public duty (like an ordinary factory inspector) and was, consequently, in the same position as an invitee. The respondents were managers of the factory as agents for the Ministry of Supply and had the same responsibility to an invitee as an ordinary occupier in control of the premises. The duties of an occupier of premises to an invitee have been analysed in many reported cases, but in none of them, I think, is there any hint of the proposition necessary to support the claim of the appellant in this case. The fact that the work that was being carried on was of a kind which requires special care is a reason why the standard of care should be high, but it is no reason for saying that the occupier is liable for resulting damage to an invitee without any proof of negligence at all.

Blackburn, J., in delivering the judgment of the Court of Exchequer Chamber in *Fletcher* v. *Rylands* (1) (L.R. 1 Exch. 265, at p. 279), laid down the proposition that:

> . . . the person who, for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

It has not always been sufficiently observed that in the House of Lords, when the appeal from *Fletcher* v. *Rylands* (1) was dismissed and Blackburn, J.'s pronouncement was expressly approved, Lord Cairns, L.C., emphasized another condition which must be satisfied before liability attaches without proof of negligence. This is that the use to which the defendant is putting his land is a "non-natural" use (L.R. 3 H.L., 330, at pp. 338-9). Blackburn, J., had made a parenthetic reference to this sort of test when he said (L.R. 1 Exch. 265, at p. 280):

> . . . it seems but reasonable and just that the neighbour, who has brought something on his own property, *which was not naturally there*, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

I confess to finding this test of " non-natural " user (or of bringing on the land what was not " naturally there," which is not the same test) difficult to apply. Blackburn, J., in the sentence immediately following that which I have last quoted, treats cattle-trespass as an example of his generalisation. The pasturing of cattle must be one of the most ordinary uses of land, and strict liability for damage done by cattle enclosed on one man's land if they escape thence into the land of another is one of the most ancient propositions of our law. It is, in fact, a case of pure trespass to property, and thus constitutes a wrong without any question of negligence : see per Lord Coleridge, C.J., in *Ellis* v. *Loftus Iron Co.* (2) (L.R. 10 C.P. 10, at p. 12). The circumstances in *Fletcher* v. *Rylands* (1) did not constitute a case of trespass because the damage was consequential, not direct. It is to be noted that all the counts in the declaration in that case set out allegations of negligence (see L.R. 1 Ex. 265), but in the House of Lords Lord Cairns, L.C., begins his opinion by explaining that ultimately the case was treated as determining the rights of the parties independently of any question of negligence.

The classic judgment of Blackburn, J., besides deciding the issue before the court and laying down the principle of duty between neighbouring occupiers of land on which the decision was based, sought to group under a single and wider proposition other instances in which liability is independent of negligence, such, for example, as liability for the bite of a defendant's monkey : *May* v. *Burdett* (3). See also the case of a bear on a chain on the defendant's premises : *Besozzi* v. *Harris* (4). There are instances, no doubt, in our law in which liability for damage may be established apart from proof of negligence, but it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle. The conditions under which such a liability arises are not necessarily the same in each class of case. Lindley, L.J., issued a valuable warning in *Green* v. *Chelsea Waterworks Co.* (5) (70 L.T. 547, at p. 549), when he said of *Rylands* v. *Fletcher* (1) that that decision :

> . . . . is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision.

It seems better, therefore, when a plaintiff relies on *Rylands* v. *Fletcher* (1) to take the conditions declared by this House to be essential for liability in that case and to ascertain whether these conditions exist in the actual case.

Now, the strict liability recognised by this House to exist in *Rylands* v. *Fletcher* (1) is conditioned by two elements which I may call the condition of " escape " from the land of something likely to do mischief if it escapes, and the condition of " non-natural use " of the land. This second condition has in some later cases, which did not reach this House, been otherwise expressed, *e.g.*, as " exceptional " user, when such user is not regarded as " natural " and at the same time is likely to produce mischief if there is an " escape." Dr. Stallybrass, in a learned article in 3 Cambridge Law Review, p. 376, has collected the large variety of epithets that have been judicially employed in this connection. The American Restatement of the Law of Torts, III, s. 519, speaks of " ultra-hazardous activity," but attaches qualifications which would appear in the present instance to exonerate the respondents. It is not necessary to analyse this second condition on the present occasion, for in the case now before us the first essential condition of " escape " does not seem to me to be present at all. " Escape," for the purpose of applying the proposition in *Rylands* v. *Fletcher* (1) means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control. Blackburn, J., several times refers to the defendant's duty as being the duty of " keeping a thing in " at the defendant's peril and by " keeping in " he means, not preventing an explosive substance from exploding, but preventing a thing which may inflict mischief from escaping from the area which the defendant occupies or controls. In two well-known cases the same principle of strict liability for escape was applied to defendants who held a franchise to lay pipes under a highway and to conduct water (or gas) under pressure through them : *Charing Cross Electric Co.* v. *Hydraulic Power Co.* (6); *Northwestern Utilities, Ltd.* v. *London Guarantee, etc., Co.* (7).

In *Howard* v. *Furness Houlder Argentine Lines, Ltd.* (8) Lewis, J., had before him a case of injury caused by an escape of steam on board a ship where the plaintiff was working. The judge was, I think, right in refusing to apply the doctrine of *Rylands* v. *Fletcher* (1) on the ground that the injuries were caused on the premises of the defendants. Apart altogether from the judge's doubt (which I share) whether the owners of the steamship by generating steam therein are making a non-natural use of their steamship, the other condition on which the proposition in *Rylands* v. *Fletcher* (1) depends was not present, any more than it is in the case with which we have now to deal. Here there is no escape of the relevant kind at all and the appellant's action fails on that ground.

In these circumstances it becomes unnecessary to consider other objections that have been raised, such as the question whether the doctrine of *Rylands* v. *Fletcher* (1) applies where the claim is for damages for personal injury as distinguished from damages to property. It may be noted, in passing, that Blackburn, J., himself when referring to the doctrine of *Rylands* v. *Fletcher* (1) in the later case of *Castle* v. *Stockton Waterworks* (9) leaves this undealt with. He treats damages under the *Rylands* v. *Fletcher* (1) principle as covering damages to property, such as workmen's clothes or tools, but says nothing about liability for personal injuries.

On the much litigated question of what amounts to "non-natural" use of land, the discussion of which is also unnecessary in the present appeal, I content myself with two further observations. The first is that when it becomes essential for the House to examine this question it will, I think, be found that Lord Moulton's analysis in delivering the judgment of the Privy Council in *Rickards* v. *Lothian* (10) is of the first importance. The other observation is as to the decision of this House in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.* (11), to which the appellant's counsel in the present case made considerable reference in support of the proposition that manufacturing explosives was a "non-natural" use of land. This was a case of damage to adjoining property. I find in Scrutton, L.J.'s judgment (in the court of first instance (123 L.T. 211, at p. 212)) that he understood it to be admitted before him that the person in possession of and responsible for the D.N.P. was liable under the doctrine of *Rylands* v. *Fletcher* (1) for the consequences of its explosions. The point, therefore, was not really open for argument to the contrary before the House of Lords, where Lord Carson begins his opinion by stating that it was not seriously argued, and that the real point to be determined was as to the liability of two directors of the appellant's company. The opinion of Lord Buckmaster, which covers many pages, is almost exclusively concerned with establishing the directors' liability, and on the other point his observation ([1921] 2 A.C. 465, at p. 471), merely is that the making of munitions was certainly not the "common and ordinary use of the land" . . . I think it not improper to put on record, with all due regard to the admission and *dicta* in that case, that if the question had hereafter to be decided whether the making of munitions in a factory at the government's request in time of war for the purpose of helping to defeat the enemy is a "non-natural" use of land, adopted by the occupier "for his own purposes," it would not seem to me that the House would be bound by this authority to say that it was. In this appeal the question is immaterial, as I hold that the appellant fails for the reason that there was no "escape" from the respondents' factory. I move that the appeal be dismissed with costs.

Lord Macmillan: My Lords, nothing could be simpler than the facts in this appeal; nothing more far-reaching than the discussion of fundamental legal principles to which it has given rise. The appellant, while employed as an inspector by the Ministry of Supply at the Elstow Ordnance Factory in Bedfordshire, where the respondents were engaged in the manufacture of high explosive shells for the government, was injured by an explosion in the filling shop. She sued the respondents for damages. In her statement of claim she made no allegation of negligence on the part of the respondents. All that she averred was that the respondents were engaged in the manufacture of high explosive shells in premises occupied by them, that the respondents knew that high explosive shells were dangerous things and that while she was on their premises in the course of her duties a high explosive shell exploded and caused her injury. For aught that appears the explosion may have been a pure accident for which no one was to blame. The trial judge (CASSELS, J.) found for the appellant. He relied mainly on the doctrine formulated in the well-known and much-discussed case of *Rylands* v. *Fletcher* (1), and on the decision of this House in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (11). The Court of Appeal unanimously reversed the judgment of the trial judge and entered judgment for the respondents. The appellant with the leave of the Court of Appeal has now brought her case to your Lordship's Bar.

In my opinion, the appellant's statement of claim discloses no ground of A
action against the respondents. The action is one of damages for personal injuries. Whatever may have been the law of England in early times I am of opinion that, as the law now stands an allegation of negligence is in general essential to the relevancy of an action of reparation for personal injuries. The gradual development of the law in the matter of civil liability is discussed and traced with ample learning and lucidity in HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 8, pp. 446 *et seq.*, and need not here be rehearsed. Suffice B
it to say that the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on C
the conduct of the person whose act has occasioned the injury and the question is whether it can be characterised as negligent. I do not overlook the fact that there is at least one instance in the present law in which the primitive rule survives, namely, in the case of animals *ferae naturae* or animals *mansuetae naturae* which have shown dangerous proclivities. The owner or keeper of such an animal has an absolute duty to confine or control it so that it shall not do injury to others and no proof of care on his part will absolve him from respon- D
sibility, but this is probably not so much a vestigial relic of otherwise discarded doctrine as a special rule of practical good sense. At any rate, it is too well established to be challenged. But such an exceptional case as this affords no justification for its extension by analogy.

The appellant in her printed case in this House thus poses the question to be determined:

> Whether the manufacturer of high explosive shells is under strict liability to prevent E
> such shells from exploding and causing harm to persons on the premises where such manufacture is carried on as well as to persons outside such premises.

Two points arise on this statement of the question. In the first place, the expression "strict liability," though borrowed from authority, is ambiguous. If it means the absolute liability of an insurer irrespective of negligence, then the answer, in my opinion, must be in the negative. If it means that an exacting F
standard of care is incumbent on manufacturers of explosive shells to prevent the occurrence of accidents causing personal injuries I should answer the question in the affirmative, but this will not avail the plaintiff. In the next place, the question as stated would seem to assume that liability would exist in the present case to persons injured outside the defendants' premises without any proof of negligence on the part of the defendants. Indeed, CASSELS, J., in his judgment ([1944] 2 All E.R. 98, at p. 101) records that: G

> It was not denied that if a person outside the premises had been injured in the explosion the defendants would have been liable without proof of negligence.

I do not agree with this view. In my opinion, persons injured by the explosion inside or outside the defendant's premises would alike require to aver and prove negligence to render the defendants liable.

In an address characterised by much painstaking research counsel for the H
appellant sought to convince your Lordships that there is a category of things and operations dangerous in themselves and that those who harbour such things or carry on such operations in their premises are liable apart from negligence for any personal injuries occasioned by these dangerous things or operations. I think that he succeeded in showing that in the case of dangerous things and operations the law has recognised that a special responsibility exists to take care, but I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of

such things or the conduct of such operations. In truth, it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. In my opinion, it would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter.✓In a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe. The first experimental flights of aviators were certainly dangerous, but we are now assured that travel by air is little, if at all, more dangerous than a railway journey.

Accordingly, I am unable to accept the proposition that in law the manufacture of high explosive shells is a dangerous operation which imposes on the manufacturer an absolute liability for any personal injuries which may be sustained in consequence of his operations. Strict liability, if you will, is imposed on him in the sense that he must exercise a high degree of care, but that is all. The sound view, in my opinion, is that the law in all cases exacts a degree of care commensurate with the risk created. It was suggested that some operations are so intrinsically dangerous that no degree of care, however scrupulous, can prevent the occurrence of accidents, and that those who choose for their own ends to carry on such operations ought to be held to do so at their peril. If this were so, many industries would have a serious liability imposed on them. Should it be thought that this is a reasonable liability to impose in the public interest, it is for Parliament so to enact. In my opinion, it is not the present law of England.

The mainstay of the argument of counsel for the appellant was his invocation of the doctrine of *Rylands* v. *Fletcher* (1), and especially the passage in the judgment of BLACKBURN, J., so often quoted, approved and followed. Adopting and adapting the language of BLACKBURN, J., he said that the respondents here brought on their lands and collected and kept there things likely to do mischief, but the immediately following words used by that eminent judge did not suit so well, for, according to him the things must be things likely to do mischief if they escape and the duty is to keep them in at peril. In the present case it could not be said that anything had escaped from the defendants' premises or that they had failed in keeping in anything. Counsel was, accordingly, constrained to paraphrase the words of BLACKBURN, J., and read them as if he had said "likely to do mischief if not so controlled as to prevent the possibility of mischief." He invoked, as did BLACKBURN, J., the case of straying cattle as an illustration of such liability. That again, in my opinion, is a special survival with an historical background and affords no analogy to the present case.

The doctrine of *Rylands* v. *Fletcher* (1), as I understand it, derives from a conception of the mutual duties of adjoining or neighbouring landowners and its congeners are trespass and nuisance. If its foundation is to be found in the injunction *sic utere tuo ut alienum non laedas*, then it is manifest that it has nothing to do with personal injuries. The duty is to refrain from injuring not *alium* but *alienum*. The two prerequisites of the doctrine are that there must be the escape of something from one man's close to another man's close and that that which escapes must have been brought on the land from which it escapes in consequence of some non-natural use of that land whatever precisely that may mean. Neither of these features exists in the present case. I have already pointed out that nothing escaped from the defendants' premises, and, were it necessary to decide the point, I should hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives. I could conceive it being said that to carry on the manufacture of explosives in a crowded urban area was evidence of negligence, but there is no such case here and I offer no opinion on the point.

It is noteworthy in *Rylands* v. *Fletcher* (1) that all the counts in the declaration alleged negligence and that on the same page of the report on which his famous *dictum* is recorded (L.R. 1 Exch. 265, at p. 279), Blackburn, J., states that:

> the plaintiff . . . must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible.

His decision for the plaintiff would thus logically seem to imply that he found some default on the part of the defendants in bringing on their land and failing to confine there an exceptional quantity of water. Notwithstanding the width of some of the pronouncements, particularly on the part of Lord Cranworth, I think that the doctrine of *Rylands* v. *Fletcher* (1), when studied in its setting, is truly a case on the mutual obligations of the owners or occupiers of neighbouring closes and is entirely inapplicable to the present case, which is quite outside its ambit.

It remains to say a word about the *Rainham Chemical Works* case (11). There are several features to be noted. Perhaps most important is the fact that the application of the doctrine of *Rylands* v. *Fletcher* (1) was not contested except on the ground that it was not non-natural to use land in war-time for the manufacture of explosives. Lord Carson says ([1921] 2 A.C. 465, at p. 491) that the liability of the defendant company "was not seriously argued." In the next place it was a case of damage to adjoining property. The explosion caused loss of life, but we find nothing in the case about any claim for personal injuries. It is true that Lord Buckmaster states (*ibid.* at p. 471) (what was not contested, except to the limited extent I have indicated), that the use of the land for the purpose of making munitions was "certainly not the common and ordinary use of the land" and thus brought the case within the doctrine of *Rylands* v. *Fletcher* (1), but that was a finding of fact rather than of law. In his enunciation of the doctrine he clearly confines it to the case of neighbouring lands. And the case is open to the further observation that the real contest was, not whether there was liability, but who was liable, in particular, whether two directors of the company which was carrying on the manufacture of munitions were in the circumstances liable as well as the company itself. The case clearly affords no precedent for the present plaintiff's claim.

Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called on to rationalise the law of England. That attractive, if perilous, field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead, for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us "the life of the law has not been logic; it has been experience." For myself, I am content to say that, in my opinion, no authority has been quoted from case or text-book which would justify your Lordships, logically or otherwise, in giving effect to the appellant's plea. I should, accordingly, dismiss the appeal.

Lord Porter: My Lords, the point for decision by Your Lordships in this case may be stated in a sentence. It is: Are the occupiers of a munitions factory liable to one of those working in that factory who is injured in the factory itself by an explosion occurring there without any negligence on the part of the occupiers or their servants.

Normally at the present time in an action of tort for personal injuries if there is no negligence there is no liability. To this rule, however, the appellant contends that there are certain exceptions, one of the best known of which is to be found under the principle laid down in *Rylands* v. *Fletcher* (1). The appellant's counsel relied on that case and naturally put it in the forefront of his argument. To make the rule applicable, it is at least necessary for the person whom it is sought to hold liable to have brought on to his premises, or, at any rate, to some place over which he has a measure of control, something which is dangerous in the sense that, if it escapes, it will do damage. Possibly a further requisite is that to bring the thing to the position in which it is found is to make a non-natural use of that place. Such, at any rate, appears to have been the opinion of Lord Cairns, and this limitation has more than once been repeated and approved: see *Rickards* v. *Lothian* (10) ([1913] A.C. 263, at p. 280, per Lord Moulton).

Manifestly, these requirements must give rise to difficulty in applying the rule in individual cases and necessitate at least a decision as to what can be dangerous and what is a non-natural use. Indeed, there is a considerable body of case law dealing with these questions and a series of findings or assumptions as to what is sufficient to establish their existence. Among dangerous objects have been held to be included gas, explosive substances, electricity, oil, fumes, rusty wire, poisonous vegetation, vibrations, a flag-pole, and even dwellers in caravans. Furthermore, in *Musgrove* v. *Pandelis* (12) it was held that a motor-car brought into a garage with full tanks was a dangerous object, a conclusion, which, as Romer, L.J., pointed out in *Collingwood* v. *Home and Colonial Stores* (13), ([1936] 3 All E.R. 200 at p. 209) involves the propositions that a motor-car is a dangerous thing to bring into a garage and that the use of one's land for the purpose of erecting a garage and keeping a motor-car there is not an ordinary or proper use of the land.

My Lords, if these questions ever come directly before this House it may become necessary to lay down principles for their determination. For the present I need only say that each seems to be a question of fact subject to a ruling of the judge whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

I do not, however, think that it is necessary for Your Lordships to decide these matters now, inasmuch as the defence admits that high explosive shells are dangerous things, and, whatever view may be formed whether the filling of them is or is not a non-natural use of land, the present case can, in my opinion, be determined upon a narrower ground. In all cases which have been decided, it has been held necessary, to establish liability, that there should have been some form of escape from the place in which the dangerous object has been retained by the defendant to some other place not subject to his control. In *Rylands* v. *Fletcher* (1) it was water; in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (11) it was explosive matter; in *National Telephone Co.* v. *Baker* (14) it was electricity; in *Northwestern Utilities* v. *London Guarantee and Accident Co.* (7) it was gas which escaped from the defendants' mains into property belonging to the plaintiff, and so on in the other instances. In every case, even in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (6) there was escape from the container in which the defendants had a right to carry the dangerous substance, and which they had at least a licence to use, and also an escape into property over which they had no control. Such escape is, I think, necessary if the principle of *Ryland* v. *Fletcher* (1) is to apply. The often quoted words of Blackburn, J. in that case in the Court of Exchequer Chamber (L.R.1 Exch. 265 at p. 280) are:

> . . . it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

and in *Howard* v. *Houlder Lines Ltd.* (8), Lewis, J. so decided in a judgment with the result of which I agree. The limitations within which the judgment of Blackburn, J. confines the doctrine have all been the subject of discussion, more particularly as to who is a neighbour, whether knowledge of the danger is a condition of liability and how far personal injuries are covered, but I know of no case where liability was imposed for injury occurring on the property in which the dangerous thing was confined.

It was urged on Your Lordships that it would be a strange result to hold the respondents liable if the injured person was just outside their premises but not liable if she was just within them. There is force in the objection, but the liability is itself an extension of the general rule, and, in my view, it is undesirable to extend it further. As Lindley, L.J. said in *Green* v. *Chelsea Waterworks Co.* (5) (70 L.T. 547 at p. 549):

> That case (*Rylands* v. *Fletcher* (1)) is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision.

Much of the width of principle which has been ascribed to it is derived not from the decision itself but from the illustrations by which Blackburn, J. supported it. Too much stress must not, in my opinion, be laid on these illustrations. They are but instances of the application of the rule of strict liability, having for the most part separate historical origins, and though they support the view that liability may exist in cases where neither negligence, nuisance nor trespass are to be found, yet it need not as I think necessarily be said they form a separate coherent class in which liability is created by the same elements throughout.

I would add that, in considering the matter now in issue before Your Lordships, it is not, in my view, necessary to determine whether injury to the person is one of those matters in respect of which damages can be recovered under the rule. Atkinson, J. thought it was: see *Shiffman* v. *Order of St. John* (15) and the language of Fletcher Moulton, L.J. in *Wing* v. *L.G.O. Co.* (16) where he says ([1909] 2 K.B. 652 at p. 665):

> This cause of action is of the type usually described by reference to the well-known case of *Rylands* v. *Fletcher* (1). For the purpose of to-day it is sufficient to describe this class of actions as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger.

is to the same effect, and, although the jury found negligence on the part of the defendants in *Miles* v. *Forest Rock Granite Co. Ltd.*, (17), the Court of Appeal applied the rule in *Rylands* v. *Fletcher* (1) in support of a judgment in favour of the plaintiff for £850 in respect of personal injuries. Undoubtedly, the opinions expressed in these cases extend the application of the rule and may some day require examination. For the moment it is sufficient to say that there must be escape from a place over which a defendant has some measure of control to a place where he has not. In the present case there was no such escape and I would dismiss the appeal.

Lord Simonds: My Lords, it is undeniable that this appeal raises a question of great importance in the law of tort, but I have no doubt how it should be answered and I hope that I shall not be thought wanting in respect to the judge who heard the case or to the careful and far reaching argument of counsel for the appellant if I do not deal with every point that has been raised.

The appellant claims damages from the respondents for personal injuries received by her in consequence of an explosion on their premises on Aug. 31, 1942, and founds her claim on the following pleas:—that the respondents were at all material times the occupiers of certain premises known as the Elstow Ordnance Factory; that at the said premises the respondents carried on the manufacture of high explosive shells which were to their knowledge dangerous things; and that she was lawfully in a shell-filling shop at the said premises when a high explosive shell exploded whereby she suffered injuries, loss and damage.

My Lords, it does not surprise me that the respondents defended the action by pleading that the statement of claim disclosed no cause of action. For, be it observed, the appellant did not allege negligence on the part of the respondents. That was not an issue in the case. Boldly she averred and by her counsel maintained the averment before this House, that he who lawfully carries on the business of manufacturing high explosive shells upon his premises is, without proof of negligence, liable to any person lawfully on those premises who suffers damage by reason of an explosion. For, she said, high explosive shells are "dangerous things" and the respondents knew it. My Lords, there is, I believe no justification for such a proposition of law nor was any authority cited for it. The approach to it was ingenious, for in the appellant's formal case the question was thus stated:

> Whether the manufacturer of high explosive shells is under strict liability to prevent such shells from exploding and causing harm to persons on the premises where such manufacture is carried on as well as to persons outside such premises.

The question thus stated assumes that, if the appellant had been outside the premises when she was injured by the explosion, she would have had a cause of action, and for this assumption it is clear that *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co., Ltd.* (11) is relied on. That case is an authority binding on your Lordships for whatever it decided, but two things at least it did not decide, the first that which is indicated in the question that I have cited, *viz.*, whether the respondents have the same liability to those within as to those outside their premises; the second that the liability, to whomsoever it may be owed, extends to purely personal injuries such as the appellant suffered. Holding the view that I do on the first question, I think it inexpedient to express a final view on the second, but I would not be taken as assenting to the proposition that if *e.g.*, the plaintiff in *Rainham's* case (11) had been a natural person who had suffered personal injury the result would necessarily have been the same.

I turn, then, to the first question which raises the familiar problem of strict liability, a phrase which I use to express liability without proof of negligence. Here is an age-long conflict of theories which is to be found in every system of law. " A man acts at his peril " says one theory. " A man is not liable unless he is to blame " answers the other. It will not surprise the students of English law or of anything English to find that between these theories a middle way, a compromise, has been found. For it is beyond question that in respect of certain acts a man will be liable for the harmful consequences of those acts, be he ever so careful, yet in respect of other acts he will not be liable unless he has in some way fallen short of a prescribed standard of conduct. It avails not at all to argue that because in some respects a man acts at his peril, therefore in all respects he does so. There is not one principle only which is to be applied with rigid logic to all cases. To this result both the infinite complexity of human affairs and the historical development of the forms of action contribute.

The House has had the advantage not only of an exhaustive argument in which a large number of cases were cited and discussed and many authoritative text books and articles quoted, but also of careful and elaborate judgments in the courts below, and I am left with the impression that it would be possible to find support in decision or *dictum* or learned opinion for almost any proposition that might be advanced. Yet I would venture to say that the law is that, subject to certain specific exceptions which I will indicate, a man is not in the absence of negligence liable in respect of things, whether they are called dangerous or not, which he has brought or collected or manufactured on his premises, unless such things escape from his premises and, so escaping, injure another, and, as I have already said, I would leave it open whether, even in the event of such escape, he is liable (still in the absence of negligence) for personal injury as distinguished from injury to some proprietary interest.

My Lords, in this branch of the law it is inevitable that reference should be made to what Blackburn, J. said in *Fletcher* v. *Rylands* (1) and what Lord Cairns said in *Rylands* v. *Fletcher* (1). In doing so I think it is of great importance to remember that the subject-matter of that action was the rights of adjoining landowners and, though the doctrine of strict liability there enforced was illustrated by reference to the responsibility of the man who keeps beasts, yet the defendant was held liable only because he allowed, or did not prevent, the escape from his land onto the land of the plaintiff of something which he had brought onto his own land and which he knew or should have known was liable to do mischief if it escaped from it. I agree with the late Mackinnon, L.J., that this and nothing else is the basis of the celebrated judgment of Blackburn J., and I think it is no less the basis of Lord Cairns' opinion. For it is significant that he emphasises that, if the accumulation of water (the very thing which by its escape in that case caused the actionable damage) had arisen by the natural user of the defendant's land, the adjoining owner could not have complained. The decision itself does not justify the broad proposition which the appellant seeks to establish, and I would venture to say that the word " escape " which is used so often in the judgment of Blackburn, J., meant to him escape from the defendant's premises and nothing else. It has been urged that escape means escape from control and that it is irrelevant where damage takes place if there has been such an escape, but, though it is arguable that that ought to be the law, I see no logical necessity for it and much less any judicial authority. For, as I have said, somewhere the line must be drawn unless full rein be given to the doctrine that a man acts always at his peril, that " coarse and impolitic idea " as O. W. Holmes somewhere calls it. I speak with all deference of modern American text books and judicial decisions, but I think little guidance can be obtained from the way in which this part of the common law has developed on the other side of the ocean, and I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere. On the contrary, I would say that his obligation to those lawfully on his premises is to be ultra-cautious in carrying on his ultra-hazardous activity, but that it will still be the task of the injured person to show that the defendant owed to him a duty of care and did not fulfil it. It may well be that in the discharge of that task he will sometimes be able to call in aid the maxim *res ipsa loquitur.*

My Lords, I have stated a general proposition and indicated that there are exceptions to it. It is clear, for instance, that, if a man brings and keeps a wild beast on his land or a beast known to him to be ferocious of a species generally *mansuetae naturae*, he may be liable for any damage occurring within or without his premises without proof of negligence. Such an exception will serve to illustrate the proposition that the law of torts has grown up historically in separate compartments, and that beasts have travelled in a compartment of their own. So, also, it may be that in regard to certain chattels a similar liability may arise though I accept and would quote with respect what LORD MACMILLAN said in *Donoghue* v. *Stevenson* ((18) [1932] A.C. 562 at p. 611) :

> I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

There may be other exceptions. PROFESSOR WINFIELD, to whose "TEXTBOOK OF THE LAW OF TORT," 3rd edn., 1946, I would acknowledge my indebtedness, is inclined to include certain "dangerous structures" within the rule of strict liability. This may be so. It is sufficient for my purpose to say that, unless a plaintiff can point to a specific rule of law in relation to a specific subject-matter he cannot, in my opinion, bring himself within the exceptions to the general rule that I have stated. I have already expressed my view that there is no rule which imposes on him who carries on the business of making explosives, though the activity may be "ultra-hazardous" and an explosive "a dangerous thing," a strict liability to those who are lawfully on his premises.

It was urged by counsel for the appellant that a decision against her when the plaintiff in *Rainham's* case (11) succeeded would show a strange lack of symmetry in the law. There is some force in the observation, but your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. For, if a man commits a legal nuisance, it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land. To confine the rule in *Rylands* v. *Fletcher* (1) to cases in which there has been an escape from the defendant's land appears to me consistent and logical. It is worthy of note that so closely connected are the two branches of the law that text books on the law of nuisance regard cases coming under the rule in *Rylands* v. *Fletcher* (1) as their proper subject, and, as the judgment of BLACKBURN, J. in that case itself shows, the law of nuisance and the rule in *Rylands* v. *Fletcher* (1) might in most cases be invoked indifferently. One typical illustration will suffice. In *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (6) it was the rule in *Rylands* v. *Fletcher* (1) that was relied on by the Court of Appeal, but the authority of *Midwood & Co., Ltd.* v. *Manchester* (19) was invoked and that was a case of nuisance and nothing else.

In suggesting to your Lordships that, except in reference to specific subject-matter, the rule in *Rylands* v. *Fletcher* (1) must be confined to the escape of something from the defendant's premises I am pressed by the fact that in the *Charing Cross* case the escape was not strictly from the defendant's premises, but from pipes laid in the soil of another. So, also, in *West* v. *Bristol Tramways Co.* (20) the escape was of creosote from woodblocks laid in the highway. It is not necessary to pronounce finally on these cases. It is possible that the rule should be extended to include the case where something has escaped from a pipe or whatever it may be which has been laid and maintained by the defendant by virtue of some right or franchise in the land of another. That is not this case. Nor would I exclude the possibility of a special rule being applicable as between co-users of a highway, for the highway has a law of its own, but that also is not this case. For the present purpose it is sufficient to say negatively that the appellant being on the respondent's premises cannot hold them liable for the damage suffered by her unless she alleges and proves negligence by them in their manufacture of explosives.

The respondents had a second line of defence on the maxim "*Volenti non fit injuria*," but this was not maintained before this House. It was made clear that the appellant was on the respondent's premises only because, being registered under the National Service Acts, she was required to work there as an employee of the Armaments Inspection Department of the Ministry of Supply. Had she been a free agent she would not have remained there. I content myself by saying that I see no ground for dissenting from the opinion of CASSELS, J. on this point. It is not, I think, the law of England that the will of a directing official of a government department becomes the will of the unwilling citizen whom he directs.

LORD UTHWATT: My Lords, under an agreement made in January, 1942, between the Minister of Supply and the respondents, the respondents agreed that they would as agents of the Minister undertake the operation and control of the Elstow Ordnance Factory the property of the Minister. Pursuant to that agreement the respondents went into occupation of the factory and there manufactured high explosive shells. In April, 1942, the appellant was told at the Labour Exchange that she must work at the factory. No statutory direction to that effect was served on her, but a direction would have been so served had she refused to go. In the result, the appellant, against her personal wishes, went to the factory and was there employed in the inspecting department as an employee of the Minister. While she was in the course of her duties in the shell-filling shop, an explosion occurred which injured her and others. The appellant does not allege either negligence or lack of skill on the part of the respondents. Her case is that by reason of the dangerous nature of the business which involved the risk of explosion they owed to her a duty to safeguard her from any harm resulting from its dangerous character. In substance, the appellant was on the respondents' premises in performance of a statutory duty incumbent on her as a citizen, but it is, I think, obvious that this circumstance did not alter the nature of the duty which the respondents owed to her as a person who with their consent was present on their premises on business bent. At the trial and in the Court of Appeal the respondents raised the defence that the appellant voluntarily incurred the risk of explosion as a risk incident to her employment and that the rule embodied in the maxim *volenti non fit injuria* barred her claim. That defence found no favour in the courts below and was abandoned, and in my opinion rightly abandoned, in this House. The appellant willed what she did, but her will was determined for her. Consent by the appellant to exempt the respondents from any duty they owed her cannot be implied.

The only question at issue, therefore, is whether the respondents owed to the appellant the absolute duty for which the appellant contends. In my opinion, they did not. There is much authority on the extent of the duty which an occupier of land owes to a person who for one reason or another is found on the occupier's land. The background is the original freedom of the landowner keeping within his own bounds to do what he liked with and on his own, the King's law save in felonies and trespass actions stopping at his boundary. With the development of the law and the appearance of the conception of negligence as a general ground of liability that freedom of action without liability for resulting harm has been curtailed and to the rights of a landowner, now represented by the occupier, there have been attached the duties of a host. The result is that there is no general standard of duty. The circumstances attending the presence of the stranger have to be taken into account and determine the duty owed. Put broadly, the trespasser can complain of uncivilised conduct, and if a child, of the fascinations offered by the occupier's land to which, with resulting damage to himself, he has not unnaturally succumbed. The demands of a polite society are thereby satisfied. The bare licencee is entitled to assume that the gift to him possesses its face value as the occupier sees it, but cannot otherwise call for a review of its character. Courtesy is not to be repaid by ingratitude, and to the licencee with an interest commonly called an invitee (and the appellant comes within this class of invitees) a duty of care is owed, the reason being that the invitee may reasonably expect his interests to be considered. (The animal cases so far as they relate to injuries suffered on the occupier's property I regard as exceptional. They state rules not in themselves irrational but do not exemplify any general principle). The common feature of the duties so far imposed on the occupier is that there is demanded of him a standard of conduct no higher than what a reasonably minded occupier of land with due regard to his own interests might well agree to be fair and no lower than a trespasser, bare licencee or invitee might in a civilised community reasonably expect.

Is there any good reason consistent with respect for the rights of dominion and user incident to the occupation of land and with an appreciation of the position of an invitee for subjecting the occupier carrying on a dangerous but lawful business to an absolute duty to safeguard the invitee from harm ? I can see none. In carrying on such a business the occupier may be doing something which is not common, but he is not doing anything which is out of the ordinary course of affairs or which is concealed from the invitee. He is in no way abusing his right to use his land. To subject him to an absolute duty to an invitee would be, to my mind, to impose an unreasonable limitation on the due exercise of that right, but the relation between the parties is the governing consideration and it is the incidents which the law attaches to that relation that are in question. I can understand an invitee, whatever be the nature of the business carried on, questioning in his own mind whether he is entitled to expect that the occupier will, in conducting his business, take due care, or whether he is to expect only that the occupier will continue to conduct his business in his accustomed manner, whatever that may be, but I do not think that the invitee, any more than the occupier, would assume that, by reason only of the dangerous nature of the business carried on, the occupier guaranteed him freedom from harm. If that be so, it is against reason that the law, whose function it is to give effect to reasonable expectations, should impose such a guarantee. A measure of care determined by the degree of danger is, in my opinion, the utmost that either party would envisage and, in my opinion, the law demands that, and no other, standard of duty. This denial of absolute liability to an invitee is, indeed, not inconsistent with the assertion—I do not make it—of an absolute duty towards persons who suffer harm outside the occupier's premises. Matters happening within one's own bounds are one thing and matters happening outside those bounds are an entirely different thing. In the latter case the personal relation is absent and the occupier's dominion over and right to use his land have to be reconciled with the rights of others to use or be present on adjoining lands not subject to his dominion.

Unless compelled by authority to come to a contrary conclusion I would, therefore, reject the appellant's contention. There is no authority which directly supports that contention. The appellant to some extent relied on the animal cases, but they are of no real help. Her sheet anchor was *Rylands* v. *Fletcher* (1). That case on the facts related only to the duty which an occupier of land—nuisance and negligence not being involved and trespass treated as not being involved—owed to an occupier of other land in respect of an intrusion from the land of the one to the land of the other. The accommodation between occupiers of land there laid down was that things liable to escape must be kept by an occupier within his bounds unless their presence within those bounds was due to a natural use of his land. The liability and the excuse both relate to the use of land as affecting other land. I do not regard *Rylands* v. *Fletcher* (1) as laying down any principle other than a principle applicable between occupiers in respect of their lands or as reflecting an aspect of some wider principle applicable to dangerous businesses or dangerous things. For the purposes of my opinion, therefore, it is unnecessary to consider whether or not the use of land here in question was a natural use, but I desire to express my agreement with the observations which VISCOUNT SIMON has made with reference to *Rickards* v. *Lothian* (10) and *Rainham Chemical Works* v. *Belvedere Fish Guano Company* (11). I would only add that " natural " does not mean " primitive." The decision of LEWIS, J., in *Howard* v. *Houlder Lines Ltd.* (8) is adverse to the appellant's contention, and there is a statement in *Membery* v. *G.W.R. Co.* (21) which, as I read it, is adverse to it. In that case the railway company agreed with a contractor that he should shunt their engines supplying horses and men, the company to provide boys to help when they had boys available and when they had not the shunting to be done without boys. The operation of shunting was dangerous to any man performing it without the assistance of boys. While engaged in shunting without a boy, the plaintiff, an employee of the contractor, was without negligence on his part injured by a truck running over him. The plaintiff, who was in the circumstances an invitee, based his case on negligence, and somewhat surprisingly won in the court of first instance. LORD HERSCHELL, however, took the opportunity of making a statement of his conception of the duties of an occupier to an invitee. He said (14 App. Cas. 179, at p. 191):

> Now I do not for a moment doubt that there was a duty incumbent upon the defendants towards the plaintiff at the time when he was upon their premises. They were not without duty towards him. But it is not enough to arrive at the conclusion that there was a duty, or even a duty to take care; the extent of that duty requires to be determined. My Lords, I cannot doubt that they were bound to take care that the machinery, or appliances, or tackle of theirs, which he had to use in the course of his discharge of those duties in which they were interested, were in a reasonably fit and proper condition; and certainly if they were not in such a condition, and if the defect in them was unknown to the plaintiff, I cannot doubt that the plaintiff would have his remedy against them. In addition to that, I think they were under the duty to him, having invited him upon their premises, not to permit their premises to be in such a condition that he unwittingly might fall into a trap of the existence of which he, unacquainted with their premises, would be ignorant, by which he might sustain an injury. Further than that, it might be (and I confess that I should myself be disposed to think that it was) their duty to take due and reasonable care that in the carrying on of their business they did not subject him to unreasonable risk owing to the acts which they did in the carrying on of that business. If they were carrying on a dangerous business, and one which would subject people employed upon their premises for their benefit to risk, they must take reasonable care, as it seems to me, that they do not do any act (I emphatically use the word "act") which would endanger the safety of the persons who thus, to their knowledge, are employed about their business upon their premises.

I understand the latter part of this dictum as emphasising that in relation to a dangerous business a duty of care to an invitee is demanded from the undertaker, but that a claim based only on the dangerous nature of the business is not admissible. So understood, I agree with it. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *L. Bingham & Co.* (for the appellant); *Treasury Solicitor* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GODFREY THORNFIELD, LTD. *v.* BINGHAM.

[KING'S BENCH DIVISION (Bucknill, L.J., sitting as an additional judge of the King's Bench Division), October 16, 1946.]

Landlord and Tenant—Notice to quit—Yearly tenancy—Tenant holding over on expiration of lease—Term in lease enabling landlord to determine lease by giving 6 months' notice expiring on any day—Consistency with yearly tenancy.

By a lease made on June 5, 1942, certain premises were leased to a tenant from June 24, 1942, to June 14, 1944. The lease contained the following clause: "The landlords may determine this present lease on giving to the tenant 6 months' notice . . . expiring on any day provided that such notice shall not be given until the existing hostilities between the United Kingdom and Germany and Italy shall have ceased . . ." At the expiration of the lease the tenant held over on a yearly tenancy. The war between the United Kingdom and Germany and Italy ceased on May 9, 1945. In January, 1946, the landlords gave 6 months' notice to quit expiring on Aug. 3, 1946. It was contended on behalf of the tenant that the clause with regard to notice was inconsistent with a yearly tenancy and that the notice to quit was, therefore, bad:—

HELD: the clause with regard to notice was intended by the parties to be incorporated into the yearly tenancy and was consistent with such a tenancy, and, therefore, the notice to quit was good.

[**EDITORIAL NOTE.** In the absence of special stipulation a yearly tenancy is determinable by six months' notice expiring at the end of some year of the tenancy, but the parties may enter into special stipulations as to when the notice shall expire. On construction of the lease in this case it is held that there was a special stipulation, and effect is given to this special stipulation.

As to Determination of Yearly Tenancy, see HALSBURY, Hailsham Edn., Vol. 20, pp. 130, 131, para. 140; and for Cases, see DIGEST, Vol. 31, pp. 435, 436, Nos. 5799-5810.]

Action for the possession of certain premises. The facts are fully set out in the judgment.

H. C. Leon for the plaintiffs.
F. H. Lawton for the defendant.

Bucknill, L.J.: In this case the plaintiffs are claiming possession of the ground floor shop and basement of the premises known as 40, Sackville Street, London, W. There is no dispute about the facts which are shortly these. On June 5, 1942, the Bank of Scotland granted to the defendant a lease to run from June 24, 1942, to June 14, 1944. The lease contained the following clause:

> The landlords may determine this present lease on giving to the tenant six months' notice in writing in that behalf expiring on any day provided that such notice shall not be given until the existing hostilities between the United Kingdom and Germany and Italy shall have ceased or an armistice shall have been signed between the said countries whichever shall be the earlier.

On June 14, 1944, it is common knowledge, the war was still continuing. The Allies had just landed in Normandy and there was no possibility of prophesying with any degree of accuracy when the war would come to an end. It did, in fact, cease on May 9, 1945, so far as the United Kingdom and Germany and Italy were concerned. After June 14, 1944, the defendant remained in possession of the premises, and in November, 1945, the Bank of Scotland assigned the reversion of the lease to Morris Motors, Ltd. In Jan., 1946, Morris Motors, Ltd., gave six months' notice to quit to the defendant, expiring on Aug. 3, 1946, and the question which I have to decide is whether that was a good notice or not. By a lease made on June 7, 1946, Morris Motors, Ltd., demised the pemises in question to the plaintiffs.

It is conceded that after June 14, 1944, the defendant held over as a yearly tenant on the terms of the lease so far as they are consistent with a yearly tenancy. It is argued by counsel for the plaintiffs that this clause that I have read is consistent with a yearly tenancy. On the other hand, counsel for the defendant has argued that it is not consistent with such a tenancy. I have considered the cases to which I have been referred and I have to consider, among other things, what I must infer was the intention of the parties in June, 1944, when the lease came to an end. In my view, I think the parties did intend that this clause should be incorporated in the yearly tenancy. I can see nothing in the clause which is inconsistent with a yearly tenancy, and I see no reason to suppose that they intended otherwise. That being so, there must be judgment for the plaintiffs.

Judgment for plaintiffs with costs.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiffs); *Coleman & Co.* (for the defendant).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Explained. R. *v.* PEARCE. [1951]
1 All E.R. 493.

R. *v.* HORNBY AND PEAPLE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Sellers, JJ.), October 15, 1946.]

Criminal Law—Gross indecency—Direction to jury—Charges against two persons, the one with the other:

Where two male persons are charged with an act of gross indecency the one with the other, it is the duty of the judge to direct the jury that, to be guilty of the offence, the accused persons must be acting in concert.

Semble: There may be gross indecency by one person with another even though no actual physical contact takes place.

[**EDITORIAL NOTE.** Where two persons are charged with committing gross indecency, the one with the other, the essence of the offence is that they are acting in concert. The Court of Criminal Appeal makes it clear that the jury must be directed to that effect. It is also important to note the observation of LYNSKEY, J., that actual physical contact is not a necessary element of the offence.

AS TO GROSS INDECENCY, see HALSBURY, Hailsham Edn., Vol. 9, p. 399, para. 676; and FOR CASES, see DIGEST, Vol. 15, pp. 753, 754, Nos. 8122-8127.]

APPEALS against convictions at Wiltshire Quarter Sessions on July 2, 1946, for gross indecency. The facts are fully set out in the judgment of the court.

R. Stock for the appellant Hornby.
R. W. Vick for the appellant Peaple.
Claude H. Grundy for the Crown.

LYNSKEY, J. [delivering the judgment of the court]: In this case Richard Hornby and Hector Maurice Peaple were indicted at the Wiltshire Quarter Sessions on July 2, 1946. The charge against them each was that on Apr. 14, 1946, in the county of Wiltshire, they attempted to commit buggery the one with the other. There was a second count against each of the defendants that they had been guilty of an act of gross indecency the one with the other.

The evidence called for the prosecution was that of a police officer who stated that he went into a public lavatory shortly before midnight on the day when the offence was charged and that he there found both Hornby and Peaple in a cubicle or water-closet. One of them (he stated) had his penis exposed and the penis was erect, and the other had his anus turned towards the first, the anus within a few inches of the erect penis. On that evidence the case for the prosecution mainly rested. The defence put forward by each prisoner was to blame the other. Hornby said that, when he went into the urinal, Peaple caught hold of him by the penis, and he objected to it. On the other hand, Peaple said that when Hornby came into the closet, he started messing about with himself, and he told him to go. The chairman of the quarter sessions left it to the jury whether they would convict of attempted buggery or of gross indecency. In this class of case it is understandable that the judge or chairman, having regard, possibly, to the feelings of the jury and other people in court, is apt to pass over the full details of the evidence. It is, however, essential that the charge, and also the essence of the charge, should be explained in detail to the jury. On this occasion the chairman of the quarter sessions left it to the jury in this form. He started his summing up by telling the jury:

> Members of the jury, these two men, Richard Hornby and Hector Maurice Peaple, have been charged to-day with two offences. The first offence in the count here is gross indecency, and the second offence is attempted buggery.

He then told them:

> It is for you to consider what you believe about these statements, and whether or not this man wrote down a statement without knowing what he was writing, or whether, as he said, it was made under great stress of mind and duress. It is entirely a matter for you to consider. Peaple, on the other hand, sticks to his statement, and he says: "The statement I made is correct." All his evidence-in-chief was: "I stick to the statement I made to the police."

The chairman then went on to say:

> You remember the police constable said that when he went into this lavatory Peaple was in a bending attitude with his trousers down and Hornby was standing with his penis out, which was in a state of erection. It is for you to consider which of these two stories is the correct one. As regards the second count, attempted buggery, there it is a matter for you to consider whether you believe the story of the constable. If you believe his story, then you have to consider whether the attitude in which he found those men was consistent with an attempt at buggery. You have heard his evidence. You must consider whether it was consistent with buggery. As regards A the gross indecency, if you consider that the actual attitude in which these men were found didn't go as far, one might say, as attempted buggery, then you have to consider the second clause, whether an act of gross indecency was committed in this lavatory.

On that summing up the jury found these two men not guilty of attempted buggery. The argument put before us is that there was evidence which would B justify a jury in finding a verdict of gross indecency, and, secondly, it is suggested that there was an adequate direction on the count of gross indecency. We have had an argument whether actual physical touching is essential to constitute the offence of gross indecency by one male person with another. In my view, it is not necessary to decide that question in this particular case. If I had to decide it, I, personally, would take the view that it is possible, if two people are acting in concert to act in an indecent manner, that there may C be gross indecency by one person with another even though there is no actual physical contact taking place. But in this particular case the difficulty we feel in supporting this conviction is that the chairman nowhere directed the jury that they had to find that the two men were acting in concert, that they had to find that the two men were each committing an act, or being a party to an act, of gross indecency the one with the other. In the first part of the summing up he refers to the count as one of gross indecency. In the second part of the summing up, D dealing with the same matter, he simply leaves it in this way:

> As regards the gross indecency, if you consider that the actual attitude in which these men were found didn't go as far, one might say, as attempted buggery, then you have to consider the second charge, whether an act of gross indecency was committed in this lavatory.

Taking that summing up at its face value, in view of the fact that there was E a denial by each of the men that they were parties to the act of the other, and in view of the evidence of the police constable, from which the inference might be drawn that they were not acting in concert, it was essential, in our judgment, that the minds of the jury should be directed on that point. They ought to have been directed that the act of gross indecency must be by one prisoner with the other and that, to be guilty of the charge, they must be acting in concert. They might have been directed that they could draw the inference F that they were so acting from the facts proved by the constable, if they accepted his evidence and rejected the evidence of the two appellants, but they were not so directed, and, in the absence of that direction, this court feels it cannot say that, if the jury had been properly directed, they would inevitably have come to the same conclusion and found these men guilty of gross indecency. In those circumstances, these appeals will be allowed.

Convictions quashed. G

Solicitors: *Pennington & Son*, agents for *Lemon, Humphreys & Parker*, Swindon (for the appellant Hornby); *Registrar of the Court of Criminal Appeal* (for the appellant Peaple); *Wansbroughs, Robinson, Tayler & Taylor*, Devizes (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

MORE O'FERRALL, LTD. *v.* HARROW U.D.C.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Henn Collins and Cassels, JJ.), July 30, 1946.]

Town and Country Planning—Advertisement hoarding—Land specified in planning scheme as "land to be protected in respect of advertisements"— A *Notice to remove hoarding—Other hoardings already on site prior to date of scheme—Notices already served in regard to other hoardings—Conditions to be considered in determining whether hoarding "seriously injures" amenity of land—Town and Country Planning Act,* 1932 (c. 48), *s.* 47.

Magistrates—Appeal—Case stated—Form—Majority decision.

Pursuant to the Town and Country Planning Act, 1932, a local authority made a planning scheme which came into effect in 1939. In 1945, a B company erected an advertisement hoarding on certain land to which the scheme applied. The local authority served a notice on the company, under sect. 47 of the 1932 Act, to remove their hoarding. Near to the company's hoarding there were three other hoardings which had been erected by other persons before 1939, but notices under s. 47 had now been served on the proprietors of these hoardings. The local authority C contended that, in determining whether the company's advertisement seriously injured the amenity of land specified in the scheme, the presence at or near the site of other matters or things which might injure the amenity, but which could be lawfully removed by them, should not be considered, and, therefore, the existence of the other hoardings should not be considered. The company contended that only the circumstances existing at the date of the hearing were to be considered, and, therefore, the presence of the D other hoardings must be taken into account:—

HELD: in determining whether an advertisement hoarding injured the amenity of land to which a scheme applied, the court should not be influenced by the conditions as they existed merely at the date of the hearing. The fact that the local authority had power to remove the other hoardings, and had already started to do so, should also be considered.

Per cur: Where a Case has been stated for the opinion of the High E Court, the fact that the decision was a conclusion by a majority should never be stated.

[**EDITORIAL NOTE.** Section 47 (1) of the Town and Country Planning Act, 1932 empowers a planning authority to require the removal of an advertisement or hoarding which "seriously injures the amenity of land" specified in a planning scheme. At first sight it appears a reasonable view that, if other advertisements are already on the F land, the advertisement in question cannot be said to injure the amenity thereof, it being already spoiled. The court, however, reveals the fallacy of that argument, and points out that the fact that the other advertisements may be removed must be taken into account. Otherwise, the authority might never be able to secure the removal of any advertisement on a site where others were displayed, for, as soon as they attacked one, they might be met by a reference to the others.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1932, s. 47, see HALSBURY'S STATUTES, Vol. 25, pp. 513, 514.]

G

CASE STATED by Middlesex Quarter Sessions who allowed an appeal by More O'Ferrall, Ltd., from an order of the justices of the Gore petty sessional division dismissing an appeal pursuant to the Town and Country Planning Act, 1932, s. 47, against a notice served upon the company by the Harrow Urban District Council requiring the removal of a certain hoarding.

The council's planning scheme came into operation on July 22, 1939. Before H that date three hoardings had been erected by persons other than the company on land which became subject to the scheme. The company's hoarding was erected in June, 1945. At the date of the hearing before quarter sessions, the council had already served notices pursuant to sect. 47 of the 1932 Act requiring the removal of the three hoardings erected before 1939. Near to the company's hoarding there was also a disused static water tank which, at the date of the hearing, the council was empowered to remove, but, owing to shortage of labour, they had not been able to do so. It was contended on behalf of the council (i) that the amenity to be protected by sect. 47 was the amenity which would be enjoyed by the land if the hoarding complained of had not been erected thereon, and that the protection of amenity afforded by sect. 47 was not qualified or diminished by the fact that there were, at or near the site of the hoarding complained of, other matters or things which injured the amenity of the land in question ; (ii) that, in determining whether or not there was injury to amenity by the hoarding complained of and whether or not the same was "serious" within the meaning of sect. 47, the court trying such issue ought not to have regard to the presence at or near the site thereof of matters or things which A (being injurious of amenity) were of such a kind, or existed at or near the site in such circumstances, that the council might lawfully, whether under the powers vested in them by the scheme or otherwise, take the necessary steps to remove them or eliminate any injury to amenity which might be caused thereby ; (iii) that, in determining whether or not there was injury to amenity by the hoarding complained of and whether or not the same was "serious" within the meaning of sect. 47, the court ought not to have regard to the presence B at or near the site of the said hoarding of the three other advertisements and the static water tank.

Cecil Havers, K.C., and *L. F. Sturge* for Harrow Urban District Council.
A. M. Lyons, K.C., and *G. D. Squibb* for More O'Ferrall, Ltd.

LORD GODDARD, C.J. : This is a Case stated by Middlesex Quarter Sessions C in the following circumstances. The Town and Country Planning Act, 1932, s. 47, provides :

> (1) Where it appears to the responsible authority [who in this case are the Harrow Urban District Council] that an advertisement displayed or a hoarding set up in the area to which a scheme applies seriously injures the amenity of land specified in the scheme as land to be protected under this Act in respect of advertisements, the authority may serve in the prescribed manner upon the owner of the advertisement D or hoarding a notice requiring him to remove it within such period, not being less than 28 days from the date of service of the notice, as may be specified therein . . . (2) If a person upon whom a notice or a copy of a notice has been served under the last foregoing sub-section on any date desires to allege that the advertisement or hoarding to which the notice relates does not seriously injure the amenity of any land specified in the scheme as aforesaid he may, by written notice served on the clerk of the court and the authority within 28 days from that date, appeal to a court of E summary jurisdiction . . .

In this case that was done, and the magistrates of the Gore division upheld the contention of the district council and made an order on More O'Ferrall, Ltd., who were the appellants before the quarter sessions, to remove this hoarding. More O'Ferrall, Ltd. appealed to quarter sessions, and their appeal to quarter sessions was allowed.

Prima facie the question whether or not a particular hoarding seriously F injures the amenity of land is, of course, a question of fact. Pursuant to the Town and Country Planning Act, 1932, the district council had made a scheme whereby the neighbourhood where this hoarding was displayed was specified as land to be protected from advertisements within the meaning of the Act. It is only where the zone is protected from advertisements that these proceedings can take place. Where land is protected under the Act, the authority have power [under sect. 47 (5)] to allow such advertisements as they choose. In G this case they came to the conclusion—and the petty sessions upheld them—that the amenities were seriously injured by this advertisement. In the Case Stated quarter sessions have set out the respective contentions that were put before them on either side. They decided the question upon the contentions that were put forward by the owners of the hoarding, but it is obvious that, in coming to the decision of fact, quarter sessions were not directing their minds H to the right question. The Case states :

> On behalf of the [company] it was contended that, in considering what is the amenity of the land specified in the said scheme as land to be protected in respect of advertisements, regard may be had only to the circumstances existing at the date of the hearing, including the zoning under the said scheme of the land affected by the said hoarding and that the question whether or not the hoarding complained of seriously injured the amenity of the land ought to be considered by taking into account all matters and things at or near the site thereof which were or might be injurious of amenity.

Quarter sessions then tell us that they were of opinion that that contention was correct and :

> . . . taking into account *inter alia* the matters and things proved before us to exist at or near the site of the hoarding complained of at the date of the hearing . . . we found as a fact that the said hoarding did not seriously injure the amenity of land to be protected in respect of advertisements.

In other words, it appears that the quarter sessions came to the conclusion that, if you find a dozen or more hoardings all round the place in question, you cannot say that the amenities of the neighbourhood are affected by the presence of an extra one. If this conclusion were correct the responsible authority could often not get rid of advertisements at all, because, as soon as they attacked one, the reply would be : " There are half a dozen others there, and half a dozen there." It would follow that they could never get rid of any. That this is not the intention of the Act is clearly shown from sect. 47 (6) (iv) which, in effect, says that any advertisements which were already on the site when the resolution to adopt the scheme took effect cannot be removed for five years from the time when the scheme zoning the land in question came into operation. This obviously implies that, after the five years have passed, the responsible authority can remove all such advertisements. The Case finds, in fact, that notices have been served upon the proprietors of the other advertisement hoardings in the neighbourhood.

In my opinion, therefore, quarter sessions have unduly limited themselves. They must take into account the fact that these other advertisements may be removed, and that the council are already taking steps to remove them. In so far, therefore, as they have allowed themselves to be influenced by the conditions as they exist simply at the date of the hearing, I think they were wrong. We cannot say that they must necessarily come to another decision, but we think that the ground on which they came to their decision was a wrong one, and therefore the case must go back to them with an intimation of the court that the contention of the Harrow Urban District Council, who were respondents to the appeal before them, was correct and the contention of More O'Ferrall, Ltd. was wrong. They must be required to reconsider the case in view of that expression of the opinion of the court.

I have only one other matter to add. Twice in this Case we are told that the conclusion to which quarter sessions came was a conclusion by a majority. Those words should never appear in any Case stated for the opinion of this court. It is the decision of the court of quarter sessions that comes before us. It matters not whether it is the decision of a majority or an unanimous decision.

HENN COLLINS, J. : I agree and have nothing to add.

CASSELS, J. : I agree.

Case remitted.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *H. Wells*, Harrow (for the Harrow Urban District Council) ; *Chas. T. Nicholls* (for More O'Ferrall, Ltd.).

[*Reported by* C. ST.J. NICHOLSON, ESQ, *Barrister-at-Law.*]

TAYLOR *v.* BRIGHTON CORPORATION.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Henn Collins and Cassels, JJ.), July 29, 30, 1946.]

Town and Country Planning—Resolution to prepare scheme—Scheme to include prohibition of use of land for certain purposes without consent of local authority—Validity—Town and Country Planning Act, 1932 (c. 48), *ss.* 1, 11.

The respondent council passed a resolution to prepare a planning scheme under the Town and Country Planning Act, 1932. While the resolution was still in force the appellant proposed to use as a fun fair premises in an area covered by the scheme. The council, as interim development authority, served upon the appellant a notice under the Town and Country Planning (Interim Development) Act, 1943, s. 5, that it was their intention to prohibit the use of the premises as a fun fair on the ground, *inter alia,* that it was intended to provide in the scheme that the use for a fun fair of land, whether forming the site of a building or not, should not be commenced without the consent of the council. It was contended on behalf of the appellant that, although the council could provide in a scheme for the absolute prohibition of the use of a site as a fun fair, it was not within their powers to prohibit such use conditionally on their consent being obtained :—

HELD : Section 1 of the 1932 Act provided that a scheme could be made with the general object of controlling the development of land, and ss. 11 and 12 made provisions for regulating the use or development of land ; one method of controlling or regulating was by prohibiting the use of land for some purpose unless with the consent of the local authority ; and, therefore, the insertion in the scheme of the words " without the consent of the council " was within the council's powers.

Per GODDARD, C.J. : There would be a right of appeal to the Minister against the withholding of the consent.

[**EDITORIAL NOTE.** This decision turns on the construction of s. 1 of the Town and Country Planning Act, 1932, which gives a local authority power to make a scheme " with the general object of controlling the development of the land comprised in the area to which the scheme applies," and of s. 11 (1) (*a*) which provides that every scheme " shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies." The local authority sought to exercise these powers of control and regulation by providing in the scheme that the use of land for certain purposes should be subject to their consent. *Contra,* it was argued that, while by a scheme the authority could once and for all permit or prohibit the use of land for any particular purpose, they could not make that use subject to their consent, thus leaving doubtful the position with regard to the future use of the land. The contention of the local authority is upheld, it being pointed out that liberty to change their minds in the event of an alteration of circumstances is an advantage instead of the reverse.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1932, see HALSBURY'S STATUTES, Vol. 25, p. 470 ; and FOR THE TOWN AND COUNTRY PLANNING (INTERIM DEVELOPMENT) ACT, 1943, see *ibid.*, Vol. 36, p. 239.]

CASE STATED by Brighton justices. The facts are fully set out in the judgment of LORD GODDARD, C.J.

G. R. Blanco White, K.C., and *H. A. Hill* for the appellant.

Harold B. Williams for the respondents.

LORD GODDARD, C.J. : This case involves the consideration of some very complicated legislation, the Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943. The case arises in this way. A notice was served by the Brighton Corporation, who are the interim development authority for the purposes of these Acts within the borough of Brighton, upon the appellant, who was proposing to use a building in West Street, Brighton, hitherto used as a garage, as a fun fair. The notice, which was served under s. 5 of the Act of 1943, told him that it was the intention of the authority at the expiration of 28 days from the service of the notice to prohibit the use of the land for the purpose of a fun fair on the grounds, *inter alia,*—and this is the only one that has been argued before us—that :

> It is intended to provide in the above-mentioned planning scheme [*i.e.*, a scheme which the corporation had resolved to prepare under the Act of 1932] that the use for a fun fair of land, whether forming the site of a building or not, shall not be commenced without the consent of the council.

It has been argued on behalf of the appellant that, although a scheme under the Act could prohibit a site from being used as a fun fair, it is beyond the powers of the council to provide in a scheme that a building should only be used as a fun fair with their consent; in other words, that they can prohibit absolutely, but they cannot prohibit conditionally on consent being obtained.

It is therefore necessary to examine with some little care the relevant statutes. Section 1, of the Act of 1932, gives the scope of planning schemes, in other words, it says what planning schemes can do:

> A scheme may be made under this Act with respect to any land, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience . . . and generally of protecting existing amenities whether in urban or rural portions of the area.

Those are words controlling the development, obviously words of very wide import.

The procedure which is provided by the Act is this. Under s. 6 a local authority may prepare a scheme with respect to any land in the neighbourhood, a town planning scheme, and they do that by deciding by a resolution to prepare a scheme. Then they have to submit that resolution to the Minister, who may or may not approve it, and if he does approve it certain consequences arise at once from the mere fact that a resolution has been passed. By s. 8:

> A scheme prepared or adopted by a local authority or joint committee shall require the approval of the Minister, and the Minister may approve any scheme either with or without modifications . . .

Then we find what the subsequent history of the scheme will be when it is finally prepared and finally settled, which may not be for several years; it will have to be laid before Parliament, and then certain proceedings may be taken, into which I need not go, including a provision that application may be made to the High Court, though Parliament has not rejected the scheme, to have any provisions in it declared *ultra vires*.

But, as I have said, the scheme, before it becomes finally effective, may be postponed for many years, and, accordingly, as it is recognised that development must go on and building is not to be stopped altogether while a scheme is being prepared and finally passed, provision is made by s. 10 of the Act of 1932 for what is called interim development of land, and under that section it is provided:

> (1) The Minister shall make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply . . . [and such a general order has been made]. For the purposes of this section the expression "interim development" means development between the date on which the resolution takes effect, and the date of the coming into operation of the scheme. (2) An order made under the preceding subsection (in this Act referred to as "an interim development order") may itself permit the development of land either unconditionally or subject to any condition specified in the order, or may empower any authority so specified to permit the development of land in accordance with the terms of the order.

So I suppose if the order imposed certain conditions the authority could only permit the development of land subject to those conditions. Then it is also provided:

> (3) Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application . . .

Then there are certain provisions about the time in which it is to be done or need not be done.

The next matter which I think has to be considered is this. Under s. 11 it is provided:

> (1) Every scheme shall define the area to which it applies, and specify, in accordance with the provisions of the next succeeding subsection, the authority or authorities

> who are to be responsible for enforcing and carrying into effect the provisions of the scheme, and—(*a*) shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made . . .

Here again I call attention to the very wide words " regulating the development of land." I might perhaps say in parenthesis that " land " by the interpretation section includes any buildings, so it is quite obvious that under s. 11 the scheme may prohibit the use of buildings for any particular purpose, or it A may regulate the use of buildings for any particular purpose.

It is also necessary to refer briefly to s. 12, which provides :

> (1) The provisions to be inserted in a scheme with respect to buildings and building operations may include provisions— . . . (*c*) regulating, or enabling the responsible authority to regulate, the size, height, design and external appearance of buildings ; (*d*) imposing restrictions upon the manner in which buildings may be used, including, B in the case of dwelling houses, the letting thereof in separate tenements ; and (*e*) prohibiting building operations, or regulating such operations in respect of matters other than those specified in this subsection . . .

Then in 1943 the Town and Country Planning (Interim Development) Act was passed. That, among other things, put the whole of the land in England into the position that it was deemed to be the subject of a resolution, whether a resolution had in fact been passed or whether it had not ; in other words, C all land now is to be regarded as though the Town and Country Planning Act, 1932, and some scheme had been applied to it. Section 5 provides :

> (1) If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area [as it is in the case of Brighton] any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission D granted under that order, then subject to the provisions of this section, the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme (*a*) where the development consists of the erection, construction or carrying out of any building or work or any part of a building or work, remove or pull down the building, work or part ; (*b*) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land . . . E

Then there is a provision in Sched. I, para. 2, to that Act, providing that :

> If any person served with such a notice as aforesaid desires to dispute any allegation contained therein, he may, by written notice served on the clerk of the court and on the interim development authority within twenty-eight days from the date of the service of the original notice on him, appeal to a court of summary jurisdiction . . .

That is what has been done here. F

It seems to me that the object of this legislation so far as interim development is concerned is to provide that once the council has embarked upon a course of town planning people are not to be allowed in the interim, *i.e.*, between the date of the resolution and the date of the scheme coming into effect, to build or use the land or develop the land in such a way as will be contrary to the scheme if it subsequently comes into effect. It is very reasonable that that G should be so, because of course you do not want to have schemes entirely wrecked by the fact that at the time the scheme comes into operation the district has been developed in some way which would render the scheme nugatory. That would never do, and you also do not want people to be expending money and so forth, perhaps in ignorance of the existence of a scheme, when what they are doing is an offence against the scheme. So Parliament has obviously made provision for the interim development authority controlling H the matter during the interim period, the interim period being, as I have said, the period between the passing of the resolution and now, of course, a certain date when all land is supposed to be subject to a resolution and the perfection of the scheme.

The sole point that is now really before us is this. In the Brighton scheme it is intended, when the scheme becomes perfect, that there should be a provision " that the use for a fun fair of land, whether forming the site of a building or not, shall not be commenced without the consent of the council," and the argument of counsel for the appellant is that that would delegate something under the scheme to the discretion of the council. He says that that is not permitted, his argument being that the scheme must say either that a fun fair is prohibited or that a fun fair is permitted in any particular area under the scheme. He contends, for instance, and the contention is quite easy to follow, that you could prohibit—take an instance in Brighton, if you like—the use of a building as a fun fair in West Street, and at the same time you could permit land, say in Old Steyne, to be used as a fun fair, or you could say no land or building shall be used as a fun fair within, perhaps, a radius of half a mile of the Palace Pier. You could prohibit it altogether, but you must not say "Land shall not be used in West Street or any other street in Brighton for a fun fair without the consent of the council."

I am wholly unable to accede to that argument, because it seems to me that what the Act says in its first section is that the scheme can be made with the general object of controlling the development of land, and under ss. 11 and 12 of the Act of 1932 we find provisions for regulating the use of land or the development of land, and surely no better means of control or regulation can be found than by saying that you shall not use your land for some purpose or another unless with the consent of the local authority. That is one method of controlling or regulating.

The consequences of deciding the contrary would seem to me to be somewhat serious, because the conditions in any town or in any countryside may change, and change rapidly from time to time, and what may be a perfectly reasonable control or regulation in the year 1946 might be a wholly unreasonable or undesirable regulation in the year, let us say, 1950 or 1956. It may be that one part of the town alters to such an extent that the council would say: "Although we have hitherto granted fun fairs in this part of Brighton, or this part of our area, we are no longer going to do so because the character of that part has changed; whereas although we formerly would not have given leave to have a fun fair in West Street, now West Street has so changed that we think it is a very proper place to have one if anybody wants to." Surely it is a desirable thing that in these matters there should be a certain amount of elasticity and provision for local authorities adjusting their regulations or their prohibitions as circumstances may arise. It does not seem to me a necessary answer to say that the scheme can be altered, because that means that new schemes have to be prepared, and so forth, and have to go before the Minister and get finally approved, which takes a great deal of time. Of course, if on a fair construction of the Act it is impossible to apply a prohibition without the consent of the council, if these words in some way offend against the Act, then we should have to give effect to it; but it seems to me that they are strictly within the words of the Act because that is only one method of regulation or control, and if a local authority has power to control, they must of necessity in exercising their power to control be entitled to impose conditions.

The part of argument of counsel for the appellant which impressed me most at first was that s. 12 (1) (c) provides in the scheme for regulating or enabling the responsible authority to regulate the size, height, design and external appearance of buildings; and on that counsel founded an argument in which he said: "If Parliament intends the responsible authority when once the scheme has been approved to have any discretion in the matter, it gives it in express words." But I think when one reads the whole section one sees at once why those words "or enabling the responsible authority to regulate" appear in that section. It is because in respect of that matter s. 12 provides a particular method of appeal where the scheme itself does not regulate but enables the responsible authority to regulate.

I do not think I need go into all the other matters which have been argued with regard to the right of appeal, and so forth. It seems to me quite clear that there is in fact a right of appeal to the Minister against the withholding of the consent, but that is not the point we have to decide. The point we have to decide is whether the insertion of the words "without the consent of the council" would be *ultra vires* in that scheme. If they are not, it follows that the council had the power under s. 5 of the Act of 1943 to take the action which they did, and it follows, in my opinion, that the decision of the magistrates was right, and therefore this appeal must be dismissed with costs.

Henn Collins, J.: I agree, and I only desire to add one short word. The argument of the appellant, as I see it, is this, that while the scheme may include provisions restricting the manner in which buildings may be used, those restrictions must be crystallised, as it were, at the moment the scheme is first adumbrated; they cannot in any sense be included lawfully in the scheme unless they are so defined or if they leave some residual power of alteration in the local authority. There is no such express provision in the Act; it is only to be found, if at all, by implication, but when one recollects that provision A is being made, as it were, to-day for what may happen in the course of years and years hereafter, it seems absurd, if I may say so, to suppose that we can to-day fix restrictions which will be effective and proper in another 50, 60, or whatever number of years. There is no *prima facie* reason for making any such implication in the Act and I do not see any ground for doing so upon the construction of the Act other than the suggestion that under s. 12 (1) there is a reference enabling the responsible authority to regulate a matter. My Lord B has dealt with that in his judgment, and I do not want to say any more about it.

For these reasons, I agree that the appeal should be dismissed.

Cassels, J.: I agree. It would indeed be a curious position that after 20 years of legislation dealing with town and country planning and control and use of and development of buildings and land, and after local authorities have concerned themselves in the preparation of planning schemes and develop- C ment between the date when the resolution is passed and the scheme comes into operation, that a garage in the middle of a town should be turned into what is known as a fun fair and the local authority should be powerless to deal with the position.

In December, 1944, the responsible authority passed their resolution. In 1945, the appellant became the lessee of this building and started a fun fair. D On Jan. 16, 1946, the respondents, as interim development authority, served notice under s. 5 of the Act of 1943 on the appellant telling him that they proposed at the end of 28 days to prohibit the use of the land as a fun fair. The appellant preferred a complaint to the magistrates. They dismissed his complaint. He appeals to this court and says that the resolution of the local authority is *ultra vires* and illegal. I agree that the resolution is *intra vires* for the reasons which have been given by my Lords. The submission of unreason- E ableness is without foundation, assuming that in this case it is a proper submission to make.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. G. Drew*, Town Clerk, Brighton (for the respondents).

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[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LA MARQUISE FOOTWEAR'S APPLICATION.

[CHANCERY DIVISION (Evershed, J.), October 15, 16, 1946.]

Trade Marks—Application to register—Distinctive word—" Oomphies "—Footwear —Trade Marks Act, 1938 (c. 22), *s.* 9 (1) (*c*) (*d*), (11).

On an application for registration of the word " Oomphies " in connection with footwear, evidence was given that the word " oomph " had originated in cinema films and was a recognised term in American slang, signifying " sex appeal." The application was refused by the registrar on the grounds (i) that the word did not satisfy the requirements of the Trade Marks Act, 1938, s. 9 (1) (*c*) or (*d*), and (ii) that, assuming that the word referred to sex appeal, it was not one for which protection should be given in any event. The applicants appealed :—

HELD : (i) since the word " oomph " had a recognised meaning, " oomphies " was not an invented word and, therefore, it was not registrable under s. 9 (1) (*c*) (*S.M.T. Gramophone Co., Ltd.* v. *Itonia Gramophones, Ltd.* (2) *applied*), but that it was registrable under s. 9 (1) (*d*), because it had no direct reference to the character or quality of footwear.

(ii) the application should not be rejected merely on the ground that the word had a reference to sex appeal.

[**EDITORIAL NOTE.** By s. 9 (1) of the Trade Marks Act, 1938, a trade mark, to be registrable, must consist of (para. (*c*)) an invented word or words, or (para. (*d*)) a word or words having no direct reference to the character or quality of the goods. This case is an example of a word consisting of an existing word *plus* so trifling an addition that the whole word cannot be said to be " invented " within para. (*c*). It is also an example of a word which just falls on one side of the dividing line as " having no direct reference to the character or quality of the goods "—a question which must be decided on the circumstances of each case. Section 11 of the Act prohibits the registration as a trade mark of " any matter the use of which would . . . be contrary to morality." While asserting that the views on such matters of persons who might be regarded as old-fashioned must not be ignored, the judge holds that in these days a word should not be refused registration merely because it refers to what has become known as " sex appeal." It is worthy of note that he proceeds on the view that on this issue the sexually abnormal should be disregarded and only the normal taken into consideration.

AS TO WORDS CAPABLE OF REGISTRATION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 543-548, paras. 851-854 ; and FOR CASES, see DIGEST, Vol. 43, pp. 138-141, Nos. 15-21, 28-41, and pp. 142-145, Nos. 49-65 and Supp.]

Cases referred to :

(1) *Philippart* v. *William Whiteley, Ltd., Re Philippart's Trade Mark* " *Diabalo* ", [1908] 2 Ch. 274 ; 43 Digest 141, *36* ; 77 L.J.Ch. 650 ; 99 L.T. 291.

(2) *S.M.T. Gramophone Co., Ltd.* v. *Itonia Gramophones, Ltd.* (1931), 47 T.L.R. 324 ; Digest Supp. ; 48 R.P.C. 309.

(3) *Re Keystone Knitting Mills Trade Mark* (1928), 45 R.P.C. 421 ; 43 Digest 193, *414* ; 97 L.J.Ch. 316.

(4) *Re Coats* (*J. & P.*), *Ltd.'s Application*, [1936] 2 All E.R. 975 ; Digest Supp. ; 155 L.T. 127 ; 53 R.P.C. 355.

APPEAL by motion from a decision of the Assistant Registrar of Trade Marks. The facts are set out in the judgment.

G. H. Lloyd-Jacob, K.C., and *P. J. Stuart Bevan* for the applicants.

H. O. Danckwerts for the Comptroller-General of Patents, Designs and Trade Marks.

EVERSHED, J. : This is a case in which, I confess, I have suffered some vacillation of mind, especially when I heard the short but pressing argument of counsel for the Comptroller-General. But, on the whole, I have come to the conclusion that the case is one in which the appeal should succeed.

The appeal is from a decision of Mr. Faulkner, acting for the Registrar of Trade Marks, by which he decided adversely to the applicants, a corporation domiciled in America and known as La Marquise Footwear, Incorporated, on both of two grounds : (i) that the word registration of which was sought did not satisfy the requirements of the Trade Marks Act, 1938, s. 9 (1) ; (ii) that, in the exercise of his discretion, the word was not a word for which protection should in any event be given. I say at once that, as regards the second ground, I differ from the registrar with the utmost diffidence, and I shall state hereafter the reasons why I feel in this case that it would be unjust to deprive the applicants of their registration.

It is necessary, however, that I should, first, say something of the word which has been the subject-matter of the argument. It is "oomphies." In speaking of it as a word, as one must, one is, I think, paying it a compliment, because it barely deserves an appellation which makes it part of articulate speech, which is said by some to be the only distinguishing feature between the human race and brute beasts. The word "oomph" owes its origin, according to the evidence, to a cinema actress, Miss Ann Sheridan, and, as I understand it, after being particularly applied to her, it has achieved a significance—how widespread I cannot say—meaning those qualities which have been described variously and of which I can use the phrase "sex appeal." In that sense, it has, apparently, a precursor in the word "It," which, beginning by particular reference to Miss Clara Bow, achieved a certain wide significance until it was supplanted by the present word. That being the origin of the word, the applicants have added to it the suffix "ies" and have produced the word "oomphies." Counsel for the applicants has said, with justice, that that word, at any rate, is new in the sense that this is the first occasion on which it has ever been used as a word.

Bearing in mind the significance of the word "oomph," the registrar (and it is proper, I think, that I should deal with this aspect of the matter first) has come to the conclusion that, in the exercise of his discretion, he must decide adversely to the applicants on general grounds. In the course of his decision, he has referred to the circumstance that, according to a textbook which he quotes, women's shoes may have, on morbid and abnormal people, an erotic effect. I was at first inclined to think that the registrar had exercised his discretion because he thought that in connection with shoes any word having the signification of sex must be regarded as morbid and salacious and on that ground should not be accepted. I think it is fair, not only to the registrar, but also to the applicants, to say that I am satisfied that no such significance can properly be given to this word in connection with shoes. If it be the fact that to abnormal and morbid people there is some peculiar, exciting sexual effect derived from looking at women's shoes, I think that is a matter which is so far removed from normal experience that for present purposes one may disregard it. In justice to the applicants it should be made clear that there cannot fairly be said to be any salacious or improper signification in applying this word to women's footwear.

When the registrar came to exercise his discretion, he did so on the somewhat broad ground that, assuming one meaning of the word to be sex appeal, no registration of such a word should be allowed in respect of any goods. I most wholeheartedly accept the proposition that it is the duty of the registrar (and it is my hope that he will always fearlessly exercise it) to consider, not merely the general taste of the time, but also the susceptibilities of persons, by no means few in number, who may be regarded as old fashioned, and, if he is of opinion that the feelings of those people will be offended, he will properly consider refusal of registration. I should certainly hope that, in taking (as I do take in this case) a different view from him, I am in no way debasing the standard which, as a servant of the state, he should maintain in his jurisdiction, but to found the discretion on the view that any word having a reference to sex appeal must be refused registration is, I think, in these times, too wide a statement, and, although in American slang this strange word "oomph" has a significance of sex appeal, I do not think that, if all the circumstances of this case are taken into account, including the circle of people in which such words are likely to be current, it is just to reject on that ground an application for registration. Seeing that, as I venture to think, the registrar founded his discretion on a somewhat over-wide proposition, in my view, I am bound by the Trade Marks Act, 1938, s. 52, to exercise my own discretion. Assuming, therefore, in advance of the other part of the case that the applicants have satisfied the requirements of s. 9 (1), I come to the conclusion, in the exercise of my discretion and bearing in mind that perhaps others might take a different view, that it would not be right to refuse registration on the ground of the meaning of "oomph."

I, therefore, return to the question whether s. 9 (1) is satisfied. It is plain that the word must come within either para. (*c*) or (*d*) of the subsection. If it can properly be said to be an invented word, it would fall within para. (*c*). As I have already stated, the whole word with which I am here concerned, having the suffix " ies," is, in one sense of the term, invented, not having, so far as the evidence shows, any previous existence. Counsel for the applicants has addressed a strong argument for the view that the word with the suffix is so materially distinct from the word " oomph " without the suffix that he can fairly say that it is an " invented word " within the language used by PARKER, J., in *Philippart* v. *William Whiteley, Ltd.* (1) and quoted by LORD TOMLIN in *S.M.T. Gramophone Co.'s Trade Mark* (2). My own inclination is to the view that it is not an " invented word," having regard to the origin which I have stated, and that the effect of the suffix " ies " may fairly be described in the language which LORD TOMLIN used in reference to " Consolette " (47 T.L.R. 324, at p. 325) :

> This is a case of taking a word with an accepted meaning, and adding to it . . . a . . . trifling addition, leaving the word still to convey very much the same meaning as it conveyed before the addition was made to it.

The point is difficult, but I am inclined to think that the right answer is to treat it, not as an invented word, but as a word having an accepted meaning, and, therefore, one which, if it is to satisfy s. 9 (1) of the Act, as I think that it does, must come within para. (*d*). I should, perhaps, add this. Much argument was addressed on the footing that the word, in so far as it is in current use (however short and brutish a life it may have), is American slang rather than part of our own native tongue. That is a matter on which one might debate for hours—whether the English tongue, as spoken in these islands, and the English tongue, as spoken in the United States, Canada, Australia, or other parts of the globe, is or is not one and the same language. I do not propose to throw any light on any possible answer to the question, save to say that, where, as here, the word is primarily employed in the film industry, and since, as is well-known, the products of the American film industry are shown and seen by hundreds of thousands of people throughout the English speaking world, it would be an affectation to say that a word which has gained any currency as an American slang word ought to be treated in these islands as a foreign word.

I say no more on that aspect of the case, but turn to s. 9 (1) (*d*). The question under that paragraph is whether, having regard to the significance which the word has, it can be said to have a " direct reference to the character or quality of the goods." On that matter, counsel for the Comptroller-General referred me to the " Charm " case in the Court of Appeal : *Re Keystone Knitting Mills Trade Mark* (3). There it was said by all the members of the Court of Appeal that the word " charm," when applied to ladies' stockings, was plainly a direct reference to the character or quality of the goods. In the language of RUSSELL, L.J., (45 R.P.C. 421, at p. 427) :

> . . . when you realise that the goods in question here are ladies' hosiery and articles of feminine use or adornment, it is quite impossible to say that the word " charm " has no direct reference to the character of the goods.

It was plain from the observations of the judges that " charm " ought to be treated in that connection as merely another way of expressing the adjective " charming," and the decision points out that such an adjective applied to such goods is truly a reference to their character or their quality, *i.e.*, it would be perfectly normal and proper to describe ladies' stockings as charming if they had the necessary quality or character to deserve such an adjective, and that in substance it was an example of a merely laudatory epithet.

Though the cases show that sometimes the borderline is not very easy to define, I think the considerations which apply in this case are different. The burden of the case put by counsel for the Comptroller-General is that " oomphies" must mean that the shoes to which the word would be applied have the quality or character of giving to the wearer those allurements and attractions which make her desirable to the opposite sex, and that, accordingly, it is as plain in this case as in the other case that there is a direct reference to the character or quality of the goods. In approaching a problem of this kind, one has to bear in mind that the court must consider, as the legislature considered, whether the use of particular marks in reference to particular goods would embarrass or harass other traders, and it seems to me that, where you take an ordinary word in common use, properly applicable in its ordinary meaning to the class of goods to which it is sought to be applied by the applicant, the court will not give to the applicant in effect a monopoly of that epithet. Where, however, you take a word which is exceedingly uncommon by comparison, different considerations apply, and, if you say that it has a direct reference, you are going to assume that this word has a much more precise significance and a much greater circulation than, I think on the evidence, it has. The analogy which I think is a much closer one is to the "*Sheen*" case (4), to which counsel for the applicants referred, albeit that the word "sheen" had all the qualities which this word does not possess, namely, the qualities of being aesthetic, poetic and archaic.

Without attempting further analysis, when all the circumstances of the origin and the novelty of the word "oomphies" are considered, I do not think that it can properly and justly be said that "oomphies," applied to footwear, has a direct reference to the character or quality of that footwear. Not having such a direct reference and not being a geographical name (so far as I know), and, I hope, not being a surname, the requirements of the paragraph are met, and I think, therefore, the applicants are entitled to succeed.

Motion allowed.

Solicitors: *Neve, Beck & Co.* (for the applicants); *Solicitor to the Board of Trade* (for the Comptroller-General).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

JACKSON *v.* MINISTER OF PENSIONS.

[King's Bench Division (Denning, J.), October 17, 1946.]

Royal Forces—Pension—Appeal—Medical history sent by tribunal to specialist—Matters included unconnected with disease on which claim based.

On an appeal to a tribunal under the Pensions Appeal Tribunals Act, 1943, it is, as a general rule, a proper course for the tribunal to adopt to send the appellant's medical history to a specialist it wishes to consult, and a tribunal is not wrong in point of law in sending to the specialist a medical history containing matters not connected with the disease upon which the appellant's claim for a pension is based.

[**EDITORIAL NOTE.** Rule 15 of the Pensions Appeal Tribunals (England and Wales) Rules, 1943, empowers a pensions appeal tribunal to take the opinion of a medical specialist in a case where a difficult medical question arises. This case decides that, save in exceptional circumstances, the appellant's full medical history may properly be sent to the specialist, even though it deals with matters other than with which the specialist is concerned and includes decisions of the Ministry adverse to the appellant on those points, but the judge throws out the suggestion that the parties should be consulted on the question whether or not special circumstances do exist.

For the Pensions Appeal Tribunals Act, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.

Appeal from a decision of a pensions appeal tribunal. The relevant facts are set out in the judgment.

G. H. Crispin for the appellant.
Stephen Chapman for the respondent.

Denning, J.: This appeal raises a short point. The appellant is a man who was in the army for just over a year. He joined in September, 1939, and was discharged in October, 1940, in consequence of chronic lumbago. His application for a pension is not based on that matter, but is on the ground that his eye-sight has been affected by war service. When the matter came before the tribunal, they desired to take the opinion of an ophthalmic surgeon on the condition of his eyes, and so the papers were sent to a specialist under the provisions of r. 15, and there was sent with them the statement of the case including the appellant's medical history from the time of his enlistment to the time of his discharge, and that included the decision of the Ministry in regard to his other claims—lumbago and so forth—from which it could be inferred that, in the view of the Ministry, those other claims were unfounded. What is said before me is that in these circumstances the sending of the statement of the case to the ophthalmic specialist was prejudicial to the man because there were irrelevant matters in the medical history which were prejudicial to him.

I am satisfied that ordinarily it is the proper course for the tribunal to send to a specialist the appellant's medical history. In most cases it would be desirable. It is only on the medical history coupled with the actual physical examination of the man that the specialist can give an informed opinion. The only question in this case is whether that general rule should apply, or whether in the circumstances the tribunal were wrong in point of law in sending this particular medical history to the specialist when it dealt with other matters and not with his eyes. I am unable to say that in point of law they were wrong. It seems to me a matter for their consideration what papers should be submitted to the specialist. It may well be that in future cases the views of the parties should be sought upon it so that the question which has arisen in this case should not arise again. From some points of view, this medical history on other matters may be relevant in regard to eyes. It all depends on the circumstances of the case. If one examines the opinion of the ophthalmic specialist, he seems to have gone into it very carefully free from any prejudice whatsoever. I cannot see that any injustice was done and certainly no error in point of law. This appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Culross & Co.* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

W. *v.* MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), October 16, 1946.]

Royal Forces—Pension—Attributability—Anxiety state resulting from matrimonial troubles caused by separation due to war service.

The appellant, who was discharged from the army after four year's service as permanently unfit for any form of military service in consequence of a severe and chronic anxiety state, himself attributed his trouble to worry about his wife, who had misconducted herself with several men during his absence in the army. The pensions appeal tribunal on the evidence, medical and otherwise, found as a fact that the disability was brought on solely by domestic marital affairs, worry and anxiety, and that war service factors and conditions played no part in adversely affecting the deterioration:—

HELD: the question of causation was to be treated not in a metaphysical sense, but according to common-sense standards, and, approaching the question in that way, the cause of the appellant's anxiety state was not his war service but an intervening cause, the wife's conduct, his separation from her, though attributable to war service, only providing the conditions in which the cause operated.

[**EDITORIAL NOTE.** There must be many cases with the same or similar facts in which the principle here applied by DENNING, J., would apply. At first sight it would seem that if war service results in the separation of husband and wife and consequent conduct of the wife which produces worry and ill-health on the part of the husband, his ill-health is caused by the war-service. But, to use a phrase with which the lawyer is familiar in, for instance, cases of negligence, for the purpose of attributability in pensions matters one must look at the proximate or effective cause of the disability. The illustration given by the judge of the young soldier who commits suicide on hearing that his fiancee has broken off their engagement makes this very clear.

FOR THE PENSIONS APPEALS TRIBUNAL ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

APPEAL from the decision of a pensions appeal tribunal. The facts are fully set out in the judgment.

G. H. Crispin for the appellant.
Stephen Chapman for the Minister.

DENNING, J.: The appellant joined the army in April, 1940, and was discharged in March, 1944, as permanently unfit for any form of military service in consequence of a severe and chronic anxiety state. There is a compelling presumption in his favour that that is attributable to war service or has been aggravated by it and the burden is on the Ministry to prove the contrary. The Ministry say that this anxiety state is not due to his service as a member of the military forces, but to the conduct of his wife and the domestic worry which that gave to him. The Ministry on that ground decided against the claim and the tribunal upheld them. The case gives rise to a question whether there is any evidence to support the decision and also a question of causation which are questions of law.

The appellant himself attributed his trouble to the worry about his wife. When he was invalided from the army he stated in his own writing that the cause of his condition was worry about his wife, domestic trouble, and when he made a statement in support of his appeal, this is what he said:

> I went on leave on June 3, 1942, and I accidentally found out that my wife was associating with other men. I questioned her about it, but she told me some fabulous story which I did not believe. By the time my leave was up, I had proof that she had misconducted herself with a married man and two single men. I reported back to my unit on June 12, 1942, very much upset, and spoke to my O.C. asking him for extra leave to try and straighten things out and he granted me 48 hours on June 17, 1942, but it was impossible to straighten things out in so short a time and I applied for an extension and was granted 24 hours. We still could not settle things, but I had to return to my unit.

Then, as a result of a talk with the chaplain it was arranged that the appellant's wife should go to Scotland for a holiday. She did go for a week, on July 28, 1942, and the appellant had a sleeping out pass and lived with her there. Then he had 48 hours leave and went home with his wife. Things did not seem to get any better, however, in his domestic affairs, and he made applications to stop her allowance. Eventually, in 1943, the welfare officer suggested that they should make it up and have a child and that is what they did. He had leave, discussed the matter with his wife, and they had a child. Nevertheless, notwithstanding all those efforts, the marriage did not prove a success. When he gave evidence at the hearing, he said:

> The position with regard to my wife is still the same, very unsatisfactory. She left me, but came back three weeks ago.

In the medical report the medical officer of the Ministry of Pensions summed up the situation in this way:

> All features of the appellant's disability are characteristic of an anxiety state occurring in a constitutionally pre-disposed subject faced with a situation involving emotional conflict centred on personal problems. The manifestation in service is considered to be due to domestic worry reacting on an individual pre-disposed to neurosis and entirely unrelated to his war service.

On that evidence the tribunal found as a fact that this disability was brought on solely by domestic marital affairs, worry and anxiety, and that war service factors and conditions played no part in adversely affecting the deterioration.

It seems to me that there was ample evidence on which the tribunal could find that the appellant's anxiety state was brought about by his wife's conduct, but how does that stand in regard to attributability? No doubt, the war service produced the separation, but did the separation produce the anxiety state? It seems to me that there is an intervening cause, the wife's own personality and conduct. That intervening cause was not attributable to the separation. The separation gave rise to circumstances in which the cause operated, but the real cause was the wife's own conduct. The question of causation, as has been said in many cases, is to be treated not in a metaphysical sense, but according to common-sense standards. Approaching the question in this way, it seems to me that the cause of this anxiety state was not the appellant's war service, but the wife's conduct. The separation was attributable to war service, but it only provided the conditions in which the cause operated. It is suggested that his condition was aggravated by war service, but having regard to the leaves that he was given and the efforts of the chaplain, the welfare officer, and all concerned to put things right, it seems to me that there was ample evidence on which the tribunal could come to the conclusion that this trouble, this anxiety state, was attributable to the wife's own conduct and that war service did not aggravate it in any way.

Similar cases, I have no doubt, often occur. I might put a hypothetical case, where a young man, serving abroad, receives a letter from his fiancee breaking off the engagement on account of his absence and he is so distressed that he commits suicide. There again his death is not attributable to war service. It is attributable to an intervening cause. So in this case it was the wife's own conduct which caused the man's anxiety state and not his war service, nor did war service aggravate it. It seems to me that there was ample evidence to support the tribunal's decision. In my view, their decision was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Culross & Co.* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re PIPER: DODD AND ANOTHER *v.* PIPER AND OTHERS.

[CHANCERY DIVISION (Romer, J.), July 31, 1946.]

Wills—Condition—Validity—Public policy—Encouraging separation of parent and child—Malum prohibitum.

By his will the testator gave a part of his residuary estate to be held as to both capital and income on trust for such of the four D. children "as attain the age of 30 years and do not before attaining such age reside with" their father. The children's father had been divorced by their mother before the date of the will:—

HELD: on the construction of the will, the condition as to non-residence was a condition precedent which, being calculated to bring about the separation of parent and child, was *malum prohibitum* and void as being against public policy, and the gift would take effect free from it.

[**EDITORIAL NOTE.** It is well established that any condition to a gift under a will which tends to separate a child from its parent is void as being against public policy: see *Re Morgan* (5); *Re Boulter*, [1922] 1 Ch. 75; and ROMER, J., here holds that that is so even though the parent whose association with the child is sought to be prevented has been divorced. As ROMER, J., points out, the difference between *malum prohibitum* and *malum in se* has never been very precisely defined, but he holds that a condition the object of which is to keep a child away from its parent is *malum prohibitum*.

AS TO VOID CONDITIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 105-109, paras. 141, 142; and FOR CASES, see DIGEST, Vol. 44, pp. 452-459, Nos. 2745-2804.]

Cases referred to:

(1) *Egerton* v. *Brownlow* (*Earl*) (1853), 4 H.L. Cas. 1; 44 Digest 192, *208*; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306.

(2) *Re Moore, Trafford* v. *Maconochie* (1888), 39 Ch.D. 116; 44 Digest 438, *2646*; 57 L.J.Ch. 936; 59 L.T. 681.

(3) *Re Hope Johnstone, Hope Johnstone* v. *Hope Johnstone*, [1904] 1 Ch. 470; 27 Digest 223, *1941*; 73 L.J.Ch. 321; 90 L.T. 253.

(4) *Re Borwick, Borwick* v. *Borwick*, [1933] Ch. 657; Digest Supp.; 102 L.J.Ch. 199; 149 L.T. 116.

(5) *Re Morgan, Dowson* v. *Davey* (1910), 26 T.L.R. 398; 44 Digest, 459, *2802*.

ADJOURNED SUMMONS to determine a question arising under the will of a testator.

By cl. 9 of his will, dated July 29, 1942, the testator directed his trustees to pay the income of the first moiety of his estate to Mrs. G.D., as therein mentioned so long as she did not reside with her former husband, R.D., and, if she remarried or did so reside, then on the trusts and for the purposes in and for which the same would be for the time being held if she were then dead, and, after her death or the cesser of her life interest, to stand possessed of the capital and future income of the first moiety on the trusts applicable to the second moiety. Clause 10 provided:

> My trustees shall hold the second moiety of my trust fund as to both capital and income on trust for such of them the four D. children, *i.e.*, children of R.D. and G.D., as attain the age of 30 years, and do not before attaining such age reside with . . . R.D., and if more than one in equal shares provided always that if any one or more of the D. children resides or reside with the said R.D. before attaining the age of 21 years and my

> trustees in their absolute and uncontrolled discretion are satisfied that such child or children on . . . attaining the age of 30 years is or are not under the influence of the said R.D. my trustees may if they think fit declare in writing that for the purposes of this clause such child or children has [*sic*] not resided with the said R.D. and thereupon such child or children shall be entitled to share in the second moiety as if she [*sic*] or they had not resided with the said R.D. as aforesaid.

Clause 13 provided :

> Notwithstanding anything hereinbefore contained and for removing all doubts I hereby declare that for the purposes of this my will (*a*) the word " reside " in reference to residing with . . . R.D. shall be construed so as to include passing any part of a day or night in premises or any part of premises belonging to hired by or lent to . . . R.D. : (*b*) Any of the D. children in respect of whom power is hereinbefore given to my trustees to declare in writing that he or she has not resided with . . . R.D. shall be deemed to be entitled in expectancy or presumptively to a share in the first moiety or the second moiety as the case may be until he or she attains the age of 30 years or dies under that age ; (*c*) No share of or in the capital of the first . . . or . . . second moiety shall be or be deemed to be vested in any of the D. children before he or she shall have attained the age of 30 years : (*d*) My trustees shall not be liable or accountable for or by reason of the payment or transfer of the income or capital of the trust fund or any part thereof to any of them . . . Mrs. G. D. and the D. children after the determination of his or her interest in such capital or income as the case may be under the provisions of this my will unless they shall have received express notice of the act or event causing such determination before making such payment or transfer.

Clause 14 provided :

> If none of the D. children attains a vested interest under the foregoing trusts affecting the trust fund or such trusts otherwise fail or determine then subject to the trusts powers and provisions hereinbefore declared and contained and to the powers by law vested in my trustees and to any or every exercise of such powers my trustees shall hold the trust fund and the income thereof in trust for B. . . .

On Jan. 30, 1943, the testator died. By this summons, which was taken out on Sept. 6, 1944, the executors of the will asked, *inter alia*, whether the condition in cl. 10 that the D. children should not reside with their father before attaining the age of 30 years was void for uncertainty, or as being against public policy, or on some other, and, if so, what, grounds, and, if the condition was void, whether each of the D. children was entitled, subject to attaining the age of 30 years, to a share of the moiety of the residuary estate given by cl. 10, or whether the gift of that moiety was wholly void or had failed to take effect and, if so, on what grounds. The defendants to the summons were the testator's widow, the former wife of R.D., who had divorced R.D., and remarried and was at the date of this summons Mrs. B., the D. children, of whom there were four, all infants, and the ultimate residuary legatee.

C. R. D. Richmount for the executors.
W. F. Waite for the widow.
Michael Bowles for G.D.
H. A. Rose for the D. children.
E. M. Winterbotham for the ultimate residuary legatee.

ROMER, J. : The question of construction is, in effect, whether the gift in cl. 10 is on a dual contingency or on one contingency. It is clear that it is on the contingency of attaining the age of 30 years, but not equally clear whether it is on that of not residing with the father. Clause 10, considered by itself, contains a requirement of a twofold nature. A child cannot take unless it can be said of him or her that he or she has attained the age of 30 years and has not resided with the father. The attainment of that age and the non-residence are two separate characteristics, two separate requirements each of which has to be satisfied. Counsel for the D. children conceded that that was so *qua* cl. 10 by itself, but contended that, on the true construction of cl. 10 and other clauses, the condition was subsequent, and he cited *Egerton* v. *Brownlow* (1), which showed that a condition subsequent could be attached to a contingent interest. Counsel for the D. children relied principally on the use, in cl. 13 (*d*) of the will, of the word "determination," which word was considered also in *Egerton* v. *Brownlow* (1), and contended that the interest could not have "determined" except on the footing that it had commenced and that, therefore, the interest of the D. children had commenced. There is some force in that contention, but those indications are not strong enough to displace the effect of cl. 10, and the condition of not residing with the father is, therefore, of the same character as the condition of attaining 30 years of age.

I, therefore, approach the matter from the point of view that the condition was a condition precedent. In JARMAN ON WILLS, 7th edn., Vol. 2, pp. 1443, 1444, it is stated :

> . . . the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent ; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gifts and condition void.

That statement (as contained in JARMAN ON WILLS, 4th edn., vol. 2, p. 12), was considered in *Re Moore* (2) by COTTON, L.J. (39 Ch.D. 116, at pp. 128, 129).

Counsel for the D. children suggested that the condition as to residence was bad, as being against the policy of the law. In that he is correct, and the fact that the husband and wife had been divorced before the date of the will does not affect the matter. The condition is expressed in terms which are calculated to bring about the separation of parent and child, and it has been recognised many times that such a condition will not be enforced. The difference between *malum prohibitum* and *malum in se* has never been very precisely defined or considered. Assistance was given, however, by *Re Hope Johnstone* (3) where KEKEWICH, J., said ([1904] 1 Ch. 470, at p. 479) :

> What is meant by a provision being void as against the policy of the law ? The phrase means no more than that the provision is not enforceable by anyone or in any court.

Assistance is given also by a passage in SHEPPARD'S TOUCHSTONE, vol. 1, p. 132, where it is stated :

> All conditions annexed to estates, being compulsory, to compel a man to do any thing that is in its nature good or indifferent ; or being restrictive, to restrain or forbid the doing of any thing which, in its nature, is *malum in se*, as to kill a man, or the like ; or *malum prohibitum*, being a thing forbidden by any statute, or the like ; all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty ; the condition for the most part is void.

That passage was cited by BENNETT, J., ([1933] Ch. 657, at p. 666), in *Re Borwick* (4). Counsel for the residuary legatee referred to *Re Morgan* (5) and contended that the condition in the present case ought to be regarded as *malum in se*, with the result that the whole gift was bad. In the absence of direct authority I am not prepared to hold that a gift, the object of which is to keep a child away from its parent, is *malum in se*. I am quite satisfied that it is not, but, on the other hand, it is *malum prohibitum*. The position in the present case is, therefore, precisely within the statement of the law in JARMAN ON WILLS, which I accept as accurate, with the result that the gift takes effect freed and discharged from the void condition.

I need not, therefore, deal with the further point on which counsel for the D. children relied, namely, that the condition was impossible of fulfilment owing to uncertainty in view of the terms of the definition clause. I express no view on that point. The condition is void as against public policy, the gift takes effect free from it, and each of the D. children is entitled to a share on attaining the age of 30 years.

Declaration accordingly.

Solicitors : *James & Charles Dodd* (for the executors) ; *Field, Roscoe & Co.* (for the widow) ; *Lithgow, Pepper & Eldridge*, agents for *Walter H. & G. M. Day*, Maidstone (for G.D. and the D. children) ; *F. J. Thairlwall & Co.*, agents for *Cook & Talbot*, Southport (for the ultimate residuary legatee).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law*.]

TRAVERS *v.* GLOUCESTER CORPORATION AND OTHERS.

[KING'S BENCH DIVISION (Lewis, J.), July 23, 1946.]

Negligence—Dangerous article—Gas geyser—Defective installation by landlord—Liability of landlord to tenant's lodger.

A lodger in one of the defendant corporation's houses died from accidentally inhaling carbon monoxide fumes generated by, or emitted from, a gas geyser in the bathroom. The vent pipe of the geyser, which had been installed under the direction of the corporation's architect when the house was built for the corporation some years before, terminated under the eaves and had no efficient baffle, with the result that a down-draught was created, which interfered with combustion and caused carbon monoxide to be produced and discharged into the bathroom, a defect to which the corporation's attention had been drawn by the local gas company. In an action by the mother of the deceased, under the Fatal Accidents Act, 1846, it was contended on behalf of the plaintiff that where a person negligently instals a dangerous apparatus in a dwelling-house he is liable to anyone injured as a result of that negligence, and that the corporation were, through their servants or agents, who had done the work, liable to the plaintiff :—

HELD : that the case fell to be decided on the principle that a landlord who lets a house in a dangerous state was not liable to the tenant's customers or guests for accidents happening during the term, and that the principle of *M'Alister* (*or Donoghue*) v. *Stevenson* (3) had no application. The corporation were, therefore, not liable.

[**EDITORIAL NOTE.** This case is of special importance to local authorities at the present moment when housing programmes are being pushed forward with all possible vigour. The decision is based, as to one ground, on the well-established principle, which has now stood for many years, that the landlord of an unfurnished house is not liable to his tenant or a third party for defects in the house which render it dangerous to the occupant : see, for the most important cases, *Cavalier* v. *Pope* (15), *Bottomley* v. *Bannister* (16), *Otto* v. *Bolton and Norris* (17), *Cameron* v. *Young* (19), and *Davis* v. *Foots* (20). An attempt to bring the case within the principle of *M'Alister* (*or Donoghue*) v. *Stevenson* (3) would, it is submitted, also have failed on the ground that there was ample opportunity for inspection of the geyser. It is, perhaps, opportune to review the principal decisions in which this test of the applicability of the decision has been applied. In *Grant* v. *Australian Knitting Mills, Ltd.* (12) (dermatitis through wearing woollen garment) ; *Parker* v. *Oloxo, Ltd.* ([1937] 3 All E.R. 524) and *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd.* ([1940] 1 All E.R. 174) (dermatitis through use of hair dye) ; *Barnett* v. *Packer* ([1940] 3 All E.R. 575) (wire in a sweetmeat) ; *Malfroot* v. *Noxal, Ltd.* (7), *Stennett* v. *Hancock* ([1939] 2 All E.R. 578), and *Herschtal* v. *Stewart & Ardern, Ltd* (8) (faulty repair of motor vehicles) ; and *Haseldine* v. *Daw & Son, Ltd.* (10) (faulty repair of lift), the principle was applied, the dangerous defect in each case being unknown to and undiscoverable by the customer or customers. Cases where the principle has not been applied include *Farr* v. *Butters, Bros. & Co.* (18) (defect in crane sold in parts and erected by purchaser's expert) ; *Dransfield* v. *British Insulated Cables, Ltd.* (13) (defect discoverable by examination in bull ring through which passed trolley-wire) ; *Evans* v. *Triplex Safety Glass Co., Ltd.* ([1936] 1 All E.R. 283) (breaking of safety glass windscreen of car).

AS TO NEGLIGENCE IN REGARD TO DANGEROUS OR INJURIOUS GOODS OR MATTER, see HALSBURY, Hailsham Edn., Vol. 23, pp. 629-634, paras, 883-889 ; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.]

Cases referred to :

(1) *Buckner* v. *Ashby & Horner, Ltd.*, [1941] 1 K.B. 321, 337 ; Digest Supp. ; 110 L.J.K.B. 460 ; 105 J.P. 220.

(2) *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640 ; 36 Digest 28, *142* ; 79 L.J.P.C. 13 ; 101 L.T. 359.

(3) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(4) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 ; 36 Digest 8, *9* ; 52 L.J.Q.B. 702 ; 49 L.T. 357.

(5) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491 ; 36 Digest 10, *26* ; 62 L.J.Q.B. 353 ; 68 L.T. 626.

(6) *Brown* v. *Cotterill* (1934), 51 T.L.R. 21 ; Digest Supp.

(7) *Malfroot* v. *Noxal, Ltd.* (1935), 51 T.L.R. 551 ; Digest Supp. ; 79 Sol. Jo. 610.

(8) *Herschtal* v. *Stewart & Ardern, Ltd.*, [1939] 4 All E.R. 123 ; [1940] 1 K.B. 155 ; Digest Supp ; 109 L.J.K.B. 328 ; 161 L.T. 331.

(9) *Paine* v. *Colne Valley Electricity Supply Co., Ltd., and British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803 ; Digest Supp. ; 160 L.T. 124.

(10) *Haseldine* v. *Daw & Son., Ltd.*, [1941] 3 All E.R. 156 ; [1941] 2 K.B. 343 ; Digest Supp. ; 111 L.J.K.B. 45 ; 165 L.T. 185.

(11) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 ; 36 Digest 37, *213* ; 92 L.J.K.B. 50 ; 128 L.T. 386.

(12) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 ; Digest Supp. ; 105 L.J.P.C. 6 ; 154 L.T. 18.

(13) *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382 ; Digest Supp.

(14) *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221 ; 36 Digest 136, *900* ; 33 L.J.C.P. 1 ; 9 L.T. 523 ; 3 New Rep. 85.

(15) *Cavalier* v. *Pope*, [1906] A.C. 428 ; 42 Digest 968, *3* ; affirming [1905] 2 K.B. 757 ; 74 L.J.K.B. 857 ; 93 L.T. 473.

(16) *Bottomley* v. *Bannister*, [1932] 1 K.B. 458 ; Digest Supp. ; 101 L.J.K.B. 46 ; 146 L.T. 68.

(17) *Otto* v. *Bolton & Norris*, [1936] 1 All E.R. 960 ; [1936] 2 K.B. 46 ; Digest Supp. ; 105 L.J.K.B. 602 ; 154 L.T. 717.

(18) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606 ; Digest Supp. ; 101 L.J.K.B. 768 ; 147 L.T. 427.

(19) *Cameron* v. *Young*, [1908] A.C. 176 ; 31 Digest 348, *4901 ;* 77. L.J.P.C. 68 ; 98 L.T. 592.

(20) *Davis* v. *Foots*, [1939] 4 All E.R. 4 ; [1940] 1 K.B. 116 ; Digest Supp. ; 109 L.J.K.B. 385.

ACTION under the Fatal Accidents Act, 1846, for damages for negligence. The facts are fully set out in the judgment.

H. H. Maddocks for the plaintiff.

R. C. Hutton for the defendants, the Gloucester Corporation.

R. F. Lyne for the defendants, the Building and Public Works Construction Co., Ltd.

LEWIS, J. : On Mar. 12, 1942, the plaintiff's son, on whom she was wholly dependent, died from accidentally inhaling carbon monoxide fumes generated by or emitted from a geyser into the bath-room of No. 24 Malmesbury Road, in the city of Gloucester. There was a sickly smell of gas in the bath-room, but the gas had been turned off. The deceased was a lodger in that house, which was in the occupation of a Mrs. Taylor as tenant of Gloucester Corporation. He had been a lodger in that house for some 10 months. He was 20 years of age, a healthy and intelligent young man, earning over £5 a week, with an opportunity, in the reserved occupation in which he was employed, of earning still larger wages in the near future. He contributed to the support of his mother £3 10*s.* 0*d.* or thereabouts every week, and the mother also drew £1 4*s.* 0*d.* from the Government in respect of his reserved occupation.

No. 24 Malmesbury Road is one of 264 houses built by the corporation under a contract dated June 15, 1935, made between the mayor, aldermen and citizens of the City of Gloucester and the Building and Public Works Construction Co., Ltd. No. 24 was finished on Oct. 12, 1938, and occupied by Mr. Taylor as tenant on Oct. 17, 1938, and the tenancy was transferred to his wife at a later date. The rent book had a notice to the effect that any damage or defects should be reported at once to the estates manager, and one of the conditions of tenancy was that the tenant should immediately notify the estates manager of any damage or defect other than that to be made good by the tenant. The specification in the contract provided for fixing over each bath one Wheeler's standard copper geyser on brackets and having galvanized baffle with all bends, straights and cowl, and fitted with safety locking device. The contract contained a provision that the work should be executed in such manner and at such times as the corporation's architect might direct. In accordance with this contract and specification, Wheeler's geysers were installed in these houses, including No. 24 Malmesbury Road, under the direction of the architect, and on Jan. 29, 1940, a final certificate was issued to the Building and Public Works Construction Co., Ltd., in respect of the houses. The geysers so installed were, no doubt, unsatisfactory and dangerous. The vent pipe which was put in terminated under the eaves of the house instead of rising above the eaves so as to ensure that the fumes did not descend into the bath-room.

In 1941, the Gloucester Gas Light Co. drew the attention of the corporation to the unsatisfactory manner in which the geysers and vents were fitted in these houses, and after a lapse of some 9 months the corporation asked for and obtained an estimate for the erection of proper vents. Some houses were then fitted with proper vent pipes. After the date of the death of the deceased, some more houses, including 24 Malmesbury Road, were similarly fitted. The correspondence shows that the corporation, though they had taken no expert advice on the question of the installation of the geysers in these council houses, had full warning from the gas company of the necessity of geysers having proper and adequate vent pipes and baffles. As long ago as 1924 the National Gas Council had issued a booklet of "Instructions for Fixing Geysers," for the use of gas fitters, in which it was pointed out that the termination of the vent should A be not under the eaves but above them. Anyone with the slightest knowledge of the dangers of gas fumes should have known as early as 1924 that the practice of terminating the vent pipe under the eaves was dangerous. In view of the warning given, I am satisfied that the corporation or their officials knew that the installation as put in was dangerous.

By writ issued on Mar. 10, 1943, the plaintiff, the mother of the deceased man, brought an action under Lord Campbell's Act against the Gloucester Corporation, B the Gloucester Gas Light Co., and the Building and Public Works Construction Co., Ltd., claiming damages in respect of her son's death owing to the alleged negligence of the defendants or one or other of them. The action came on for hearing before SINGLETON, J., in October, 1945, at the Gloucester Assizes, when the action against the gas company was dismissed with costs and leave was given to amend the statement of claim as against the first and third defendants. Leave was also given to those defendants to require particulars of the statement C of claim as so amended and to amend their defences if necessary, and the action was adjourned generally. Amendments were, accordingly, made and on May 27, 1946, at the Summer Assizes at Gloucester, the case came before me. The issues raised on the pleadings at that time were as follows. The statement of claim as amended alleged, first, that the plaintiff was bringing the action for her own benefit as mother of the deceased. It sets out that at all material times D the deceased was a lodger in the dwelling-house of Mrs. Taylor, at No. 24, Malmesbury Road, and that he died of asphyxia in the bathroom of the said dwelling-house after accidentally inhaling carbon monoxide fumes generated by or emitted from a lighted gas geyser in the said bathroom. Then it is alleged that the deceased's death was due to the negligence of the person or persons who installed in the said dwelling-house the said gas geyser, which was a dangerous apparatus. The particulars of negligence are : E

> The vent pipe was carried through the outside wall of the said house and terminated against the said outside wall and immediately beneath the eaves of the roof of the said house and no efficient baffle was fitted in the said vent pipe. The said defective installation caused and/or permitted a down-draught into the combustion chamber of the said geyser resulting in inadequate combustion and the generation of carbon monoxide gas. The said dwelling-house was built and the said geyser and system of ventilation installed by the first and third defendants, or alternatively by one or by the other of them. In F the alternative the said dwelling-house was built and the said geyser and system of ventilation were installed by the third defendants [*i.e.*, the Building and Public Works Construction Co., Ltd.] as the servants or agents of the first defendants. In the further alternative the said geyser and system of ventilation was installed by the second defendants.

Then there are set out particulars as to the deceased man, under the statute.

To that the Gloucester Corporation said they were not negligent : G

> 1. They owed no duty to the deceased, alternatively they were not in breach of any duty. 2. The third-named defendants were not the servants or agents of these defendants. The third-named defendants built the said house and if which is not admitted they installed the said geyser and system of ventilation they did so as independent contractors the contract being in writing dated June 15, 1935. 3. None of the facts alleged relating to loss or dependency is admitted. Each fact alleged in para. 3 of the amended statement of claim is denied. 4. Alternatively, the deceased by his own H negligence caused or contributed to his death by remaining in a small bathroom while the geyser therein was alight without making certain that the said room was being adequately ventilated particularly having regard to the fact that a strong wind was blowing at the time.

The Building and Public Works Construction Co., Ltd., by their amended defence, say that the statement of claim discloses no cause of action against them. They deny that they were guilty of negligence. They set out the agreement made between themselves and the corporation, and they say that by that agreement :

> These defendants agreed for the consideration therein named to execute and complete the works shown upon the plans signed by both parties or described or referred to in the specification and conditions thereto annexed ; such works included No. 24 Malmesbury Road, Gloucester. 4. The said plans, conditions and specifications were prepared by a surveyor to the Gloucester Corporation who was also the architect referred to in the said agreement. 5. By cl. 24 of the general conditions it was agreed that all kinds of materials specifically stated to be used in the specification should be used. 6. By cl. 50 of the general conditions it was further agreed that the work should be executed in such manner as the architect might direct. 7. Under the said conditions, it was agreed that these defendants would give all facilities to the second-named defendants, the Gloucester Gas Light Co. and their workmen to carcass the said dwelling-house to four points to (*inter alia*) the said geyser, such work to be done by the Gloucester Gas Light Co. at their own cost no payment being made to these defendants in respect thereof. 8. The said dwelling-house was built and the geyser and system of ventilation installed by these defendants in accordance with such plans and specifications and under the direction of the architect.

Then clause 48 (7) of the general conditions is set out, *viz.* :

> That the final certificate of the architect save as therein mentioned should be conclusive evidence as to the sufficiency of the said works and materials.

Then they say :

> In the premises these defendants were under no duty to the said [deceased] nor to the plaintiff.

They do not admit that the deceased died for the reason alleged ; they do not admit that the particulars pursuant to the statute appearing in the statement of claim are correct ; and they say alternatively that the deceased by his own negligence caused or contributed to his death by remaining in a small bathroom whilst the geyser was alight without making certain that the said room was being adequately ventilated.

An application was made on behalf of the plaintiff for a further amendment of the statement of claim, which I allowed, and a further paragraph was added to the statement of claim which read as follows :

> Further or alternatively, the first defendants were negligent in that they failed to warn the occupiers of the said house that the said gas geyser and vent pipe as installed was defective and dangerous, notwithstanding that they were expressly so informed by the Gloucester Gas Light Co.

At the trial the facts set out at the beginning of this judgment were proved. Two expert witnesses were called, one on behalf of the plaintiff and the other on behalf of the Gloucester Corporation. The expert called on behalf of the plaintiff proved that the method of installation was contrary to all accepted principles, as when a wind impinges on a wall or under the eaves of a house a zone of still air at a higher pressure than the air on the other side is set up, with the result that a down-draught is created which, meeting the products of combustion from the geyser, becomes diluted and is carried into the combustion chamber, thus interfering with combustion and causing carbon monoxide to be produced and discharged into the bath-room. The extent of that down-draught varies according to the force and direction of the wind. The expert called for the first defendants entirely failed to satisfy me that these conclusions were erroneous, and answers to certain questions put to him showed that in his view the installation put in was, to say the least of it, wrong.

Counsel for the plaintiff, at the outset of his argument, said that he felt he had no case against the contractors who had acted as agents for the corporation under the instructions of their architect, and he could find no fault with them. He referred me later to *Buckner* v. *Ashby & Horner, Ltd.* (1), in which case ATKINSON, J., held that contractors whose duty it was to do the work to the satisfaction of the corporation, who had inspected and passed the work (in this particular case by giving the final certificate), owed no duty to the plaintiff. That decision was affirmed by the Court of Appeal. But as against the corporation he contended that where a person instals in a dwelling-house a dangerous apparatus negligently he is liable to anyone injured as a result of that negligence, and that the corporation were, through their agents or servants, who had, in fact, done the work, liable to the plaintiff. It was argued that the decision of the Privy Council in *Dominion Natural Gas Co.* v. *Collins* (2) was an authority which covered this case. As in the present case, the installation there was a dangerous thing, but the appellants in that case were the distributors of gas as a commercial product and had negligently erected an installation in the premises of a railway company and thereby injured the respondent, who was employed by the railway company. The circumstances of that case are very different from those in the present case, and the duty owed by the corporation to the deceased man in this case was not the duty owed by the gas company to the respondents in the case cited. That case, however, was decided before *Donoghue* v. *Stevenson* (3), and it was argued that the opinion of the majority of their Lordships in the House of Lords in that case had extended the principle of the duty to third parties owed by a person who instals a dangerous thing. The headnote (which in my opinion quite correctly sets out the decision of their Lordship's House) reads as follows :

> By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Lord Atkin, with Lord Thankerton and Lord Macmillan, was in the majority ; Lord Buckmaster and Lord Tomlin dissented. In stating his opinion, Lord Atkin, in a passage which is now very well known, said as follows (*ibid*, at p. 580) :

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of " *culpa*," is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ; and the lawyer's question, Who is my neighbour ? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* (4), as laid down by Lord Esher (then Master of the Rolls), when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J., in *Le Lievre* v. *Gould* (5). Lord Esher says ([1895] 1 Q.B. 491 at p. 496) : " That case established that, under certain circumstances, one may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith, L.J. (*ibid*, at p. 504) : ". . . The decision of *Heaven* v. *Pender* (4) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. . . ."

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of " proximity " was intended by Lord Esher is obvious from his own illustration in *Heaven* v. *Pender* (4) of the application of this doctrine to the sale of goods (11 Q.B.D. 503, at p. 510) :

> This [*i.e.*, the rule he has just formulated] includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would

> be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.

Then Lord Atkin, having cited that passage, says ([1932] A.C. 562, at p. 582) :

> I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed . . . It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer ; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleansing fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

In referring in his opinion to *Dominion Natural Gas Co., Ltd.* v. *Collins* (2) Lord Atkin said (*ibid*, at p. 596) :

> In the *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins* (2) the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape-valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee (consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson), after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded ([1909] A.C. 640, at p. 646) : "There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."

Then Lord Atkin goes on :

> This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved ; but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun.

That is how Lord Atkin summed up the decision of the Privy Council in the *Dominion Natural Gas Co.* case (2).

The principle enunciated in *Donoghue* v. *Stevenson* (3) was applied in *Brown* v. *Cotterill* (6), in *Malfroot* v. *Noxall, Ltd.* (7) and in *Herschtal* v. *Stewart & Ardern, Ltd.* (8). In the latter case, Tucker, J. (as he then was) decided that

that principle applied not only to manufacturers but also to suppliers and repairers of goods. On the other hand, Goddard, L.J. (as he then was) refused to apply such a principle in *Paine* v. *Colne Valley Electricity Supply Co.* (9), on the ground that there was no proximity of relationship between the manufacturers and the workman in that case so as to impose on them the duty laid down in *Donoghue* v. *Stevenson* (3).

I was also referred to *Haseldine* v. *Daw & Son, Ltd.* (10). The facts in that case were these. One Daw was landlord of a block of flats known as Hornton Court, Kensington, and, with other members of his family who owned other properties, he formed a company, Daw & Son, Ltd., of which he was a director and the secretary, to manage the properties. The landlord himself entered into the tenancy agreements for the flats and he remained the occupier of the common staircase and the lift, but he used the company as his agent to make all contracts and arrangements necessary for the running and the maintenance of the lift. Under that authority the company made a contract of insurance with an insurance society against third-party risks in respect of the use of the lift, and also a contract with a firm of engineers, who undertook once a month to adjust, clean and lubricate the mechanism of the lift, to provide packing material for the glands and leather for the control valves, and to furnish signed reports after each periodical visit. The engineers duly examined, and in November, 1939, replying to a complaint by Daw & Son, Ltd., that the lift was slow in descending, they wrote a letter in which they said :

> The rams of these hydraulic lifts are badly worn and scored. The diameter varies from place to place. . . . All these lifts require to be fitted with new top and bottom rams, but we know that you are disinclined to face this expenditure under present conditions. We doubt if we could obtain the necessary bars and tubes. We have discussed this matter before and the better plan is to electrify the lifts which also is probably out of the question at the moment. We suggest that we send our men in twice a month, the extra visit per month being merely to grease the rams.

The engineers never said or stated that the lift was in a dangerous condition and ought not to be used. A visitor, who was the managing clerk to a firm of solicitors, in the course of his professional duties went to Hornton Court to visit one of the tenants. On arriving at the flats the plaintiff was informed by the porter that the flat which he wanted was on the fifth floor. The porter was standing by the lift, the door of which was open, and he motioned to the plaintiff to enter the lift. The plaintiff did so. The porter also entered the lift, closed the gates and set the lift in motion. When the lift had ascended as far as the second floor, it stopped and then fell to the bottom of the well, the cause of its failure being the fracture of one of the glands. The plaintiff received injuries and brought his action against Daw & Son, Ltd, and the engineers. It was held by the Court of Appeal, after a discussion whether the plaintiff was an invitee or licensee of the landlord, that the only obligation on the landlord was to take care that the lift was reasonably safe, and that he had fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it, and that, therefore, the landlord was not liable. Scott, L.J., held that the plaintiff was an invitee of the owner of the flats and that the expressions of opinion to the contrary effect in *Fairman* v. *Perpetual Investment Building Society* (11) were *obiter dicta.* It was held by Goddard, L.J., that the court was bound by that decision. Then it was held by Scott, L.J., and Goddard, L.J., Clauson, L.J. dissenting, that the repairer of an article owes a duty to any person by whom the article is lawfully used to see that it has been carefully repaired in a case where there is no reasonable opportunity for the examination of the article after the repair is completed and before it is used, and when the use of the article by persons other than the person with whom the repairer contracted must be contemplated or expected, and that, therefore, the plaintiff was entitled to recover from the engineers. In so finding the majority adopted the principle of *Donoghue* v. *Stevenson* (3) against the engineers. If the lift had been occupied by the tenant upon whom the visitor was calling, as part of the hereditament leased by the landlord, on the authorities to which I shall now have to refer the plaintiff could not possibly have recovered. In passing, I should like to refer to the judgment of Goddard, L.J., in that case as, if I may venture to say so, extremely helpful in considering what it really was that *Donoghue* v. *Stevenson* (3) decided.

He refers to *Grant* v. *Australian Knitting Mills, Ltd.* (12) and says, ([1941] 3 All E.R. 156, at p. 183):

> LORD WRIGHT disposed of the matter in a sentence: "It was not contemplated that they should be first washed." If, then, there was any doubt about the governing principle of *Donoghue* v. *Stevenson* (3), LORD WRIGHT has dissipated it. The manufacturer was held liable, not because he was interested in his product being used as it left his factory, but because he had no reason to contemplate an examination by the retailer or ultimate buyer before use. Believing, as I do, that this is the governing principle, it follows that, in my opinion, *Dransfield* v. *British Insulated Cables, Limited* (13) was wrongly decided, although I do not propose to burden this judgment with a discussion of that case. On what sound principle, then, can the case of a repairer be distinguished from that of a maker of an article? Of course, the doctrine does not apply to the repair of any article any more than to its manufacture. If I order my tailor to make me a suit, or a watchmaker to repair my watch, no one would suppose that anyone but myself was going to use the suit or watch. If the tailor left a large needle in the lining and it injured a person to whom at some time I lent the coat, I should think that the latter could not recover against the tailor. The relationship would be altogether too remote, and many of the suggested difficulties of *Donoghue* v. *Stevenson* (3) disappear if it is realised that the decision was, as I venture to believe, essentially one on the question of remoteness. The case of a lift repairer, however, is very different. A lift in a block of flats is there to be used by the owner and his servants, the tenants and their servants, and all persons resorting thereto on lawful business. Blocks of flats and offices are frequently owned by limited companies who would be contracting parties with the lift engineers. In such a case, the employer would be the one "person" who could by no possibility use the lift. If the repairers do their work carelessly, or fail to report a danger of which they as experts ought to be aware, I cannot see why the principle of *Donoghue* v. *Stevenson* (3) should not apply to them.

I do not propose to make this judgment one of undue length, but there follow on subsequent pages some observations which, without presumption, I may venture to say are extremely helpful.

So much for the argument of counsel for the plaintiff with regard to *Donoghue* v. *Stevenson* (3), on which he sought to found his case. But that case has no application, in my view. In my opinion, in the present state of the law, this case falls to be decided on a different principle. Here the complaint is against the landlord of the house who let the house unfurnished to the tenant in a dangerous condition by reason of the faulty gas installation which he had negligently caused to be put in. In *Robbins* v. *Jones* (14) ERLE, C.J. said, (15 C.B.N.S. 221 at p. 240):

> A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.

This passage, said LORD MACNAGHTEN, in *Cavalier* v. *Pope* (15) ([1906] A.C. 428 at p. 430) is beyond question the law. That principle was relied on by the Court of Appeal in *Bottomley* v. *Bannister* (16) which was decided before *Donoghue* v. *Stevenson* (3). In *Bottomley* v. *Bannister* (16) it was held by the Court of Appeal that at common law, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, nor is a vendor of real estate liable to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge. *Robbins* v. *Jones* (14) and *Cavalier* v. *Pope* (15) were followed. The action was brought by the administrators of Bottomley and his wife, on behalf of Bottomley under his contract and on behalf of his wife in tort, consequent upon their deaths owing to an escape of gas in their bathroom. The action was tried before HAWKE, J., with a common jury. The judgment was reversed by the Court of Appeal and it was held, on the facts of that case and the finding of the jury, that there was no evidence of a breach of any duty which the law cast upon the defendants as vendors or lessors of the house towards Bottomley or his wife, and that the plaintiffs could not recover.

There is an interesting comment on that case in CLERK AND LINDSELL ON TORTS, 9th ed. p. 502:

> In *Bottomley* v. *Bannister* (16), a builder sold a house which was equipped with a gas boiler having a special burner which, if properly regulated, required no flue. The purchaser and his wife were killed by gas, owing to the improper regulation of the

> burner. The builder was held not liable on the grounds, (1) that the installation was part of the realty and no duty was owed in respect of it to a purchaser, (2) that the burner was regulated by the gas company or the purchaser and not by the builder, and (3) that the builder did not know the apparatus was dangerous. Since the decision in *Donoghue* v. *Stevenson* (3) the last ground of the decision can no longer be maintained, if the builder ought to have known of the danger. It may be doubted, indeed, if the first ground of the decision can be maintained, having regard to the fact that the apparatus was designed to deal with such a dangerous thing as gas.

The authors of this work seem to think that *Bottomley* v. *Bannister* (16), since the decision in *Donoghue* v. *Stevenson* (3) ought to have been decided differently.

In *Otto* v. *Bolton & Norris* (17) ATKINSON, J., following *Bottomley* v. *Bannister* (16) decided that a builder who builds a house for sale is under no duty either to a future purchaser or to persons who come to live in the house to take care that it is well constructed and safe. It was held expressly that the law as stated by SCRUTTON and GREER, L.JJ., in *Bottomley* v. *Bannister* (16) has not been altered by the decision of the House of Lords in *Donoghue* v. *Stevenson* (3). The principle laid down in *Donoghue's* case (3) is that there can be no duty cast upon the vendor without proximate relationship, of which the main test is whether there is reasonable opportunity for examination between the time of the sale or the doing of the work and the use or consumption of the article by the purchaser. ATKINSON, J., says this ([1936] 2 K.B. 46, at p. 57) :

> In *Farr* v. *Butters Bros. & Co.* (18), decided by the Court of Appeal since *Donoghue* v. *Stevenson* (3), SCRUTTON, L.J., extracts precisely this principle from the case. Dealing with that case, he said : " There was thus no opportunity of independent examination between the manufacture and the consumer. That proximate relationship, according to the three Law Lords who constituted the majority, created the liability of the manufacturer." Then, following his quotation from LORD THANKERTON, he goes on : " There, obviously, the liability is rested upon the fact that the manufacturer sends out the ginger-beer in such a condition that it cannot be inspected until it is consumed. The impossibility of intermediate examination makes the relation so proximate that there is a liability." Now even if this principle does apply to buildings which are sold by the man who has built them, it seems to me that it would still be impossible to hold that there was the necessary proximity between the defendants and Mrs. Otto. There was nothing to prevent examination of the house on the intermediate purchase. Indeed, the well known absence of any duty in respect of the sale of a house makes examination usual and likely. The defect was not hidden or latent ; the blobs were there plainly to be seen and would have put anybody, making a proper inspection, on his guard. In fact, there was an examination, although an inadequate one, by the person who made a report on September 21 or 22 to Miss Otto's solicitors. I think the remarks of GREER, L.J., in *Bottomley* v. *Bannister* (16) are absolutely relevant and are unqualified by anything said in *Donoghue* v. *Stevenson* (3). Therefore, although I say so with great regret, I am bound by the law as laid down in that case to hold that Mrs. Otto's claim fails.

As I read a passage in *Donoghue* v. *Stevenson* (3) in LORD MACMILLAN'S opinion, I venture to think that that is exactly the view which LORD MACMILLAN expressed with regard to whether or not the principle of *Donoghue* v. *Stevenson* (3) is to be applied in cases of landlord and tenant or vendor and purchaser of houses. The point at issue before their Lordships' House in *Donoghue* v. *Stevenson* (3) was whether the manufacturer of an article of food, medicine or the like, sold by him to a distributor, in certain circumstances which I have already read, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. Bearing that in mind, LORD MACMILLAN says ([1932] A.C. 562, at p. 609) :

> I observe, in the first place, that there is no decision of this House upon the point at issue, for I agree with LORD HUNTER that such cases as *Cavalier* v. *Pope* (15) and *Cameron* v. *Young* (19) which decided that " a stranger to a lease cannot found upon a landlord's failure to fulfil obligations undertaken by him under contract with his lessee," are in a different chapter of the law.

As I understand it, LORD MACMILLAN is there saying that there are cases in which there is no liability upon a vendor or an owner or lessor of a house to the purchaser or the lessee, but those belong to an entirely different branch of the law from the branch to which we have to give our attention in this case of *Donoghue* v. *Stevenson* (3). This general comment appears in PROFESSOR WINFIELD'S TEXT BOOK OF THE LAW OF TORT, 3rd ed., p. 543 :

In *Otto* v. *Bolton* (17), A. sold to B. a newly-built house which was so negligently constructed that the ceiling of one of the bedrooms fell upon and injured B. and C. (the mother of B.) who was staying in the house. Both B. and C. sued A. B's claim was based upon breach of contract and, as A. had expressly assured B. that the house was well-built, A. was held liable for a breach of warranty to that effect. C's claim was for negligence, but ATKINSON, J., held that A. was not liable because there was nothing in *Donoghue* v. *Stevenson* (3) which had qualified the law about ruinous houses. That side of *Donoghue's* case (3) which referred to dangerous chattels was inapplicable, for a house A is not a chattel, and even if it were reckoned as such, the plaintiff had had a reasonable opportunity of examining it; that side of it which referred to the scope of duty in negligence was equally inapplicable because the House of Lords in *Cavalier* v. *Pope* (15) decided many years before *Donoghue's* case (3) had held that no legal duty existed with respect to a ruinous house, and legal duty is an essential of the tort of negligence. It is difficult to see how the learned judge could have reached any other conclusion; but the law is not satisfactory on this point and it is quite likely that if no one had ever sued in tort for injury arising from a ruinous house until after LORD ATKIN's definition B of legal duty in *Donoghue's* case (3), the defendant in *Otto* v. *Bolton* (17) would have been held liable, for he would have been the "neighbour" of the plaintiff within the terms of that definition. What conceivable difference is there between carelessly putting in circulation a dead snail in a bottle of ginger-beer and putting on the market a house so carelessly built as to be likely to cause death or grave injury? The exception which denied a remedy in the latter case had a very questionable historical origin and it gave such a charter of immunity to the jerry-builder that the Housing Act, 1925 (re-enacted C on this point by the Housing Act, 1936) made a partial qualification of it in favour of the tenant; but nothing except further legislation will confer any similar remedy on a third person injured in this way.

The last case to which I was referred was *Davis* v. *Foots* (20), which again was a case of an escape of gas. It was held that the defendants were not liable to the plaintiff in damages as a landlord of an unfurnished house, in the absence of an express contract, is not liable to the tenant for defects in the house D rendering it dangerous or unfit for occupation even if he has brought about the defect itself or is aware of its existence. That is a decision of the Court of Appeal on an appeal from a decision of WROTTESLEY, J., and the judgments were given by MACKINNON, L.J., DU PARCQ, L.J. (as he then was), and BENNETT, J. DU PARCQ, L.J., ([1940] 1 K.B. 116, at p. 124), deals with *Donoghue* v. *Stevenson* (3) and with the decision of ATKINSON, J., to which I have already referred, in *Otto* v. E *Bolton & Norris* (17), and comes to the conclusion that the appeal should be allowed and says he cannot find any ground on which the judgment of the judge can be upheld.

In the present case there was undoubtedly ample opportunity of inspection. The geyser, with all its defects, was in the house when the tenant took it, and there was evidence that there was a smell of gas in the bathroom, as, indeed, there was in another house with a geyser of similar construction. Counsel for F the corporation pressed the point of contributory negligence against the deceased man, but I am unable to find any such negligence as this was proved. Counsel for the plaintiff asked me to hold that for the purposes of this case the corporation should be regarded, not as landlords (in order to get round the principles of the landlord and tenant cases), but as strangers who had negligently installed a dangerous thing in the house. I think, however, it is impossible, without doing violence to the admitted facts in this case, to treat G the corporation in any other way than as the landlords of Mrs. Taylor, in whose house there was installed this dangerous gas installation.

In the result, I am, bound to dismiss the action, and there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *William A. Leyson*, Neath (for the plaintiff); *Armitage Chapple* H *& Co.*, agents for *Madge, Lloyd & Gibson*, Gloucester (for the Gloucester Corporation); *Tarry, Sherlock & King*, agents for *Townsend, Calderwood & Story*, Swindon (for the Building and Public Works Construction, Co., Ltd.).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

HULME ESTATE CO. LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), July 8, 9, 10, 25, 1946.]

Income Tax—Sur-tax—Investment company—Apportionment according to member's interest in assets—Trust fund of shares for maintenance of member's infant children—Application for member's benefit—Finance Act, 1939 (*c.* 41), *s.* 14 (4), *s.* 15 (3).

The appellant company was an investment company incorporated in 1922. In the same year trusts in respect of certain shares in the company owned by P. were declared in favour of P.'s infant son and daughter and a similar trust was subsequently declared in favour of another daughter. The trustees were P., his solicitor, and his sister, and it was provided that the trustees should apply the income for the maintenance, education and personal support of the children, but the trustees' discretion was subject to the approval and consent of P. during his life, and they had no power to require any account of the application of the money. P., by reason of the voting rights under the articles, was in control at the director's meetings and at the meetings of the company. From the inception of the trust for the son down to 1935 the trustees had paid to P. the whole income amounting to £34,000 net and had agreed thereafter to pay £3,000 a year. The income of the daughters' shares was, during the whole of the relevant period paid over in full or practically in full. The children, before and after the trusts, lived with P. at his country house. In 1927 the company purchased a country house and a town house which were let to P. on favourable terms. In these circumstances the Special Commissioners apportioned under the Finance Act, 1939, s. 15, the whole of the income of the company to P. for the year 1938-1939. The main issue was whether there was evidence on which the commissioners could find that P. was able to secure that the whole of the income or assets of the company should be applied either directly or indirectly for his benefit and that it was appropriate that the whole income of the company, except its estate or trading income, should be apportioned to him :—

Held : (i) the commissioners were entitled to take the view on the facts that, notwithstanding the formation of the trusts, P. was able to secure that the whole income or assets would be applied, directly or indirectly, for his benefit, within s. 15 (3) of the Finance Act, 1939, and that if, in law, there were persons who might restrain him, they were unlikely to do so.

(ii) notwithstanding anything in s. 14 (4) of the Act, in the case of a mixed investment and estate company, the commissioners were entitled to consider the whole history of the company's activities.

(iii) it was impossible to lay down as a rule of law that moneys paid to a father under a trust for maintenance, must, for income tax purposes, be always treated as money paid for the father's benefit.

Inland Revenue Comrs. v. *Russell* (3) *distinguished on the facts.*

[**EDITORIAL NOTE.** The point of interest in this case is that a judicial exposition is given of Lord Thankerton's language on the construction of s. 15 (3) of the Finance Act, 1939, in his speech in *Inland Revenue Comrs.* v. *L.B.* (*Holdings*), *Ltd.* (1), where the question of the true construction arose in relation to a company. It was submitted in argument in the present case that Lord Thankerton had held that the subsection means that there must be an application of income or assets by or on behalf of the company, thus excluding an application by any other person, in this case the settlement trustees. It is held that this is not the meaning of the passage in the speech. All that Lord Thankerton was dealing with was a suggested criminal seizure of the company's property so that it could not be said that a taxpayer was within the subsection because he had the " key of the safe or might forge the company's signature." Where the initial step is a distribution of income by a company, the subsection may still operate though the income is applied by some other person by subsequent action. It is held on the facts, and, particularly, having regard to the absence of evidence of the actual application of sums, *prima facie*, excessive, paid to the taxpayer for the maintenance of his infant children, that the commissioners were entitled to come to the conclusion that the taxpayer treated these sums as his own income.

For the Finance Act, 1939, s. 15, see HALSBURY'S STATUTES, Vol. 32, p. 185.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *L. B. (Holdings), Ltd.*, [1946] 1 All E.R. 598 ; 175 L.T. 54.

(2) *Wilson* v. *Turner* (1883), 22 Ch.D. 521 ; 28 Digest 229, *862* ; 53 L.J.Ch. 270 ; 48 L.T. 370.

(3) *Russell* v. *Inland Revenue Comrs.*, *Inland Revenue Comrs.* v. *Russell*, [1944] 2 All E.R. 192 ; Digest Supp. ; 171 L.T. 249 ; 26 Tax Cas. 260.

Appeal by the taxpayer from an order of Wrottesley, J., dated Apr. 3, 1946. The relevant facts are set out in the judgment of the court.

Terence Donovan, K.C., and *L. C. Graham-Dixon* for the appellant company.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

Cur adv. vult.

July 25. Somervell, L.J., read the following judgment of the court. This is an appeal from a judgment of Wrottesley, J., who confirmed a decision of the Special Commissioners apportioning under the Finance Act, 1939, s. 15, the whole of the income of the appellant company to a director of that company, Sir John Prestige, for the year 1938-1939. We agree with the decision of Wrottesley, J., and for substantially his reasons. As, however, the case was fully argued before us, and counsel for the appellant company pressed one or two points of construction, we will deal with the arguments addressed to us. It is unnecessary to set out the general nature of the successive sections from 1922 onwards designed to deal with avoidance of sur-tax. Although it is necessary to refer to s. 14 of the Act of 1939 later, it is sufficient to set out here the material provisions of s. 15 :

> (2) In apportioning for the purposes of . . . s. 21 [of the Finance Act, 1922] the income of an investment company . . . (*c*) to any person who is a member of the company and in [the Special Commissioners'] opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein ; the Special Commissioners may apportion to him such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary. (3) For the purposes of this section, a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not . . .

The rest of the subsection deals with the circumstances in which the commissioners may draw the inference that a person is likely to be able to secure. They illustrate the very wide discretion conferred on the commissioners, but it is unnecessary to set them out.

The main issue is whether there was evidence on which the commissioners could find that Sir John Prestige was able to secure that the whole of the income or assets of the company should be applied either directly or indirectly for his benefit, and that it was appropriate that the whole income of the company, except its estate or trading income, should be apportioned to him.

The full facts will be found in the Case, but the following summarises the most important : (1) the appellant company was incorporated in 1922. It purchased from Sir John 153,923 shares in J. Stone & Co., Ltd., for 900 fully paid £1 A shares, and 8,100 fully paid B shares, a sum in cash, and other consideration which is not material. The B shares had no voting rights. (2) At all material dates Sir John, by reason of the voting rights under the articles, was in control at directors' meetings and at meetings of the company. (3) Sir John had three children, John, born in 1919, Rosemary, born in 1920, and Elizabeth, born in 1924. In 1922 trusts were declared in respect of 2,900 B shares in the appellant company in favour of John, and in respect of 1950 B shares in favour of Rosemary. The trustees were Sir John, his solicitor and his sister. Other trustees were added later. I will read para. 4 of the trust :

> The trustees or trustee are to stand possessed of the said shares and the investments and moneys for the time being representing the same and also of any property to be transferred or made over as aforesaid and of the investments and moneys for the time being representing the same upon trust for John Theodore Radclyffe Prestige (hereinafter called "John") a child of Sir John Prestige whose age was on Oct. 15, 1922,

> three years three months but so that the said fund (hereinafter called " John's Settled Fund ") shall be retained and held by the trustees or trustee upon the trusts and with and subject to the powers and provisions hereinafter mentioned concerning the same the trustees or trustee are to stand possessed of John's Settled Fund upon trust until he shall attain the age of 24 years (which period is hereinafter termed his minority) to pay and apply the dividend and income thereof for or towards the maintenance and education and personal support of John in such manner as the trustees or trustee shall in their his or her uncontrolled discretion think fit but subject to the approval and consent of Sir John Prestige during his life and either for the trustees or trustee during A the minority of John to apply the same for all or any of the like purposes or to pay the same to his parents or parent or guardian for all or any of the like purposes without seeing to the application thereof or requiring any account thereof and to accumulate the surplus income (if any) by investing the same and the resulting income thereof in manner aforesaid to the intent that the accumulations shall be added to the trust fund and follow the destination thereof with power nevertheless for the trustees or trustee at any time with the like approval and consent to resort to the accumulation of any preceding year or years and apply the same for any of the purposes aforesaid. B

The other trusts also contained like provisions. (4) In July, 1925, about a year after the birth of Elizabeth, three transactions took place. The trustees of Rosemary's trust required Sir John, in accordance with a provision in the trust deed, to purchase 975 B shares at £3 a share. On July 22, Sir John made a similar declaration of trust in respect of these shares in favour of his daughter Elizabeth. By an extraordinary resolution of July 30, the 1950 B shares, the C subject matter of the two daughters' trusts, were converted into £1 C shares conferring the right to receive in priority of any other shares a cumulative preferential dividend, which it is clear the company was in a position to pay, of 100 per cent. free of income tax up to 4*s.* 6*d.*, and certain priority rights in a winding up. Article 3 of Table A was incorporated in the articles of the company. It reads as follows : D

> If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two E persons at least, holding or representing by proxy one-third of the issued shares of the class.

The following comment seems to us justified. Unless all the B shares had been receiving, and were likely to receive, 100 per cent. or more, the extraordinary resolution was damaging to the interests of John. If they had been receiving such a dividend, it is difficult to see how Rosemary's trustees would have been justified in requiring Sir John to purchase such shares at £3 a share. F (5) At all material dates subsequent to 1937, Sir John held 900 A shares and 3,750 B shares. He held with other trustees 3,300 on the trust for John, 975 on the trust for Rosemary, and 975 on the trust for Elizabeth. There were 50 D shares which can, we think, be disregarded. (6) From the inception of the trust for John down to 1935, *i.e.*, 12½ years, the trustees had paid the whole income over to Sir John amounting to £34,000 net. G By a deed dated 1937, it was agreed between the trustees, including, of course, Sir John, that, for the future, £3,000 net should be paid, and a sum of £7,797 9*s.* 6*d.* was treated as over-paid in the past and 400 £1 B shares were accepted by the trustees in satisfaction of this. (7) The income on the daughters' shares was during the whole relevant period paid over in full, or practically in full, to Sir John. (8) The children before and after the trusts lived with their father at his country house. (9) In 1927 the appellant company purchased a country house which was let to Sir John H for 50 years at £200 a year, which was the annual value. This rent appears later to have been increased by agreement to £300 a year. The company also purchased a house in London, No. 43, Montpelier Square, let to Sir John at £150. In 1927 and 1928 the appellant company spent some £9,000 on the country house. It is impossible to arrive at the purchase price of this house, as it was purchased with other land not let to Sir John. On the purchase and on work on the London house the appellant company up to 1928 had spent over £7,000.

On these facts, which it has been necessary to set out at some length, it seems to us there was ample evidence on which the commissioners could find as they did. The sums paid in respect of the children appear on the face of them to have had no regard to what was reasonably required for the maintenance, education and support of the infant children. It was suggested that the representative of the revenue before the commissioners should have cross-examined Sir John, when special circumstances justifying these sums might have been elicited. We think he was perfectly entitled to allow these, as it seems to us, extravagant figures to make their own impression on the commissioners' minds unless justified by the appellant company. In fact, for 12½ years the whole income of the trust shares went into Sir John's pocket, and, so far as the evidence goes, everything went on in the same way as before. So far as the houses are concerned, he, as controller of the company, caused it to purchase houses either from the capital or income resources of the company in which the trustees were interested, and caused the company to let them to him on terms which appear unduly favourable to himself. If, as counsel for the appellant company suggested there was no evidence that anyone else would have given a higher rent, then, on that view, he caused the company to spend its money on a very unremunerative investment from which he enjoyed substantial advantages. The commissioners, we think, were entitled to take the view on these facts that, notwithstanding the formation of the trusts, Sir John was able to secure that the whole income or assets should be applied directly or indirectly for his benefit, and that if in law there were persons who might restrain him, they were unlikely to do so.

This is the view which was taken by the judge, and is the view which commends itself to us. It is necessary now to consider whether certain points of construction raised by counsel for the appellant company lead to a different conclusion. The judge referred to *Inland Revenue Comrs.* v. *L.B.* (*Holdings*), *Ltd.* (1). That decision lays down that there is no reason for implying the adjective "lawful" before the words "any means whatsoever" in s. 15 (3), and that the word "secure" does not necessarily imply permanence or certainty. This part of the decision is on the whole unfavourable to the appellant company. Counsel for the appellant company relied on a passage in LORD THANKERTON'S opinion which I will read ([1946] 1 All E.R. 598, at p. 604) :

> As regards criminal means, WROTTESLEY, J., said that he was not concerned with them, and the judges in the Court of Appeal were content with the statement of counsel for the Crown, that it was not contended by the Crown that any criminal action could be within the means referred to in sub-s. (3). In my opinion, however, this question cannot be so lightly brushed aside on such a question of construction as the present one. It appears to me that the point may be settled by a consideration of the whole phrase "to secure that income or assets [of the company] will be applied for his benefit." In my view, this means that such application will be made by, or on behalf of, the company, which would exclude any criminal action by the person in question.

Counsel submitted that, the application relied on in the present case being by the trustees, it was excluded as not being an application by or on behalf of the company. We cannot put this construction on the words in question. In the case with which LORD THANKERTON was dealing, the application of the income relied on was an application by one Brady, who received dividends from the company as sole trustee, and, having so received them, applied them, it was said, for his own benefit. If counsel's submission is right, the whole of LORD THANKERTON'S opinion on the first point which he deals with was unnecessary. It seems to us clear that LORD THANKERTON was dealing with a suggested criminal seizure of its property from the company. In other words, one could not say that the taxpayer is "able to secure that income or assets" will be applied for his benefit because he has the key of the safe or might forge the company's signature. We feel clear that LORD THANKERTON was not intending to lay down that where the initial step is a distribution of income by the company it may not be possible to satisfy the section if it can be shown that the income is or may be "indirectly" applied by subsequent action or inaction for the benefit of the person to whom the commissioners apportion.

Counsel for the appellant company took another point based on s. 14 (4) of the 1939 Act :

> Where part only of the actual income from all sources of an investment company to which s. 21 of the Finance Act, 1922, applies is estate or trading income, the provisions of the said s. 21 and any provisions of this or any other Act relating thereto shall have effect as follows: (*a*) in the first place, they shall have effect as if such part of the actual income from all sources of the company as is not estate or trading income were the whole of the income of the company, and directions shall be given by virtue of sub-s. (1) of this section accordingly as respects that part; (*b*) in the second place and separately (but without prejudice to the treatment of the company as an investment company for the purposes of the said provisions), they shall have effect as if such part of the actual income from all sources of the company as consists of estate or trading income were the whole of the income of the company, and, if the circumstances warrant that source, directions may be given accordingly as respects that part otherwise than by virtue of the said sub-s. (1).

He submitted that the commissioners, by setting out as relevant the transactions with regard to the houses, had acted contrary to this section. We do not so construe the section. We think that where there is a mixed investment and estate company the commissioners are entitled to consider the whole history, and, indeed, in some cases it might be impossible to get an intelligible picture without doing so. Facts with regard to the estate side of the business might tell in favour of Crown or taxpayer. It might be very important for the taxpayer to show that in some estate transaction trustees had been alert and threatened to restrain action unfair to their *cestui que trusts*, as negativing any suggestion on behalf of the Crown that the trustees were ready to acquiesce in anything that was done. The subsection seems to us to deal with the procedure when, having heard whatever of the history of the company either side desires to bring before them, the commissioners address themselves, in the light of their findings of fact, to the directions and apportionments which are to be given or made.

Counsel for the Crown drew our attention to some authorities in which, prior to the Conveyancing and Law of Property Act, 1881, ss. 42 and 43, the courts had held that where a father was able to maintain a child, trust income for that child's maintenance could not be paid to him as it would go for his benefit: see *Wilson* v. *Turner* (2). The position was altered by the Conveyancing and Law of Property Act, 1881, and the provision is now to be found in the Trustee Act, 1925, s. 31. Counsel for the appellant company argued that this proved too much, and, if it was right, the whole proceedings were misconceived in that on this view Sir John Prestige could have been assessed for the whole sum under the Act of 1922 without resorting to s. 15. He also relied in this connection, and, indeed, in his main argument, on what was said in *Comrs. of Inland Revenue* v. *Russell* (3). LUXMOORE, L.J., laid down that under a trust deed where the provisions for maintenance were similar to those in the present case the father of the children to whom payments for maintenance were made was under a legal liability to apply the money for the benefit of the infants and could be compelled to account. The facts in that case were different from those in the present case. In view of the existing statutory provision in the Trustee Act, 1925, and what was said by LUXMOORE, L.J., in the case cited, we think it impossible to lay down as a rule of law that moneys paid to a father under a trust for maintenance must, for income tax purposes, be always treated as money paid for the father's benefit. In the present case we think that, in the absence of evidence as to how the very large sums paid over were applied, the commissioners were entitled to come to the conclusion that Sir John treated them as his own income to do what he liked with and are not precluded from coming to this conclusion by the fact that he, no doubt, continued to maintain his children. That these were " unlawful means " does not on the decision in *L.B.* (*Holdings*), *Ltd.* (1) invalidate the commissioners' finding.

In the result, there was, in our view, evidence justifying the finding and apportionment, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Marchant, Newington & Dommett* (for the appellant company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

In Re SOUND CITY (FILMS) LTD.

[Chancery Division (Evershed, J.), October 28, 1946.]

Companies—Alteration of members' rights—Application to court to cancel resolution—Authority of holders of requisite amount of stock not communicated to petitioner at date of presentation of petition—Companies Act, 1929 (*c.* 23), s. 61 (1) (2).

To clothe a petitioner with the necessary authority to make an application on behalf of other shareholders under the Companies Act, 1929, s. 61 (2), to have a variation of the rights attached to any class of shares cancelled, not only must the appointment of the petitioner be in writing, as required by the sub-section, but the fact that such authority has been signed must also have been communicated to the petitioner at the time when the petition is presented.

[**EDITORIAL NOTE.** In *Re Suburban and Provincial Stores, Ltd.* (1) the Court of Appeal held that at the time of the presentation of a petition under s. 61 the petitioner must be fully clothed with authority by the requisite number of qualified shareholders, and that a defect in that respect could not be cured by shareholders subsequently giving him authority. The present case takes the matter a stage further by deciding that not only must the authority have been given at the time of the presentation of the petition, but that fact must also have been communicated to the petitioner at that time.

As to Restraint on Variation of Rights Attached to Classes of Shares, see HALSBURY, Hailsham Edn., Vol. 5, p. 156, para. 281; and for Cases, see DIGEST, Vol. 10, pp. 776-780, Nos. 4857-4882.]

Cases referred to:

(1) *Re Suburban and Provincial Stores, Ltd.*, [1943] 1 All E.R. 342; [1943] Ch. 156; Digest Supp.; 112 L.J.Ch. 145; 168 L.T. 247, C.A.; *affg.*, [1943] 1 All E.R. 297; [1943] W.N. 47.
(2) *Pole* v. *Leask* (1863), 33 L.J. (Ch.) 155; 8 L.T. 645.
(3) *Netz* v. *Ede*, [1946] 1 All E.R. 628; [1946] Ch. 224; 115 L.J.Ch. 197; 174 L.T. 363.

Motion to strike out a petition presented pursuant to the Companies Act, 1929, s. 61. The facts are set out in the judgment.

S. Pascoe Hayward, K.C. and *G. W. H. Richardson* for the company. This petition should be struck out, for it cannot possibly succeed. It is plain from the terms of s. 61 (2) and the language of Bennett, J., and Lord Greene, M.R., in *Re Suburban & Provincial Stores, Ltd.* (1) that when the petitioner presents his petition he must actually have the shareholders' authorities in writing in his possession. At the least he must have been informed at that time that the written authorities are in existence. In the present case, when the petitioner presented the petition on Sept. 9, he had no knowledge that he had been appointed to do so by the shareholders specified in the affidavit of Oct. 25. Until the appointment has been communicated to the appointee he cannot be said to be acting, in the words of s. 61 (2), "on behalf of" the dissentient shareholders.

M. G. Hewins for the petitioner. All that is necessary for an appointment to be valid is that it is in fact made within the time specified by s. 61 (2) and is in writing. Communication to the appointee of its existence or possession by him of the written document at the time of the presentation of the petition is unnecessary. Even if the matter is regarded as governed by the law of principal and agent, the important element in the constitution of an agency is the will of the principal, and nothing further, such as the communication of the document expressing that will to the agent, is needed: *per* Lord Cranworth in *Pole* v. *Leask* (2) at p. 161. *Re Suburban & Provincial Stores, Ltd.* (1) is distinguishable, for there no authority at all existed at the date of the petition. The *dicta* of Bennett, J., and Lord Greene, M.R., did not go so far as has been contended.

Evershed, J.: On Sept. 9, 1946, one Lewisohn presented to this court a petition served on Sound City (Films) Ltd., praying that a certain alleged variation of the rights of the preference shareholders of that company should be cancelled. The petition was presented pursuant to the Companies Act, 1929, s. 61, and in order, therefore, that the petition should on the face of it be seen to comply with the requirements of that section, Lewisohn alleged in his petition that he had been appointed in writing by a number of persons, whose names are set forth in a schedule to the petition, to present the petition on their behalf as well as on his own. The schedule consisted of a list of the names of some 138 persons, and there is set opposite the name of each person the number of preference shares that that person was alleged to hold. The total of the scheduled shares amounted to 21,343. It appears from the petition that the total number of preference shares issued is 134,800, so that, assuming A the schedule to be in all respects unimpeachable, 21,343 manifestly represented more than 15 per cent. of the total number of issued preference shares.

There were, however, certain errors in that schedule insofar as, first, certain persons were put down as holding more shares than they, in fact, held, and others, unbeknown to Lewisohn, had given proxies which were used at the meeting in favour of the resolutions now sought to be impeached. The result of that was to reduce what I will call the effective number of shares for this B purpose to a figure of 17,870 which is, unfortunately for the petitioner, appreciably less than the number he requires to show a title to sue. Lewisohn's reply to that challenge has been to produce a new list of supporters. That list is contained in an affidavit, filed by him on Oct. 25, 1946, and it brings the total number of those who follow him, according to his petition, to 166 persons. The total of the shares which he claims to have marshalled on his side is now C some 21,000 odd, a number sufficient, if it is not open to challenge, to support the present petition.

I interpose here to observe that, according to the petition, the claim of the petitioner is that the resolutions impeached by him depriving the preference shareholders of certain of their rights (which were passed on Sept, 2, 1946) were so passed by virtue of the votes cast on behalf of British Lion Film Corporation Ltd., a company alleged to have a controlling interest in Sound City D (Films) Ltd., and the petitioner, therefore, says that he, representing and supported by independent preference shareholders, desires an opportunity of arguing before this court that the resolutions are unfair on the persons who have no interest in the ordinary shares and are only preference shareholders of the company. I am bound to say that I feel considerable sympathy with Lewisohn. The fact that he has so far marshalled no less than 166 persons to support his present application indicates the E difficulties that stand in the way of an applicant under this section, when one is dealing with a company having a large issued share capital. The question of hardship was presented to the Court of Appeal in *Re Suburban & Provincial Stores, Ltd.* (1), when LORD GREENE, M.R., found that it was not sufficient to make him doubt the correctness of the decision of BENNETT, J., but I repeat that I cannot help feeling some sympathy for a man who, by the terms of the section, on the argument of counsel for the company F has but 7 days in which to collect the necessary forces to support his application. If, however, in such a case as the present, the terms of the section place a heavy burden on an applicant, that is a matter for Parliament and not for me.

The question involved falls within a very small compass. On the facts of the case, as admitted or proved, it is plain that the individuals whose names are set out in the affidavit of October 25, in no way had communicated any G authority to the petitioner at the time that he presented his petition. I assume for the purposes of the present application that each one of those persons had, in fact, signed a document purporting to confer authority on the petitioner before the time when he presented the petition, but, as I have said, it is conceded that the fact of their having so signed was unknown to him at the date when he presented the petition, and the sole question I have to determine is whether, in those circumstances, it can be successfully contended on Lewisohn's H behalf, that he has satisfied s. 61 (2) of the Act.

Section 61 (2) is in the following terms:

> An application under this section [*i.e.*, to have the variation of rights cancelled] must be made within seven days after the date on which the consent was given or [as in the present case] the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

The phrase "the shareholders entitled to make the application" means, as is found from the preceding subsection, the holders of not less in the aggregate than 15 per cent. of the shares of the class concerned, being persons who did not consent to or vote in favour of the resolution sought to be challenged. The question, therefore, is, on the facts as I have indicated : Can it be said that Lewisohn had been appointed in writing for the purpose of making the application by all the various persons indicated before the expiration of 7 days after the passing of the resolution ?

The matter comes before the court on a motion by the company to strike out the petition on the ground that it cannot, in any circumstances, succeed, by reason of the fact that the petitioner has not satisfied the requirements of s. 61 (2). There is before the court at the same time a summons for leave to amend the petition by adding to the schedule to the petition the individuals whose names appear in the affidavit.

Counsel for the petitioner has first drawn my attention to the circumstance that, on an application to strike out a petition such as the present, the court must be satisfied beyond any reasonable doubt that the petition cannot succeed. That aspect of such an application was recently considered by WYNN-PARRY, J., in *Netz* v. *Ede* (3), to which counsel referred, and it is well established that the court ought not to make use of its jurisdiction to stay proceedings at this stage in a case in which there is some point which ought to be and can be argued. As it seems to me, when the sole question is one of construction of a few words in this subsection, it would be wrong, having reached my conclusion on it, for me to say that because it involves or may be thought to involve some difficult point I must postpone the decision till a later date. In saying that, I am much influenced by the bearing on this feature of the case of the decision in *Re Suburban and Provincial Stores Ltd.* (1). That case was different in certain very important respects from the present, for in *Re Suburban and Provincial Stores Ltd.* (1) the petitioner had not at the time he presented the petition, or at the time when the motion to strike out came before the court, purported to get any support from any other shareholders. His claim was that he had presented the petition on his own behalf and on behalf of other shareholders of not less than 15 per cent., and that it would be sufficient if by the time the petition came to be heard he could get their authority ratifying the assumed agency. In the present case, Lewisohn's point is not that up to now he has failed to get any support, but that, so far as is material to the present application, the appointment in writing had been made in fact although not communicated to him. But, when I look at the reasoning of the decisions both of BENNETT, J., and of the Court of Appeal, it seems to me reasonably plain that both courts proceeded on the view that, since the question at issue is title to sue, a petitioner claiming to petition on behalf of others under this section must show that at the date he presents the petition on their behalf he was clothed with their authority to do so.

If that is the right view, it seems to me that the facts of this case admit of only one answer. Counsel for the petitioner claims that because these persons had put their names to written authorities, that clothed the petitioner with the authority to present the petition, although they had not communicated the fact to him. From this, as Mr. Hewins concedes, it must follow that he would still be entitled to sue, although they never communicated their authority to him or destroyed it without having done so. That seems to me to be an absurd construction, and my own view of this section is that, to clothe the petitioner with the necessary authority, not only must that authority be in writing, as required by the section, but also the fact of its having been given must have been communicated to the person making the application. That view, as it seems to me, plainly flows from the reasoning in the decisions of BENNETT, J., and the Court of Appeal in *Re Suburban and Provincial Stores Ltd.* (1). BENNETT, J., used this language ([1943] W.N. 47 ; [1943] 1 All E.R. 297, at p. 299) :

> If the applicant did not himself hold the prescribed percentage of shares, he must, at the date of the presentation of the petition, have the written authority of other qualified shareholders whose holdings together with his own must amount in the aggregate to fifteen per cent. of the issued shares of the class the rights of which were to be varied.

I take that language to mean that he must be able to show as a matter of fact that he, as an individual, has been authorised in writing by some other person, and I cannot see that that can be shown if the fact of an instrument having been executed has never been communicated to the petitioner. In the report of the hearing of the case in the Court of Appeal it is stated in the statement of facts ([1943] Ch. 156 at p. 157; [1943] 1 All E.R. 342, at p. 344):

> When the motion came before Bennett, J., on Feb. 9, the petitioner had received the support of well over fifteen per cent. of the ordinary stockholders to the petition. Bennett, J., struck the petition out on the ground that, the petitioner having no *locus standi* at the time of presentation, it was not proper to leave on the file a petition which could not possibly succeed . . .

and the argument of counsel for the petitioner was that it would be sufficient if *ex post facto* the assumed agency was in writing and was ratified afterwards. The answer of Lord Greene, M.R., to that argument makes no reservation of any kind to cover any case in which, unknown to the petitioner, some writing did exist. Lord Greene, M.R., took the view that the terms of the section did not contemplate *ex post facto* ratification ([1943] Ch. 156, at p. 159; [1943] 1 All E.R. 342, at p. 344):

> If more shareholders than one make up the necessary fifteen per cent. they can either all join in the presentation of a petition or appoint one or more of their number in writing to make the application on their behalf . . .

He goes on to say that the question is one of title to sue, and says (*ibid.*):

> . . . if he [*i.e.*, the petitioner] is not [the holder of fifteen per cent.] the only way in which he can obtain a title to sue is by having the authority in the statutory form—namely, an appointment in writing—from the number of shareholders necessary to make up fifteen per cent. of the shareholding affected.

Reading those passages together in the light of the facts and arguments, it seems to me that Lord Greene, M.R., indubitably proceeded on the footing that the petitioner must be clothed with authority given and communicated to him before he can commence the proceedings by presentation of the petition. Holding the view that I do, and I confess in the light of those decisions I feel clear in my own mind that that is the right view of the meaning of the section, I think it would not be proper for me to postpone the decision of this point on the ground that it is arguable and might be more conveniently dealt with at the hearing of the petition. I think I ought, having reached that decision, to accede to the company's motion to strike out.

The summons for leave to amend the petition is dismissed and I order that the petition be removed from the file and struck out, the petitioner to pay the costs of both summons and motion.

Summons to amend petition dismissed with costs. Motion to strike out petition allowed with costs.

Solicitors: *Slaughter & May* (for the company); *Ingledew, Brown, Bennison & Garrett* (for the petitioner).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

NORTHCHURCH ESTATES LTD. *v.* DANIELS.

[Chancery Division (Evershed, J.), October 22, 1946.]

Landlord and Tenant—Nature of tenancy created—Demise for 2,000 *years—Contract for grant of leasehold interest with obligation for perpetual renewal—Law of Property Act,* 1922 (*c.* 16), *sched. XV, para.* 7 (1)—*Law of Property Act,* 1925 (*c.* 20), *s.* 149 (3).

By a tenancy agreement dated Jan. 14, 1938, it was provided that "the term shall be for a period of one year certain from March 25, 1938, the tenant having the option to renew the tenancy from year to year on identical terms and conditions as hereinafter stated notice of such intention to renew the tenancy to be given in writing on or before December 25 in each year." The landlord covenanted "to keep the structure outer walls roof and exterior drainage system of the house in good repair and condition and to paint the outside of the premises and buildings as and when may be reasonably necessary." The tenant agreed to maintain the interior of the premises at all times in good condition, to permit prospective tenants or purchasers to view the house and premises at reasonable times of the day "during the last six months of the tenancy," and to allow the landlord to erect and maintain notice boards on the premises "during the same period." The tenant further agreed not to assign or underlet the premises without the consent of the landlord.

Distinguished. *Re* Greenwood's Agreement. [1949] 2 All E.R. 743.

HELD: (i) the agreement was a "contract . . . for the grant of a . . . leasehold interest with a covenant or obligation for perpetual renewal," within the Law of Property Act, 1922, sched. XV, para. 7 (1), and, therefore, operated "as an agreement for a demise for a term of 2,000 years."

(ii) the agreement was not a "contract to create a term limited to take effect more than 21 years from the date of the instrument purporting to create it" within s. 149 (3) of the Law of Property Act, 1925, and so void by reason of the provisions of that sub-section.

[**EDITORIAL NOTE.** EVERSHED, J., accepts the proposition that it is the practice of the court to lean against construing an agreement to constitute a perpetually renewable leasehold, but points out that that is subject to the duty of the court to arrive at a conclusion, after reading the agreement as a whole, as to what the parties intended. Giving effect to the language used by the parties, he is left in no real doubt about what they intended, namely, to create a perpetually renewable leasehold, although some of the terms of the agreement—*e.g.*, the covenants to repair and to permit inspection "during the last six months of the tenancy"— might appear to be inconsistent with such an intention. The argument is rejected that the agreement is a contract to create a series of reversionary terms of one year each, starting on Mar. 25, 1939, and continuing *ad infinitum*, and, as to all terms starting more than 21 years after the date of the agreement, therefore, void under s. 149 (3) of the Law of Property Act, 1925. That sub-section, it is held, does not cover contracts to create perpetually renewable leaseholds. Thus, two apparently conflicting provisions in closely related statutes are reconciled.]

AS TO COVENANTS FOR PERPETUAL RENEWAL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 154-157, paras. 167-169; and FOR CASES, see DIGEST, Vol. 31, pp. 79-81, Nos. 2240-2261.]

Cases referred to:

(1) *Gray* v. *Spyer*, [1922] 2 Ch. 22; 91 L.J.Ch. 512; 127 L.T. 277; 30 Digest 394, *577*.

(2) *Green* v. *Palmer*, [1944] 1 All E.R. 670; [1944] Ch. 328; 113 L.J.Ch. 223; 171 L.T. 49; 60 T.L.R. 392; Digest Supp.

SUMMONS under R.S.C. Ord. 54A for determination of questions as to effect of a tenancy agreement. The facts appear in the judgment.

Lionel A. Blundell for the landlords.
H. O. Danckwerts for the tenant.

EVERSHED, J.: This is a summons taken out by Northchurch Estates Ltd. under Ord. 54A for the determination by the court of questions which have arisen as to the effect of a certain memorandum of agreement. That agreement was made between one Muspratt, described as care of Messrs. W. Brown & Co., auctioneers, and one Rutland, Muspratt being the landlord and Rutland the tenant. The date of the agreement was January 14, 1938, and it related to premises known as Hill Farm Cottage, Northchurch. At some date since the agreement, which it is not material to specify, the interest of Muspratt became vested in the present plaintiffs, Northchurch Estates Ltd., and the interest of Rutland became vested in the present defendant, sued as Joan Daniels, but now Mrs. Bamford. The agreement is a printed document for the most part, and intrinsic evidence shows that it was prepared by the firm of W. Brown & Co., land agents, who, in fact, signed on behalf of Muspratt, and care of whom, as I have stated, Muspratt is described as being in the agreement.

It is argued by counsel for the tenant that the parties to the original agreement could not have had in their minds (or as firmly fixed in their minds as they should have had) the provisions of the property legislation of 1922 and 1925 relating to perpetually renewable leaseholds. Certainly they appear to have neglected to pay the regard which, perhaps, they should have paid to the discouragement which those Acts intended to have upon the creation of perpetually renewable leaseholds. But if, as is alleged by counsel for the tenant, the effect, nevertheless, was to agree to create, according to its terms, a perpetually renewable lease, and, therefore, according to the operation of the Law of Property Acts, to agree to create a lease for two thousand years, and to impose a severe hardship on Mr. Muspratt and his successor-in-title, it is not irrelevant to observe that the agreement was in a form put forward by Messrs. Brown & Co. acting for the landlord. It is pertinent also to say that, if some of the printed clauses do not fit in perfectly with the typed additions, that again is a matter of which the person putting forward the document (or his successors-in-title) cannot complain. Certainly it is a matter which one should not over-emphasise in trying to discern from the typewritten language (which was deliberately put in at the time) what the two parties to the document intended.

Having said that by way of introduction, I now read the following clause in the agreement which is the essence of the case:

> The term shall be for a period of one year certain from Mar. 25, 1938, the tenant having the option to renew the tenancy from year to year on identical terms and conditions as hereinafter stated notice of such intention to renew the tenancy to be given in writing on or before Dec. 25, in each year.

Before I pass to my comments on that clause, it is right that I should mention certain other passages in the document (albeit part of the printed form), which, it is said by counsel for the landlords, throw some considerable light on the real intention as these parties have expressed it. For example, in sub-cl. (*f*) of cl. 2, which sets out the tenant's covenants, it is provided that the tenant shall:

> . . . permit prospective tenants or purchasers to view the house and premises at reasonable times of the day during the last six months of the tenancy and to allow the landlord or his agents to erect and maintain any notice boards they may wish to place on the premises during the same period.

and it is said by counsel for the landlords, how ill does that fit with the operative part which I have read from cl. 1, whereby until three months before the end of any given year the landlord will not know whether the term he intended to create—leaving aside the effect of the statute—was or was not coming to an end, for, so far as the language of the document is concerned, he can never at any time know the answer to that question unless, of course, the tenant tells him, and he has reason to rely on and to accept what he is told. Further, the landlord's covenants include an unrestricted obligation on the landlord:

> . . . to keep the structure outer walls roof and exterior drainage system of the house in good repair and condition and to paint the outside of the premises and buildings as and when may be reasonably necessary . . .

that obligation corresponding with the tenant's obligation, which is equally stringent, to maintain at all times in good condition the interior of the premises. Finally, there is a covenant against assigning and underletting without the landlord's consent to which the tenant is subjected.

It is argued, bearing in mind all those provisions, that it is manifestly unreasonable to suppose that the two parties were contemplating a term which would go on either in perpetuity or, as the law now, on one view of it, says it will, for two thousand years, that no landlord would undertake to maintain the structure of Hill Farm Cottage for two thousand years, and that no tenant would undertake to keep its interior properly decorated for a similar period of time. I am, therefore, invited to construe the passage, not part of the printed form, but inserted in type (and manifestly, therefore, exhibiting the real intention of this part of the bargain between the two parties) in the light of these other provisions, and to reach a conclusion which will avoid the effects of the Law of Property legislation. Counsel for the landlords adds the observation, that in the past it has been the practice of this court to lean against construing agreements to constitute perpetually renewable leaseholds.

I bear all those matters in mind, but any inclination on my part to lean against an intention to create a perpetually renewable leasehold must give way to the language which the parties have chosen to use, and I can only tip the balance in a particular direction if I am left in real doubt about what the parties intended. In law, manifestly, it is not my function as a judge to substitute for what the two parties have elected to arrange between themselves some other bargain which, to my mind, might seem a more sensible arrangement. It seems to me, I confess, that the language they have chosen to use really admits of no reasonable doubt that they intended to create what is commonly called a perpetually renewable leasehold. The language used includes the phrase " the option to renew the tenancy from year to year," and it says further that notice of that intention is to be given on or before Dec. 25 " *in each year.*" Those words seem to me to be very strong indications indeed that what was in the minds of the parties was that, so long as the tenant exercised his option within the time stated, he could go on from year to year *ad infinitum* renewing his tenancy.

The case is, in my judgment, similar in many ways to the case which came before the Court of Appeal in 1922 of *Gray* v. *Spyer* (1). The agreement which the court then had to construe is set out at length at [1922] 2 Ch. 24, 25. I am not saying that the language of the two documents is so close that the decision in *Gray* v. *Spyer* (1) governs altogether the decision in this case. The agreements in the two cases are different, but the decision is of assistance to me as illustrating the point that merely to avoid a result which may not be regarded as convenient or reasonable you ought not to reject words which obviously were intended, when they were inserted in the document, to express or reflect the intentions of the parties. In *Gray* v. *Spyer* (1) there was, as here, the phrase " year to year "—a right to continue the tenancy from year to year —and the learned judge of first instance, YOUNGER, L.J., on those words had come to the conclusion that the real intention of the parties was to create what is known to lawyers as a term of art, namely, a yearly tenancy or a tenancy from year to year, and, holding that to have been the intention of the parties, he rejected phraseology which would have been, in the eyes of the law, inconsistent with a yearly tenancy. The Court of Appeal, however, pointed out that you could not disregard passages which appeared to be inconsistent in that way, and that the duty of the court was to try, after reading the whole document together, to arrive at a conclusion as to what the parties intended. I apply and respectfully follow those instructions in the present case, and I am bound to say that the reference to " tenancy from year to year " was not, in my judgment, intended in this case (any more than it was in *Gray* v. *Spyer* (1)), to relate to the tenancy from year to year which is a familiar term of art to lawyers, but that in this case, as in *Gray* v. *Spyer* (1), the intention of the parties, as expressed in this clause, was to create a term of one year certain, and then to give to the tenant the right, to be exercised on or before Christmas Day in every year, to go on renewing that tenancy *ad infinitum.*

Prima facie, if that is right so far, the answer to the question propounded here is simple, because a contract creating a perpetually renewable leasehold (and the bargain I have described would clearly fall within that description) has been given the effect, by the Law of Property Act, 1922, sched. XV, para. 7, of being converted into a contract to create a term of two thousand years. It would, therefore, appear that, whatever was in the minds of Messrs. Muspratt and Rutland on Jan. 14, 1938 (and perhaps to their surprise) this was a contract by the terms of which Muspratt agreed to grant to Rutland a tenancy for two thousand years of Hill Farm Cottage, Northchurch.

That, however, is not quite the end of the matter. Counsel for the landlords has drawn my attention to one other point which is not free from difficulty. The effect of a contract of this kind may be described in the language of WARRINGTON, L.J., in *Gray* v. *Spyer* (1), as being a contract to create a succession of reversionary terms, each for one year certain, provided the requisite notice is given prior to the date stated in each of those terms. If that be an accurate way of expressing the effect of a contract of this kind, a problem arises by reason of the terms of s. 149 (3), of the Law of Property Act, 1925, which states :

> A term . . . limited after the commencement of this Act [*i.e.*, Jan. 1, 1926] to take effect more than 21 years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void.

The argument of counsel for the landlords is that, if the effect of this paragraph of the document is accurately described in the language which I have borrowed from WARRINGTON, L.J., then it is a contract to create a series of reversionary terms of one year each, the first starting on March 25, 1939, and, since the contract is made after Jan. 1, 1926, then, at any rate as to all terms starting after Jan. 14, 1959—that is, twenty-one years from the date of the instrument—it is a contract to create a reversionary term or terms which offends against the provisions of the section. That might have the result of avoiding the contract insofar as it purported to create reversionary terms of one year commencing after Jan. 14, 1959, or it might (and this alternative is the one preferred by counsel for the landlords, for, he says, you cannot properly sever these things) avoid the contract altogether.

I confess that at first sight that argument was, to my mind, not unimpressive, but it does *in limine* involve one in the difficulty that it would appear to create an almost irreconcilable conflict between s. 149 (3) of the Act of 1925 and sched. XV to the Act of 1922, for any contract to create a perpetually renewable leasehold will, according to this way of analysing it, involve the result that it is a contract to create terms commencing more than 21 years from the date of the instrument, so that you have one Act saying that perpetually renewable leaseholds shall be converted into terms of two thousand years and the other Act A saying they shall be void altogether. I should add that, although the Law of Property Act, 1922, was passed in that year, it did not come into operation until the same time, namely, Jan. 1, 1926, as came into operation the Act of 1925. That last consideration perhaps emphasises the point that all this property legislation must be construed together, and obviously a result which would make the sections to which I have referred mutually conflict must be avoided unless B there is no escape from that result.

Plainly it would need very strong and imperious language to compel a court to hold that, notwithstanding the elaborate provisions of the part of the 1922 Act which I have mentioned, all contracts to create perpetually renewable leaseholds are altogether avoided by the section which I have read from the Act of 1925. To avoid that result, counsel for the landlords falls back on this C final point. He says that these contracts to create perpetually renewable leaseholds fall into two classes, one in which the option to renew is found exclusively in the original contract, and the other class in which the option to renew is by reference read into, so as to become part of, the successive terms or interests which are from time to time created. By way of illustration of the second class, but not for any other reason, counsel for the landlords referred to the case decided by UTHWATT, J., (as he then was) of *Green* v. *Palmer* (2), D where the formula was found ([1944] 1 All E.R, 670 at p. 671):

> . . . an option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause.

and it is, no doubt, within the knowledge of all of us that that formula is one which, in various guises, occurs in renewable leases. If the case falls within that class, counsel for the landlords concedes that, since you are contemplating E notionally, at any rate, a series of separate and exhaustive agreements following one on the other, you are never really in the position in which you have a contract to create a term commencing at some very distant date.

The other class of case is illustrated, as counsel for the landlords argued, by the present case and by *Gray* v. *Spyer* (1), in which the right to renew is not incorporated in the renewed term, but remains as part of the original contract. In this instance, that point, as counsel for the landlords contends, is particularly F emphasised by the use of the word " hereinunder ":

> . . . the tenant having the option to renew the tenancy from year to year on identical terms and conditions as hereinunder stated.

The argument of counsel for the landlords is that it is only if the contract to create a perpetually renewable leasehold falls into this latter class that it is G struck at by s. 149 of the Act of 1925, and is not converted, by para. 7 of sched. XV to the 1922 Act, into a contract to create a term of two thousand years. Thus it is that he finds, in paras. 5 and 7 of sched. XV to the 1922 Act, reservations which have the effect, according to the argument, of not saving a contract for a perpetually renewable leasehold which is invalid by virtue of some other provisions of the law of the land for the time being—for example, that it involves the creation of reversionary terms commencing more than H 21 years from its date. I hope that I have accurately stated the argument.

The argument, however, is one that I feel I must reject. My own inclination is to say that the answer to it is the simple one that, reading the two Acts together, the case of a perpetually renewable leasehold, though there may be some variation in its form, *prima facie*, at any rate, is not comprehended by s. 149 of the Act of 1925, and I think the very fine distinction drawn between the two classes of case should not have the effect of bringing one class within the purview of s. 149 of the Act, and keeping the other out of it, Counsel for the tenant suggested another answer which is, perhaps, another way of putting the same thing—that, if you have here a contract for a perpetually renewable leasehold (and, therefore, covered by para. 7 of sched. XV to the 1922 Act), then it is converted into a contract to grant a term of two thousand years, and in that guise and in that form is plainly outside the ambit of s. 149. As I say, I think that may be another way of expressing the point which appeals to me, namely, that reading these provisions together, one should construe s. 149 as not covering contracts which may fairly be described as contracts to create perpetually renewable leaseholds and are intended to be covered, and are covered, by the paragraph I have mentioned in sched. XV to the Act of 1922.

In my view, that is the correct answer to give to counsel for the landlords, conceding in his favour the point of construction which he urges founded on the use of the words " hereinunder stated." I add, however, that I am not wholly satisfied that the use of that somewhat peculiar and inelegant expression has the effect of limiting the terms of the renewed tenancy only to such of the conditions of the original lease as are contained in the subsequent or later parts of the document. Even if they are—even, therefore, if the option to renew is not to be found in the successive terms—I reach the conclusion, for the reasons I have given, that, nevertheless, the contract is a contract for the grant of a perpetually renewable leasehold as described, and as intended to be described by the relevant para. of the schedule to the 1922 Act, and, being so described, it is not within the ambit of s. 149 (3) of the Act of 1925. Whether other cases might give rise in a more acute form to the difficulty which counsel for the landlords has indicated is a question which I need not here pursue. I hold that on its true construction this memorandum of agreement made between one Clifford Muspratt and one Ernest Hugo Charles Rutland, and dated Jan. 14, 1938, operates as an agreement for a demise for a term of two thousand years from Mar. 25, 1938.

Question answered.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Penny & Thorne*, Berkhampsted (for the defendant).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

R. *v.* WICKS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Singleton, Denning, Lynskey and Sellers, JJ.), October 21, 22, November 4, 1946.]

Criminal Law—Offences under temporary statute—Offence committed during currency of statute—Prosecution and conviction after expiry—Effect of expiry on operation " as respects things previously done "—Emergency Powers (Defence) Act, 1939, (*c.* 62), *s.* 11 (3).

Statutes—Operation—Temporary statute—Expiry—Effect of expiry on operation " as respects things previously done."

The appellant was convicted on an indictment which charged him with doing acts likely to assist the enemy with intent to assist the enemy, contrary to the Defence (General) Regulations, 1939, reg. 2A, and the Emergency Powers (Defence) Act, 1939, s. 3 (*b*). The acts with which the indictment charged the appellant were all committed between April, 1943, and January, 1944, and the trial took place on May 27 and 28, 1946. The Emergency Powers (Defence) Act, 1939, after numerous extensions, expired on Feb. 24, 1946. Section 11 (3) of the Act provided: " The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done." The question for decision, which turned entirely on the construction which ought to be placed on that subsection, was whether the subsection authorised the conviction of the appellant notwithstanding the previous expiry of the Act:—

HELD: the extent of the restrictions imposed by a temporary statute and the duration of its provisions were matters of construction: *Steavenson* v. *Oliver* (2) and *Spencer* v. *Hooton* (3) *approved*; and, given its ordinary meaning, the language of the subsection, elliptical though it was, was neither doubtful nor ambiguous, and was wide enough to make the provisions of the statute operate in respect of any act done before its expiration, so that the expiration of the statute did not affect the liability to punishment for such a previous act incurred under the statute or the prosecution of legal proceedings for the purpose of inflicting that punishment.

[**EDITORIAL NOTE.** The Interpretation Act, 1889, sect. 38 (2), does not apply to temporary statutes such as the Emergency Powers (Defence) Act, 1939, which was expressed to continue in force for one year from its passing on Aug. 24, 1939, and was extended from time to time until it finally expired on Feb. 24, 1946. The subsection applies only to repealed statutes: per ROCHE, J., in *Spencer* v. *Hooton* (3). The effect of a temporary Act must, therefore, depend on the construction of its language: per DARLING, J., in *R.* v. *Ellis, Ex parte Amalgamated Engineering Union* ((1921) 125 L.T. 397). The distinction between repealed and expired statutes was recognised long before the passing of the Interpretation Act by PARKE, B., when he said, in *Steavenson* v. *Oliver* (2) that repealed statutes, "except so far as they relate to transactions already completed under them, become as if they never had existed, but with respect to temporary statutes, the extent of the restrictions imposed by them becomes a matter of construction." So, the question in the present case is whether the words in sect. 11 (3) of the Act of 1939: "The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done," are sufficient to authorise a conviction after the expiry of the Act of offences committed while the Act was in force. That question is answered in the affirmative, but it would seem to be a matter for regret that in dealing with a subject which involves the liberty of the subject the language of the statute could be thought to be even in the least degree ambiguous.

AS TO THE OPERATION OF TEMPORARY STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 511-513, paras. 664-668; and FOR CASES, see DIGEST, Vol. 42, pp. 714, 715, Nos. 13351-344.]

Cases referred to:

(1) *Willinggale* v. *Norris*, [1909] 1 K.B. 57; 14 Digest 203, *1826*; 78 L.J.K.B. 69; 99 L.T. 830; 72 J.P. 495.
(2) *Steavenson* v. *Oliver* (1841), 8 M. & W. 234; 42 Digest 774, *2019*; 10 L.J. Ex. 338.
(3) *Spencer* v. *Hooton* (1920), 37 T.L.R. 280; Digest Supp.
(4) *Miller's Case* (1764), 1 Wm. Bl. 451; 42 Digest 773, *20161*, 96 E.R. 259.
(5) *R.* v. *M'Kenzie* (1820), Russ. & Ry. 429; 42 Digest 766, *1932*; 168 E.R. 881.
(6) *R.* v. *Loxdale* (1758), 1 Burr. 445; 42 Digest 663, *731*; 97 E.R. 394.
(7) *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K.B. 95; 42 Digest 685, *992*; 76 L.J.K.B. 166; 95 L.T. 855; 71 J.P. 79.
(8) *R.* v. *East Teignmouth* (*Inhabitants*) (1830), 1 B. & Ald. 244; 42 Digest 665, *759*; 9 L.J.O.S.M.C. 24; Pratt 187; 109 E.R. 778.

APPEAL against a conviction at the Central Criminal Court before CROOM-JOHNSON, J., for doing acts likely to assist the enemy with intent to assist the enemy, contrary to the Defence (General) Regulations and the Emergency Powers (Defence) Act, 1939. The facts and the grounds of appeal are set out in the judgment of the court.

Melford Stevenson, K.C., and *Sir John Cameron* for the appellant.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *Gerald Howard* and *J. S. Bass* for the Crown.

Cur. adv. vult.

Nov. 4. LORD GODDARD, C.J., read the following judgment of the court. The appellant was convicted at the Central Criminal Court before CROOM-JOHNSON, J., on an indictment containing nine counts charging him with doing acts likely to assist the enemy, with intent to assist the enemy, contrary to the Defence (General) Regulations, reg. 2A, and the Emergency Powers (Defence) Act, 1939, s. 3 (1)(*b*). It is from this latter Act that the Defence Regulations derived their validity. The Act, by s. 1 (1), empowers His Majesty by Order in Council to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged. It was passed on Aug. 24, 1939, and by s. 11 (1) it was provided that:

> Subject to the provisions of this section, this Act shall continue in force for the period of one year [afterwards extended to two years by the Emergency Powers (Defence) Act, 1940] and shall then expire.

It was further provided that:

> . . . if at any time while this Act is in force an address is presented to His Majesty by each House of Parliament praying that this Act should be continued in force for a

> further period of one year from the date at which it would otherwise expire, His Majesty may by Order in Council direct that this Act shall continue in force for that further period.

By various Orders in Council issued under the authority of this proviso the Act was continued in force until Aug. 24, 1945, and on June 15, 1945, the Emergency Powers (Defence) Act, 1945, was passed substituting for sub-s. (1) of s. 11 in the Act of 1939 a sub-section which reads :

> Subject to the provisions of this section, this Act shall continue in force until the expiration of the period of six months beginning with the twenty-fourth day of August, 1945, and shall then expire.

There was the same proviso for a further extension as was contained in the principal Act, but no further Order in Council was issued, and, accordingly, on Feb. 24, 1946, the Act expired.

The acts with which the indictment charged the prisoner with doing as likely to assist the enemy were all committed between April, 1943 and January, 1944, and his trial took place on May 27 and 28, 1946. At the trial the prisoner elected to defend himself without the assistance of counsel. Consequently, it is, perhaps, not surprising that the point with which this court has now to deal and which is of a highly technical nature was not taken at the trial and the judge was not asked to rule on it. Subsequently, an application was made to this court by counsel on the appellant's behalf for leave to appeal on a variety of grounds, but the only one in which there was any substance was whether the prisoner could be tried and convicted of an offence against an Act which had expired before the date of his conviction. This point being one of law he was entitled to appeal as of right. It will be observed that s. 11 (1) is prefaced by the words " Subject to the provisions of this section " and by sub-s. 3 it is provided that :

> The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done.

and the question which this court has to decide is whether these words authorise the prosecution and conviction of the prisoner notwithstanding the expiration of the Act.

The question is one of some difficulty and the court has had the advantage of very full argument on both sides in which all the relevant authorities have been brought to their attention. The first observation which the court would make is that they are in complete agreement with the decision of the Divisional Court in *Willingale* v. *Norris* (1) that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act.

Considering the position, first, at common law as to the expiration or repeal of a statute, in our opinion, the position may be taken as now settled. The leading authority is *Steavenson* v. *Oliver* (2). In that case, PARKE, B., said (8 M. & W. 234, at p. 241) :

> There is a difference between temporary statutes and statutes which are repealed ; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed ; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction.

That passage was considered and approved by ROCHE, J., in *Spencer* v. *Hooton* (3), and, in our opinion, is a correct statement of the law. It is worth observing that in *Steavenson* v. *Oliver* (2) there are dicta both by the Chief Baron and by ALDERSON, B. which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration, but, in our opinion, this is contrary to the older cases which were not cited to the judges, in particular, *Miller's* case (4) and *R.* v. *McKenzie* (5). At the present day it is most unlikely that any question of this nature will arise where an Act has been repealed because the position is sufficiently dealt with by the Interpretation Act, 1889, s. 38 (2) (*c*) and (*d*), which provides that the repeal of an Act passed after the commencement of that Act shall not, unless the contrary intention appears, affect any liability incurred or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, and the section goes on to provide that any legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed. This section, however, has no application to statutes which have expired, and the question must, therefore, remain one of construction A whether the provisions as to expiry are such as to make it impossible for a prosecution or other proceeding to be either instituted or brought to conviction, or whether, on a true construction of the Act, Parliament has provided that legal proceedings, whether of a civil or criminal character, can be prosecuted in relation to matters connected with the Act after it has expired. In the present case, but for the provision in s. 11 (3) it could, we think, hardly be contended that a person could be convicted of an offence against the Act after its expiration, B and, accordingly, as we have already said, the whole question is the construction which ought to be placed on s. 11 (3).

For the appellant it is argued that the words of that sub-section are insufficient to carry the consequences that would have ensued had the section contained some such provision as is contained in the Interpretation Act, 1889, s. 38, or if that section had been made to apply to the expiration as it would have done had C the Act been repealed, and that the sub-section must be read as referring only to things done and completed while the Act was in force. The Crown, on the other hand, contends that from its terms it is clear as a matter of construction that Parliament did not intend the sub-section to expire with the rest of the Act, as otherwise it would be meaningless. The court can, therefore, it is said, look at the sub-section and not treat it as expunged from the Statute Book, and, if it finds that an act has been done or omitted to be done before the Act expired, D it must allow the Act to operate in respect of that act or omission. It is always presumed that Parliament knows the state of the law at the time when it is legislating. It must also, we think, be presumed that Parliament knows what words are considered apt to effect a particular result. Bearing in mind the length of time that the Interpretation Act, 1889, has been on the statute book, it is certainly true to say that, if the legislature intended the result contended for by the Crown, it has used somewhat elliptical words. Nevertheless, statutes are E not usually expressed in terms of art as that expression would be understood by a conveyancer, and if effect can be given by a short clause to what in another Act is achieved by language more comprehensive, there is no reason why this should not be done. If the intention appears, effect to it must be given by the court.

Now, if this sub-section operates only on matters past and completed, it F may well be asked what object there was in enacting it at all. A competent authority or administrator under the Act would not require it for his protection after the Act had expired, provided what had been done or omitted thereunder was authorised by the Act at the time of the act or omission. To take an example, if after the expiration an action of trespass, either to the person or to property, were brought against an officer of the Crown alleging detention without trial or the taking possession of land against the will of the owner, he could plead G that, at the time he did the act complained of, it was justified by the law then in force. Accordingly, we do not think that we ought to construe the sub-section as one inserted merely *ex majore cautela*. While, no doubt, it does cover completed acts or transactions, we think the language is wide enough to make the provisions of the Act apply, or, in the language of the section, to operate, in respect of any act done before the expiration even though not perfected or completed till afterwards. Regulation 2A refers to an act and reg. 2B (2) refers to an omission. H If, therefore, it is proved that before the expiration of the Act a person did an act likely to assist the enemy with intent, or omitted to do that which it was his duty to do in respect of matters dealt with in reg. 2B, in our opinion, the Act is to operate notwithstanding its expiry, and it operates by making the act or omission an offence for which the offender is liable to be convicted.

A formidable argument, however, was advanced on behalf of the appellant based on subsequent legislation respecting the Act and regulations. On June 15, 1945, the Emergency Powers (Defence) Act, 1945, was passed to which we have already referred. That continued the Act of 1939 in force for a period of six months from Aug. 24, so that it was to expire on Feb. 24, 1946, but this was still subject to the provisions of s. 11 and, therefore, also to sub-s. (3). On Dec. 10, 1945, there was passed the Supplies and Services (Transitional Powers) Act, 1945. This Act gave power to direct that certain of the regulations should have effect although they were not for the time being necessary for the purposes specified in s. 1 (1) of the Act of 1939, and gave power with regard to making further defence regulations for the control of prices. This Act is to expire after 5 years, but it is expressly provided that the Interpretation Act, 1889, s. 38, shall apply on the expiry of the Act as if it had been repealed. Then, on Feb. 14, 1946, only 10 days before the Act of 1939 was due to expire, there was passed the Emergency Powers (Transitional Provisions) Act, 1946. This contains elaborate provisions for maintaining in force certain specified regulations, of which 2A is not one. It deals with the manner of instituting proceedings for offences against such regulations as are continued, and s. 1 (3) applies s. 38 of the Interpretation Act, 1889, to any regulation on its expiry as if it were an Act of Parliament and had been repealed.

Thus, it will be seen that in these Acts far more elaborate provisions have been made as to their expiry than are contained in the sub-section of the 1939 Act which we are considering. It is a sound rule of construction that when there are different statutes *in pari materia*, though made at different times or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other: *per* LORD MANSFIELD, C.J., in *R.* v. *Loxdale* (6), (1 Burr. 445 at p. 447), followed by the Court of Appeal in *Goldsmiths Co.* v. *Wyatt* (7) (76 L.J.K.B. 166 at p. 169). Conversely, if the legislature uses different words in several statutes, *prima facie* the inference is that a different meaning is intended: *per* BAYLEY, J. in *R.* v. *East Teignmouth* (1 B. & Ald. 244, at p. 249). But that is not to say that because more precise or more elaborate language is used in a later Act the language of a former Act, elliptical though it be, is not to receive its ordinary meaning. Had the words of the sub-section been: "The expiry of this Act shall not affect anything previously done or omitted to be done thereunder," there would have been greater, it may be irresistible, force in the appellant's contention. Such words would indicate no more than a confirmation of acts or a ratification of or excuse for omissions that had already taken place. Here, however, the provision is that the Act is to operate after its expiry as respects previous acts or omissions. On turning to sched. I, pt. III, to the Act of 1946, it will be noticed that exactly the same words are used with reference to each of the regulations mentioned therein, and the only difference is that s. 11 (3) of the Act of 1939 is general and sched. I, pt. III, to the 1946 Act is specific. It is clear that Parliament intends that the regulations should continue to operate in respect of the matters referred to as though they had not expired.

As we have already said, the statute operates on an act previously done with intent to assist the enemy by making it an offence punishable with penal servitude. In our opinion, therefore, we are bound to construe the sub-section as meaning that the expiration of the Act is not to affect the liability or punishment incurred under the enactment or the prosecution of legal proceedings for the purpose of inflicting that punishment. It may be that it follows from this construction that had any particular regulation been annulled by resolution of either House of Parliament, as provided by s. 8 (2), a person would, nevertheless, remain liable to punishment for anything done contrary to the regulation before its annulment, as similar words appear in that sub-section. Though this situation can never now occur, it was submitted that such a result would be so unreasonable that Parliament cannot have intended it. The answer to that contention appears to be that s. 8 (2) does not render a regulation in respect of which Parliament passes such a resolution void *ab initio* but only that it shall cease to have effect when the resolution is passed. The words are: "The Order shall thereupon cease to have effect." No doubt, if it were clear that Parliament had disapproved of the making of the Order on the ground that it was one which ought never to have been made, it is hardly likely that any authority would prosecute for a breach of the Order. If they did, the effect of annulment could and probably would, be reflected in the penalty that the court would impose. It might, however, be that the regulation was passed to deal with a state of circumstances which had ceased to exist when Parliament came to consider it. Had Parliament been in recess when the regulation was made a considerable time might elapse before it could be considered. In such a case we do not see that there would be anything unreasonable in a person being punished for a breach of the law which was in existence at the time he offended, though Parliament had put an end to it by the time the prosecution was launched.

A further argument which was pressed on the court was that where there is ambiguity or doubt as to the meaning of a statute which the canons of construction fail to solve, the matter should be resolved in favour of the subject and against the legislature which has failed to explain itself. This is a well-known doctrine and has been applied in more than one case, but though a problem may prove difficult it by no means follows that the result is either doubtful or ambiguous. Courts and juries exist for the purpose, among other things, of solving difficulties both of law and of fact, and were it to be said that, if the solution is difficult, the result must be doubtful, their task would, indeed, in many cases be far easier than it is. In our opinion, giving the words of the sub-section their natural meaning, there is neither doubt nor ambiguity, and the result would appear to be both just and reasonable. The appeal is, accordingly, dismissed. The sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

HOLTON *v.* HOLTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 23, 1946.]

Evidence—Admissibility—Written statement by deceased person—"Person interested"—Evidence Act, 1938 (*c.* 28), *s.* 1 (3).

The Evidence Act, 1938, s. 1 (3), provides that nothing in the earlier part of the section "shall render admissible as evidence any statement made by a person interested . . ."

Semble: "Person interested" in the sub-section means a person who has a pecuniary or material interest in the proceedings in which the statement is sought to be put in evidence, and does not extend to exclude a statement made by a person who has a family or sentimental interest, as, *e.g.*, the mother of the petitioner in a divorce suit.

[**EDITORIAL NOTE.** Unfortunately it not infrequently happens that important questions of evidence which arise during the hearing of a case are decided, as in the present case, without a formal, reasoned judgment being delivered. In such circumstances it is, it is submitted, fair to assume that the court adopts the main contentions of the counsel in whose favour it decides. Here the contention which runs all through the argument of counsel for the petitioner is that "person interested" must be interpreted as meaning a person with a pecuniary, material, interest, and not as having the broader, popular meaning which might be attributed to the words. Support would appear to be given to the inference that BARNARD, J., accepts that view by his remark just before the admission of the document that, if the statute had meant to exclude the statements of relatives, it would have said so. To exclude a statement by any person having an "interest" in the proceedings in the popular sense of the word might well lead to the exclusion of the statements of a large class. It is, for instance, the common experience of lawyers engaged in running down cases that a witness who has no more connection with the proceedings than that he was a passenger in a public service vehicle which is involved in an accident becomes an almost enthusiastic supporter of the side for whom he gives evidence.

AS TO THE EVIDENCE ACT, 1938, s. 1 (3), see HALSBURY'S STATUTES, Vol. 31, p. 146.]

Cases referred to:

(1) *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 57 T.L.R. 313; Digest Supp.

(2) *Robinson* v. *Stern*, [1939] 2 All E.R. 683; [1939] 2 K.B. 260; 108 L.J.K.B. 665; 161 L.T. 3; 55 T.L.R. 708; Digest Supp.

(3) *Hollington* v. *Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] 1 K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 59 T.L.R. 321; Digest Supp.

SUBMISSION ON ADMISSIBILITY OF EVIDENCE during hearing of petition for divorce.

At the end of the evidence of the husband petitioner he said that a statement which was put to him was in the handwriting of, and signed by, his mother, having been written by her in June, 1944. She had since died. The document, he added, came into existence at the suggestion of his solicitors.

A *Clifford Mortimer* (*C. O. Herd* with him), for the petitioner: I submit that this statement is admissible as coming within s. 1 of the Evidence Act, 1938. That section provides:

> (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(i) if the maker of the statement either—(*a*) had personal knowledge of the matters dealt with by the statement; or
> B . . . . (ii) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead . . . (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

C That is the only point which has to be argued, what is meant by "a person interested." Those words must mean a person who has a pecuniary or other material interest in the result of the proceedings—a person whose interest is affected by the result of the proceedings, and, therefore, would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost. That is made clear by the terms of s. 2 (1):

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> In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement . . .

That guards the respondent here. It means that the court will take into consideration the fact that the statement was written by the mother, who would naturally side with her son.

E *J. D. Casswell, K.C.* (*W. B. Frampton* with him) for the respondent: "Interested" does not mean pecuniarily interested. It is used to denote somebody who has a real interest in the result of the anticipated proceedings, and here nobody could have a much deeper interest than the petitioner's mother. This Act was passed, not to enable people to produce proofs—because this statement is practically a proof of what the mother was prepared to say in the F proceedings—but to cover statements made by people when no proceedings were anticipated. "Interested" must be given a very wide significance, and in the present case the petitioner, as he has admitted, had consulted solicitors and they knew he was going to try to divorce his wife long before this statement was made. It was never intended that a proof taken from a person for the purposes of proceedings should be admitted, even if that person should die thereafter. In *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (1) G a tester employed by a company to test each apparatus sold by them signed a proof relating to certain facts relevant in a passing-off action then pending in respect of the sale of similar articles by another company, but he died before the hearing, and it was held that the proof was not admissible under the Evidence Act, 1938, as in the circumstances the tester was "a person interested" within the meaning of s. 1 (3), the general intention of which was that, if a statement were put in evidence, either it should be one made at a time when H proceedings were not pending or anticipated involving a dispute as to any fact which it might tend to establish, or it should be made by an independent person." MORTON, J., said in his judgment [1941] Ch. 248, at p. 251:

> In my view, "a person interested" within the meaning of this sub-section must, in the context, mean a person interested in the result of the proceedings "pending or anticipated." It seems to me that a useful test, though perhaps not the only one, is: Was it better for Mr. Petrie [the tester] that the plaintiffs should succeed in the present action or was it a matter of indifference to him? Applying that test, was he a person interested? I do not know whether the salary paid to Mr. Petrie was quite

irrespective of, or depended to some extent upon, the number of tests which he carried out for the plaintiff company; but it seems to me that it must be to the advantage of the plaintiffs' tester if they win this action instead of losing it. The object of the action is to prevent the plaintiffs' trade being damaged by what they say are unfair acts on the part of the defendants and it seems to me that a man whose employment consists of testing the Plomien fuel economisers must be benefited if the plaintiffs prosper and fuel economisers are sold by them and tested by him in increasing numbers. The amount of his work is increased, and I suppose that it is reasonable to infer that his importance to the company is increased, so that possibly in time, if not immediately, his remuneration might be augmented. I think, therefore, that in this particular case, Mr. Petrie must be held to have been "a person interested," within the meaning of the sub-section, at the time when his proof was given and signed by him . . . I think that the general intention of the section is that, if there is put in evidence a statement to which, of course, no cross-examination can be directed, it should be either one made at a time when proceedings "involving a dispute as to any fact which the statement might tend to establish" are not "pending or anticipated" or one made by what I may conveniently describe as an independent person.

That cannot mean somebody who would be biased towards one side rather than the other, and one who, knowing that either there are proceedings already pending or else anticipated, would naturally tend to show that bias in a statement made, as in a proof. Therefore, his statement would be ruled out. *Robinson* v. *Stern* (2) and *Hollington* v. *Hewthorn & Co., Ltd.* (3) were both cases in which statements were held to be inadmissible because they were made at a time when proceedings in which the persons making the statements would be interested were pending.

Mortimer, in reply: The *Plomien Fuel* case (1) is distinguishable from the present, and, indeed, supports the contention now put forward on behalf of the petitioner. The decision was based on the finding that a servant of a limited company, whose emoluments depended on the prosperity of the company and the scope of his work, was a person with a pecuniary interest in the result of the action, and so was "a person interested" within the meaning of the section. That was entirely the basis of that decision and there was no question raised that the document was in the form of a proof; it was excluded because it was the statement of "a person interested." That case is most certainly not an authority for the proposition that the statement of a person who has not a pecuniary interest in the issue of the case, but has an interest in the result from sympathy, is excluded. When MORTON, J., said that the person who has made the statement must be "independent," he did not mean that the result of the case did not matter a twopenny toss one way or the other to the person making the statement. He meant that the test was whether the result would or would not affect his interest pecuniarily. "A person interested" means that he has an interest in the sense that he would suffer some disability or disqualification if the action were to fail. If your Lordship comes to any other conclusion, what innumerable disqualifications there must be. Must you prove that the doctor, for instance, did not mind one way or the other which side won? He would not be human if he was completely indifferent. If he had formed a view, as he had undoubtedly formed a view in any particular case, he must have hoped that a certain result would prevail.

BARNARD, J.: It seems to me that if the statute had meant to exclude the statements of near relatives or relatives of the parties, it would have said so.

Mortimer: It certainly would, my Lord. It would have excluded statements by persons who have an interest or who are closely related.

BARNARD, J.: I think the petitioner's mother was not "a person interested" within the meaning of the section, but the court must, of course, consider what weight it is going to attach to the statement when it sees what it contains.

The statement was then read.

Solicitors: *Vanderpump & Sykes*, Enfield (for the petitioner); *Markby, Stewart & Wadesons* (for respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Followed. ROYAL CROWN DERBY PORCELAIN CO., LTD. *v.* RUSSELL. [1949] 1 All E.R. 749.

BRAITHWAITE & CO., LTD. *v.* ELLIOTT

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 17, 18, 1946.]

Landlord and Tenant—Rent restriction—Premises let "in consequence of employment"—Reason actuating landlord—Knowledge of tenant—Materiality—Tenant allowed to remain in possession on termination of employment—Whether fresh tenancy—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1) (*a*); *sched. I, para.* (*g*) (i).

The plaintiffs owned a mill and a row of cottages which had been built for, and always let to, their workmen. In 1937 the defendant entered the plaintiff's employment and when one of the cottages fell vacant he obtained a weekly tenancy of it at a rent of 4*s.* 11*d.* a week, which was deducted from his wages. In 1938 the plaintiffs terminated the defendant's employment, but he was allowed to continue in occupation of the cottage, the weekly rent being collected from him. In 1944 the plaintiffs engaged a man who, owing to the fact that there was no cottage available for him at the time, was compelled to live in rooms 3 miles away. In consequence, the plaintiffs required the defendant's cottage for the new employee and in 1945 they served a notice to quit on the defendant, who failed to leave the cottage. In an action for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (*a*), and sched. I, para. (*g*), the county court judge refused to make an order on the grounds: (i) that the cottage was not let to the defendant in consequence of his employment within the meaning of the section because although, in fact, the plaintiffs would not have let the cottage to the defendant had he not been in their employment, the defendant did not know that fact or that the cottage was let to him in consequence of his employment by them or that his tenancy was conditional on his remaining in their employment; (ii) that a fresh tenancy had been created, and, therefore, the tenancy which was in existence when the notice to quit was served was not a letting to the defendant in consequence of his employment.

HELD: (i) on a true construction of s. 3 (1) (*a*), and sched. I, para. (*g*), the material question was what was the reason which actuated the plaintiffs in letting the cottage to the defendant, and it was immaterial whether or not the defendant knew that the cottage was being let to him in consequence of his employment or that the tenancy was conditional on his remaining in the plaintiffs' employment.

Braby (*Frederick*) *& Co.* v. *Bedwell* (2) *overruled.*

(ii) there was no new tenancy created when the defendant ceased to be employed by the plaintiffs, and, therefore, the tenancy which was in existence when the notice to quit was served was still a letting to the defendant in consequence of his employment.

Benninga (*Mitcham*), *Ltd.* v. *Bijstra* (1) *applied.*

[**EDITORIAL NOTE.** On the first point, the decision in *Frederick Braby & Co.* v. *Bedwell* (2), which has stood for 20 years is overruled, and the dictum of LUSH, J., in *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (3), which was referred to with approval in *Frederick Braby & Co.* v. *Bedwell* (2), is also disapproved. The present decision that the character of a letting depends on the intention of the landlord alone may be of importance if it becomes applicable to other branches of the law of landlord and tenant. On the second point, it is instructive to compare the present case with *Read* v. *Gordon* (4), where it was held that a new tenancy had been created so that the landlords could not avail themselves of para. (*g*) (i) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. In *Read's* case the landlord, in whose employment the tenant had been, died, and her executors did not continue to carry on her business, but allowed the tenant to remain in occupation of the dwelling-house, accepting rent from him when he had obtained employment elsewhere.

AS TO POSSESSION REQUIRED FOR LANDLORD'S EMPLOYEE, see HALSBURY, Hailsham Edn., Vol. 20, p. 331, para. 395; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. 7311-7330.]

Cases referred to:

(1) *Benninga* (*Mitcham*) *Ltd.* v. *Bijstra*, [1945] 2 All E.R. 433; [1946] 1 K.B. 58; 115 L.J.K.B. 28; 173 L.T. 298; Digest Supp.

(2) *Braby* (*Frederick*) *& Co.* v. *Bedwell*, [1926] 1 K.B. 456; 31 Digest 583, *7320*; 95 L.J.K.B. 412; 134 L.T. 320.

(3) *Queen's Club Gardens Estates Ltd.* v. *Bignell*, [1924] 1 K.B. 117; 31 Digest 583, *7319*; 93 L.J.K.B. 107; 130 L.T. 26.
(4) *Read* v. *Gordon*, [1941] 1 All E.R. 222; Digest Supp.; [1941] 1 K.B. 495; 110 L.J.K.B. 719; 165 L.T. 113.
(5) *Murton* v. *Aldis* (1929), 141 L.T. 168; Digest Supp.; 93 J.P. 184.

Appeal by the plaintiffs from a decision of His Honour Judge Allsebrook, given at Kendal County Court, and dated Mar. 19, 1946. The facts appear in the judgment of Morton, L.J.

D. G. A. Lowe for the appellants.

R. F. G. Ormrod and *J. Comyn* for the respondent.

Morton, L.J.: In this case the county court judge refused the plaintiffs possession of a cottage occupied by the defendant. The cottage was 33, Woodside Terrace, Mealbank, which is about 3 miles from Kendal. The plaintiffs own a woollen mill at Mealbank, and some 70 years ago they built a row of cottages, of which this cottage is one, for their workmen. Those cottages have always been let to workers in the employment of the plaintiffs, although it appears that not infrequently the plaintiffs have allowed persons described in the evidence as the "successors of employees" to stay on. I suppose by that is meant the widow and children of an ex-employee.

In April, 1937, the defendant entered the employment of the plaintiffs. At first he lived in a cottage about half a mile away from Woodside Terrace, but in November, 1937, he obtained this cottage, No. 33. The rent was 4*s.* 11*d.* a week, which was deducted from his wages, and he also got free electricity. The tenancy was admittedly a weekly tenancy, and it was never put into writing. In June, 1938, the plaintiffs gave the defendant notice terminating his employment, but they did not give him notice to quit the cottage. The rent was then collected from him weekly. During part of the war the defendant was away and his wife continued to occupy the cottage, but the defendant returned before these proceedings were commenced. In November, 1944, the plaintiffs engaged a man named Shaw to work at Mealbank. There was no cottage available for him at that time and he lived in rooms in Kendal. The plaintiffs seem to have been very considerate to the defendant. They wanted this cottage for Shaw, but they did not serve a notice to quit on the defendant until over a year later, on Dec. 12, 1945. As the defendant failed to leave the cottage the plaintiffs started these proceedings on Jan. 30, 1946. The judge reserved his judgment and he then, as I have said, refused the plaintiffs possession.

The relevant parts of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, are s. 3, and sched. I. Section 3 is as follows, so far as material:

> (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and . . . (*a*) the court has power so to do under the provisions set out in sched. I to this Act . . .

Schedule I, so far as material, is as follows:

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*g*) the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment or in the whole-time employment of some tenant from him . . . and either (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment . . .

As para. (*g*) has been the subject of a great deal of argument and of consideration by the courts, I hope I may be forgiven for referring to a recent judgment which I delivered in *Benninga* (*Mitcham*), *Ltd.* v. *Bijstra* (1), a judgment with which Scott, L.J. agreed. I then said—and this passage in the judgment applies equally to the present case ([1945] 2 All E.R. 433, at p. 436):

> The county court judge had to arrive at a conclusion on five questions . . .; (i) Is it reasonable to make an order for possession . . . ? (ii) Is this house reasonably required by the plaintiff company for occupation as a residence for some person engaged in its whole-time employment? (iii) Was the defendant in the employment of the plaintiff company? (iv) Was the house let to the defendant in consequence of

that employment ? (v) Has the defendant ceased to be in that employment ? All these questions arise under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, (1) (*a*), and para. (*g*) of sched. I, to that Act. I have been careful to use in each case the same tense as that which appears in the statute because a great deal of the argument . . . turned on the date at which these . . . questions must be considered. In my judgment, in answering the first two questions, the judge must have regard to the circumstances existing at the time when he hears the case, while for the purpose of answering questions (iii) and (iv) he must look back into the past.
A Nothing arises in the present case on four of these questions because the judge has held, first, that it is reasonable to make an order for possession, assuming that the other requirements are satisfied, and, secondly, that the cottage in question is reasonably required by the plaintiffs for occupation as a residence for some person engaged in their whole time employment. There is no doubt that the defendant was in the employment of the plaintiffs, nor that he has
B ceased to be in that employment. The judge, however, has held in answer to the fourth question (and this was the basis of his judgment in favour of the defendant) that the house was not let to the defendant in consequence of his employment, within the meaning of the section. The principal reason which led the county court judge to arrive at that conclusion appears in the following passage in his judgment :

> When the cottage was let to the defendant in November, 1937, the tenant [*i.e.*, the
> C defendant] was in the employment of the landlords and the landlords would not have let the cottage to the defendant had he not been in their employ, but I do not find that the tenant knew of that fact or that he knew the cottage was let to him in consequence of his employment by them. There is nothing to show that the defendant knew that his tenancy was conditional on his remaining in the plaintiff's employment. On these facts it appears to me, on the authority of *Frederick Braby & Co.* v. *Bedwell* (2) and *Queen's Club Garden Estates Ltd.* v. *Bignell* (3), that the letting in November, 1937,
> D was not in consequence of the defendant's employment.

In my view, at this stage the county court judge has misconstrued the section, and I think it is unlikely that he would have arrived at that conclusion if his attention had been directed to *Benninga's* case (1). In my view, the material question is : What was the reason which actuated the landlord in letting the cottage to the defendant ? The wording of the Act is : " and the dwelling-house was let to him in consequence of that employment." When there is an
E agreement of letting, the landlord agrees to let and the tenant agrees to take, and, in my view, under the section one has to inquire only : What was in the mind of the person who let ? Was the house let to the defendant in consequence of his employment or was it let to him for some other reason ? That matter is, in my view, concluded against the defendant in the present case by *Benninga's* case (1). If I may further quote from my judgment ([1945] 2 All E.R. 433, at
F p. 437) :

> As to question (iv) [*i.e.*, the question now under consideration] it was stated by this court in *Read* v. *Gordon* (4) that the crucial time at which this question must be decided is the date of the notice to quit. In my view the question which has to be decided, as at that time, may be accurately stated as follows : Was the tenancy, which was determined by the notice to quit, a tenancy which had been granted to the tenant in consequence of his employment by the landlord ?

G It seems to me that the judge has answered that question in favour of the present plaintiffs. He has said :

> The landlords would not have let the cottage to the defendant had he not been in their employ.

That, to my mind, is a finding of fact which concludes this point against the defendant.

H The judge goes on to discuss certain other questions which are, in my view, irrelevant. He says : " I do not find that the tenant knew the fact "—to my mind, whether he knew it or not is irrelevant—" or that he knew the cottage was let to him in consequence of his employment by them "—that again, in my view, is irrelevant. " There is nothing to show that the defendant knew that his tenancy was conditional on his remaining in the plaintiffs' employment." I cannot find in the section the slightest trace of any of these matters being relevant to the consideration of the matter before the court. *Frederick Braby & Co.* v. *Bedwell* (2) and *Queen's Club Garden Estates, Ltd.* v. *Bignell* (3) were not cited to this court in *Benninga's* case (1), but I feel bound to say that, in my view, *Frederick Braby & Co.* v. *Bedwell* (2) was wrongly decided. That was a case in which a Divisional Court had before them a finding of fact by the county court judge that the plaintiffs, who were the landlords, would not have let to the defendant but for his being employed by them. Notwithstanding that, the Divisional Court refused the landlord possession, and SHEARMAN, J., said ([1926] 1 K.B. 456, at p. 458) :

> It is not disputed that the defendant was in the plaintiffs' employment, but the question is whether they let the house to him in consequence of that employment . . . the court must be satisfied, not only that the landlords let the premises to the defendant in consequence of his being in their employment, but also that the defendant took the premises in consequence of his being in their employment.

I cannot agree with this statement. Further, in my view, it is irrelevant whether the tenant did or did not know that his tenancy was conditional on his remaining in the employment of the plaintiffs. SANKEY, J., said (*ibid.*, at p. 459) :

> I think the words do not have a unilateral, but a bilateral construction and really mean that the landlord lets and the tenant takes the premises in consequence of the employment.

He refers to, and relies on a *dictum* of LUSH, J., in *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (3). This court has recently approved the actual decision in the *Queen's Club* case (3), but I am unable to agree with the *dictum*, which I shall now quote. Referring to similar words in a section in an earlier Act, LUSH, J., said ([1924] 1 K.B. 117, at p. 132) :

> In my view they mean, not that the landlord only knows, but that both the landlord and the tenant know, that the premises were let to the tenant in consequence of his employment.

On the view that I take of the construction of this sub-section, it is unnecessary for me to say whether I think there was any evidence to support the judge's findings as to the tenant's state of mind, but I feel grave doubt whether any such findings could be supported.

The second reason which the county court judge gave for his decision was this. He found that a new tenancy had been created and, therefore, that the tenancy which was in existence when the notice to quit was served was not a letting to the tenant in consequence of his employment. In my view, there is no evidence to support that finding. The defendant admittedly became a tenant of the plaintiffs in November, 1937, at the rent which I have mentioned. When his employment ceased no alteration was made in the terms of his tenancy. I cannot see anything which created a new tenancy. It is true that, as the rent could no longer be deducted from his wages, the tenant paid rent direct, but I cannot find that this fact caused any change in the legal relationship between these parties. It was, and it continued to be, that of landlord and tenant under the letting which began in November, 1937. I think every word of the passage, which I shall now read, from my judgment in *Benninga's* case (1) applies to the present case ([1945] 1 All E.R. 433 at p. 437) :

> It is true that the plaintiff company continued to accept the rent [in that case it was 10*s.* 0*d.* a week] from the defendant after his employment had ceased, but I can see no good ground for holding that a new tenancy was thereby created. In my view the rent continued to be paid under the tenancy created in . . . 1941 [in this case, 1937] and there can be no doubt that that tenancy was granted to the defendant in consequence of his employment by the plaintiff company. Thus the tenancy which was determined by the notice to quit . . . was a tenancy granted to the defendant in consequence of his employment by the plaintiff company and question (iv) must be answered in the affirmative.

The county court judge relied on a number of cases as supporting his view that a new tenancy was created. I think I need only say that in each of them the facts were very dissimilar from the facts in the present case, and in each of them the court held on the facts that there had been a termination of the old tenancy and the creation of a new one. One naturally feels sympathy for a man who is losing his cottage, but in the present case there is bound to be hardship to one party or the other. This appeal must be allowed.

SOMERVELL, L.J. : I agree, and I do not desire to add anything to what has been said on the first point of the case, because everything that I had in my mind has been expressed by MORTON, L.J., but, as we are differing from the county court judge, I want to make some observations on the second point in the case, *viz.*, whether there was a new tenancy. The county court judge referred to, and, indeed, regarded as indistinguishable in principle, *Murton* v. *Aldis* (5). In that case the defendant, at the time when the issue arose, had been in occupation of the house for a considerable period at a rent of 5*s.* 0*d.* a week, which had been fixed by the county court judge after the defendant had been in the house for some time as a person employed by the landlord and after the employment had terminated. I think it is important to note, having regard to the arguments addressed to us and the line which the county court judge took, that in the statement of facts in that case no details were given of the rent paid by the defendant during the first period of his occupation, while he was in the employment of the landlord. Therefore, on the evidence, it was plain that, after he ceased to be in the employment of the landlord and the reference to the county court judge on the notice to quit, the county court judge being asked to fix a reasonable rent, a new rent came into existence. Not only does it distinguish this case from the present case, but if one reads the judgment of LORD HEWART, C.J., one finds that his whole reasoning is inconsistent with the argument that was addressed to us here, *viz.*, that on the facts of this case a new tenancy could be found in law. If the principle suggested by counsel for the defendant was right, LORD HEWART, C.J., would never have said that *Murton* v. *Aldis* (5) was a difficult case, because it would have been an *a fortiori* case of the principle put before us. In my view, a study of the cases (and I will not refer to the others) to which the county court judge refers really supports the conclusion at which we have arrived in this case. For these reasons, I think the appeal must be allowed.

ASQUITH, L.J.: I agree. On the issue whether there was a new tenancy, I have nothing to add to what has fallen from SOMERVELL, L.J., but at the risk of repetition I would like to add two or three words on the other issue, namely, whether the cottage was "let to" the defendant "in consequence of his employment" by the plaintiffs.

Who let this cottage? Obviously the plaintiffs. Why did they let it to the defendant? Because he was employed by them. That is what the county court judge has found, and it seems to me to conclude the matter. If the sub-section had read: "and a lease of the dwelling-house was accepted by the tenant in consequence of that employment," other considerations would arise. The criterion might then be solely the motive of the tenant, but on the wording of the sub-section, I think the criterion was solely the motive of the plaintiffs, the landlords. Nor can I see any justification for what has been called a bilateral reading of the words: "in consequence of that employment," whether such a reading is held to imply a common motive on both sides or only knowledge by the tenant of the motive of the lessor, or, again, something in the nature of a contractual *consensus* to a tenancy contingent on the continued employment of the defendant.

So far as *Braby* v. *Bedwell* (2) decided the contrary, I agree it is wrongly decided. It seems to me, further, to be inconsistent with the decision of this court in *Benninga's* case (1), but, even if both these difficulties were out of the way, I should feel very doubtful whether the county court judge was justified in finding that the defendant did not in fact know that the plaintiffs let to him in consequence of his employment. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Milne, Moser & Son*, Kendal (for the appellants); *Beachcroft & Co.*, agents for *Ernest Temple*, Kendal (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Dictum of MORTON, L.J., at p. 544, *applied*. HAMER *v.* CUNARD WHITE STAR, LTD. [1952] 1 All E.R. 787.

Re EMBLETON.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 22, 1946.]

County Courts—Procedure—Payment into court—Order by High Court—Money paid in for infant plaintiff—Attainment of full age by plaintiff—Right to payment out of fund—County Courts Act, 1934 (c. 53), s. 164 (2).

In 1937 the applicant, then an infant, brought an action in the High Court for personal injuries, and obtained a judgment for £2,250 damages which were transferred to the appropriate county court. In 1946, when he was aged 26, the applicant applied to the county court for the payment out to him of the whole of the fund standing to his credit, but his application was refused. On appeal,

HELD: s. 164 (2) of the County Courts Act, 1934, gave the county court no power to retain the fund in court after the person for whose benefit it had been directed to be applied had ceased to be under a legal disability, and, therefore, the decision of the county court judge was wrong.

Johnston v. *Henry Liston & Co.* (1) applied.

[**EDITORIAL NOTE.** There appears to be no previous authority on the extent of the jurisdiction of the county court under s. 164 of the County Courts Act, 1934, to control the application of a fund paid into that court by order of the High Court for the benefit of a person under a legal disability. The language of s. 164 (2) is wide and might well be construed—however contrary such a view might be to common sense—to give power to the county court to continue to administer the fund for all time, if it thought fit. Decisions on similar provisions in the Workmen's Compensation Rules, however, point to a different, and more logical, construction, and those decisions are applied in the present case to support a decision that the period of administration must be limited to the time for which the person entitled to the fund is under a disability.

AS TO THE COUNTY COURTS ACT, 1934, s. 164 (2), see HALSBURY'S STATUTES, Vol. 27, p. 164.]

Cases referred to:

(1) *Johnston* v. *Henry Liston & Co.*, [1920] 1 K.B. 99; 88 L.J.K.B. 1152; 121 L.T. 626.

(2) *Suffling* v. *J. Malcolm & Co.* (1933), 26 B.W.C.C. 537.

APPEAL from Middlesbrough County Court. The facts appear in the judgment of MORTON, L.J.

J. Charlesworth for the appellant.

The respondent did not appear.

MORTON, L.J.: This is an appeal from a decision of the county court judge refusing an application for the payment out of court of a sum of money.

The application was made by Mr. James Oakley Embleton for the payment out to him of the whole of a fund standing to his credit in Middlesborough County Court. Mr. Embleton is now 26 years of age, and the fund amounts to over £2,000. By an order of the High Court dated Oct. 13, 1937, in an action by Mr. Embleton (who was then 17 years of age) by his father and next friend against United Automobile Services, Ltd., terms having been agreed between the parties and approved by GODDARD, J., as he then was, it was ordered that judgment should be entered for Mr. Embleton for £2,250, that £10 thereof should be paid to Mr. Embleton or his solicitors and the balance thereof, amounting to £2,240, should be transferred to Middlesbrough County Court, and that, after payment out of such sum of certain costs, the balance thereof should be invested, applied or otherwise dealt with for the benefit of Mr. Embleton in such manner as the county court in its discretion should think fit. That order was made under s. 164 of the County Courts Act, 1934, which, so far as material, is as follows:

> (1) Where in any cause or matter in the King's Bench Division of the High Court or in an admiralty action in the Probate, Divorce and Admiralty Division of that court, money is in any manner recovered by or on behalf of, or adjudged or ordered to be paid to or for the benefit of, a person who is an infant or of unsound mind, the High Court or a judge thereof may order the money or any part thereof to be paid into or transferred to the county court of the district in which that person resides or such other county court as the High Court or judge may order. (2) On the making of any such order, the money or the part thereof to which the order relates shall be paid or transferred according to the order, and shall, subject to any special order or direction

> of the High Court or a judge thereof, and to county court rules . . . be invested, applied or otherwise dealt with for the benefit of the person to whom the order relates in such manner as the county court in its discretion thinks fit. (3) The provisions of this section shall apply to money which in proceedings under the Fatal Accidents Acts, 1846 to 1908, is recovered by or adjudged or ordered to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant.

I pause to say that, apart from the provisions of that section and the orders which the learned judge thought fit to make under it, the sum now in question would have been the absolute property of the infant plaintiff. Mr. Embleton attained his majority on Dec. 7, 1940, and shortly before that, by an order of the county court, dated Oct. 30, 1940, it was provided that as from the end of the year 1940 the interest on the fund should be paid half-yearly to Mr. Embleton indefinitely.

In 1945 Mr. Embleton applied to the county court that the whole of the fund should be paid out to him that it might be applied by him in financing certain enterprises and in buying certain land. The application came before the county court judge and he went into the question whether the proposed application of the money was shown to his satisfaction to be for Mr. Embleton's benefit. He came to the conclusion that the proposed scheme was ill-considered and hazardous, and he refused to direct payment out unless a more satisfactory scheme was brought forward. Mr. Embleton did not put forward any further scheme, but subsequently he applied again for the payment out of the whole fund on the ground that, being of age, he was entitled to demand the payment out of the whole of the fund and that any discretionary control by the county court had come to an end. The learned judge refused that application, taking the view that, on the true construction of s. 164 of the County Courts Act, he still had a discretion in the matter.

This point is not free from authority, because there are two decisions of this court in regard to a provision in very similar terms. The first one is *Johnston* v. *Henry Liston & Co.* (1). The relevant statutory provision in that case was r. 53 of the Workmen's Compensation Rules, and that rule provided :

> Where an agreement is made for the payment of a lump sum in lieu of a weekly payment to a person under any legal disability, or for the redemption by a lump sum of a weekly payment payable to a person under any legal disability, and a memorandum thereof has been recorded in accordance with the Act and these rules, such sum shall be paid into court, and shall be invested, applied or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the person entitled thereto . . .

Subject to the observation which I shall make later on subs. (3) of s. 164, of the County Courts Act, 1934, I think there is no real distinction between the wording of s. 164 and that of the rule which I have just read. In each case the statutory provision, on the face of it, might be read as giving the county court a discretionary control over the fund in question for the life of the person entitled thereto. In giving the first judgment of the Court of Appeal, WARRINGTON, L.J., after stating the relevant facts, said ([1920] 1 K.B. 99, at p. 103) :

> Does then r. 53 enable a judge to retain the fund in court when the person to whom it belongs is absolutely entitled to it and is under no legal disability ? The Act could, of course, impose any restriction the legislature thought fit on the right of a person of full age and not otherwise under any disability to dispose as he pleases of his own property, and some people may think it desirable to maintain the condition of pupilage notwithstanding the termination of the legal period of infancy, but in my opinion the court ought not to be astute to discover such a restriction of the rights of property, and ought not to hold it to be imposed except by express words or by necessary implication. I can find nothing of the kind here. The words " for the benefit of the person entitled to " seem to me to mean for the benefit of a person already described—namely, a person under legal disability, and I think that when that disability ceases the discretion ceases also. Nothing remains but the absolute title with the legal rights attached to it, one of which is to have the fund paid to the owner.

Subject to the matters to which I shall next refer, it seems to me that the reasoning of that judgment, although it was delivered in regard to another provision, is directly applicable to the section which we have to construe. A similar decision was given by this court in *Suffling* v. *J. Malcolm & Co.* (2) where the facts were, I think, indistinguishable from those in *Johnston* v. *Henry Liston & Co.* (1), and the court followed that case.

There is one possible distinction between the present case and *Johnston* v. *Henry Liston & Co.* (1). In s. 164 (3) the provisions of the section are applied to money "adjudged or ordered to be paid to the widow of the person killed." Now, the widow of a person killed would not be a person under any legal disability and, therefore, the passage from WARRINGTON. L.J.'s judgment which I have read would not apply verbatim to the case of a widow. I think, however, it would be drawing far too fine a distinction to say that the present case can be distinguished from *Johnston* v. *Henry Liston & Co.* (1) on that ground. In my view, the application of the reasoning of WARRINGTON, L.J., to the case of a widow would be that the words "for the benefit of the person to whom the order relates" mean for the benefit of a person already described, namely, a person who is the widow of the person killed, and when the person in question ceases to answer that description the discretion ceases also. Thus, if the widow remarried, she would be entitled to have the money paid out to her. That case is not before us, but it seems to me that that result must logically follow. If that is the true view, it seems to me there is no valid distinction between the present case and the decisions of the Court of Appeal to which I have referred.

The result is that this appeal should be allowed, and the county court judge ought to have acceded to the application for payment out.

SOMERVELL, L.J.: I agree.

ASQUITH, L.J.: I agree.

Appeal allowed.

Solicitors: *Cunliffe & Airy*, agents for *Meek, Stubbs & Barnley*, Middlesbrough (for the appellant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Ex parte ARONSOHN.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), Oct. 23, 1946.]

Royal Forces—Pensions—Appeal—Leave—Refusal by High Court judge—Appeal to Court of Appeal—Competency—Pensions Appeal Tribunals Act, 1943 (*c.* 39), *s.* 6 (2).

There is no appeal to the Court of Appeal from a decision of the High Court judge refusing leave to appeal against a decision of a pensions appeal tribunal.

[**EDITORIAL NOTE.** Section 6 (2) of the Pensions Appeal Tribunals Act, 1943, gives an applicant for a pension a right of appeal to the High Court from a decision of a pensions appeal tribunal "with the leave of the tribunal or of a judge of the High Court nominated for the purpose by the Lord Chancellor." It might be thought that a further appeal to the Court of Appeal would lie against a refusal by the High Court judge to grant leave, but the Court of Appeal here decide otherwise. In effect, it is held that the High Court judge has a discretion in the matter with which the Court of Appeal will not interfere, but, it is submitted, a different view might be taken if it could be shown that the High Court judge had not exercised his discretion judicially.

AS TO THE PENSIONS APPEAL TRIBUNALS ACT, 1943, s. 6 (2), see HALSBURY'S STATUTES, Vol. 36, p. 487.]

APPEAL from DENNING, J. The facts appear in the judgment of MORTON, L.J.

The applicant in person.

MORTON, L.J.: This is an application by Mr. Aronsohn in person. It appears that he is dissatisfied with a decision of a pensions appeal tribunal within the meaning of s. 6 (2) of the Pensions Appeal Tribunals Act, 1943, and he desires to appeal from that decision to the judge nominated for the purpose by the Lord Chancellor, namely, DENNING, J.

Section 6 (2) is as follows:

> Where, in the case of an appeal to the tribunal under s. 1, s, 2, s. 3, or s. 4 of this Act, the appellant or the Minister is dissatisfied with the decision of the tribunal as being erroneous in point of law, he may, with the leave of the tribunal or of a judge of the

High Court nominated for the purpose by the Lord Chancellor, appeal therefrom, within such time as may be limited by rules of court, to the judge so nominated and the decision of that judge shall be final and conclusive.

Mr. Aronsohn applied to the tribunal for leave to appeal from its decision and leave was refused. He then applied to DENNING, J., for leave to appeal from the decision of the tribunal, and DENNING, J., refused leave. Mr. Aronsohn now seeks to appeal to this court from the refusal of DENNING, J., to give leave.

In my view, no such appeal is open to him. The Act makes it a condition of any appeal from the decision of the tribunal that the appellant must obtain the leave of the tribunal or of a judge of the High Court. To my mind, it would be impossible for us, whether we thought that the decision of DENNING, J., in refusing leave was right or wrong, to direct him to give leave. Such an appeal to this court would be inconsistent with the provisions of the Act. I am disposed to agree with Mr. Aronsohn's submission that the words "the decision of that judge shall be final and conclusive" apply to the decision of the judge on the substantive appeal from the tribunal's decision of the case, but, notwithstanding that, I think that the wording of the section makes it clear that the application made before us today cannot succeed.

Mr. Aronsohn points out that when DENNING, J., refused leave he was sitting in chambers, and he relies on Ord. 55E, r. 6, which, dealing with proceedings under the Pensions Appeal Tribunals Act, 1943, provides:

> The ordinary practice and rules of the King's Bench Division shall, in so far as they are applicable, and are not inconsistent with the rules contained in this Order, apply to proceedings under this Order.

I do not think that this rule assists Mr. Aronsohn. In my view, the ordinary practice and rules of the King's Bench Division as to appeals from a judge in chambers are not applicable in the present case because of the express provision of the Act itself, making it essential for the person dissatisfied to obtain either the leave of the tribunal or the leave of the nominated judge of the High Court.

As I understand the matter, Mr. Aronsohn thinks that facts have come to light since DENNING, J., gave his decision refusing leave to appeal which would make it right for Mr. Aronsohn to have the leave which he desires. If that is so, it may be that if he applied to DENNING, J., to rehear the application for leave to appeal that learned judge might think fit to give him a further hearing. I am not expressing any view whether such a course is possible or whether the learned judge should or should not accede to any such application. This application must, in my view, be dismissed.

SOMERVELL, L.J.: I agree. In support of the construction which MORTON, L.J., has placed on s. 6 (2) of the Pensions Appeal Tribunal Act, 1943, I wish only to add that, in my opinion, the presence of the words "nominated for the purpose by the Lord Chancellor," after the words "a judge of the High Court," reinforce and make abundantly plain the conclusion which has already been expressed by MORTON, L.J.

ASQUITH, L.J.: I agree.

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

JEWITT *v.* MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), October 23, 1946.]

Royal Forces—Pensions—Attributability—Compelling presumption—Enlistment of appellant and medical examination five months before war—No further examination when embodied for war service—Inherent weakness—Precipitating cause.

The appellant enlisted in the Army in April, 1939. He was then medically examined and found fit for general service. On Sept. 2, 1939, he was embodied for war service, but he was not then further medically examined. In Nov., 1939, he first showed signs of otosclerosis, on account of which he was discharged in Nov., 1942.

HELD: the fact that there was no medical examination at the beginning of his war service did not prevent the compelling presumption applying in his favour.

[**EDITORIAL NOTE.** By art. 4 (3) of the Royal Warrant of Dec., 1943, where an injury or disease which has led to the discharge or death during war service of a member of the forces was not noted in a medical report made on that member on the commencement of his war service, he is entitled to a pension, unless the evidence shows that the conditions prescribed in art. 4 (1) are not fulfilled. In cases falling within that category, therefore, there is a compelling presumption in favour of the claimant to which effect must be given unless the contrary is shown. This case removes a matter of doubt. It decides that where no note of any disability was made in a medical report when a man was medically examined for enlistment before the war, the fact that he did not undergo a further medical examination when embodied for service in Sept., 1939, does not prevent the compelling presumption applying in his favour. The case is also an instance of war service being the precipitating cause of a disability to which the appellant had an inherent predisposition. A

As to the Pensions Appeal Tribunals Act, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

Appeal from a decision of a pensions appeal tribunal. The facts appear in the judgment. B

G. H. Crispin for the appellant.
H. L. Parker for the Minister.

Denning, J.: The appellant was medically examined for enlistment in Apr., 1939. There was then no note of any disability. He was fit for general service. He was embodied for war service on Sept. 2, 1939. The fact that there was no medical examination at the commencement of his war service and no medical report at that time does not prevent the compelling presumption applying in his favour. That compelling presumption is that the subsequent disability for which he was discharged, namely, otosclerosis, was attributable to his war service. The tribunal have found as a fact that he did not suffer from otosclerosis before Sept. 3, 1939. He developed it during his war service. The symptoms first became apparent in Nov., 1939. Through the whole of the period from Nov., 1939, to Mar., 1940, the appellant was exposed to extreme cold and was from time to time close to 4.5 inch guns while they were being fired. On Nov. 6, 1942, he was discharged from the army on account of otosclerosis. C D

A question arose in the course of the case whether this was a hereditary complaint. The tribunal found that it was not proved that either his father or his grandmother or any of his family suffered from otosclerosis. Leaving heredity aside, therefore, the only evidence against the claim is the opinion of the Medical Services Division that the nature of the condition itself precludes attributability. That report of the Medical Services Division was given at a time when they were not approaching the question of attributability in the way that the courts of this country and Scotland have subsequently said that they should. At one time the Medical Services Division took the view that the fact that there was a weakness predisposing a man to a disease negatived attributability, but the courts have said that is wrong. E F

The appellant's point is that, although there might be a latent weakness in the ears, as shown by deafness in his family, nevertheless, "it necessitates abnormal conditions to bring it out." He says: "My father's deafness was caused by trench service and gassing in the last war." His contention is, therefore, that, supposing there were an inherent weakness or inherent predisposition to this complaint, nevertheless the precipitating cause was war service. There is nothing in the opinion of the Medical Services Division to negative that view of this case. At all events on the findings of the tribunal as stated by them there is quite insufficient evidence to rebut the presumption and the appeal must be allowed. G

Appeal allowed.

Solicitors: *Culross & Co.* (for the appellant); *Treasury Solicitor* (for the Minister.) H

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

BELL LONDON & PROVINCIAL PROPERTIES, LTD. *v.* REUBEN

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 16, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Breach of covenant—Avowed intention of continuing breach—Keeping dog in flat for medical reasons without landlord's permission—Whether reasonable to make order—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1), *sched. I.*

The defendant was a statutory tenant of a flat in a block of flats owned by the plaintiffs. In the original lease, which had been determined by notice to quit, the defendant had covenanted to observe certain regulations (set out in the schedule to the lease) relating to the building, one of which prohibited the keeping of a dog in the flat without the permission of the plaintiffs, a covenant which, by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, was still binding on the defendant. On medical advice, after a burglary in her flat, the defendant kept, and announced her intention of continuing to keep, a dog in the flat without the permission of the plaintiffs, and even at the hearing of an action in the county court for recovery of possession still stated her intention to keep a dog. The correspondence between the parties disclosed that what the defendant desired was not to break the covenant but to get permission for medical reasons to keep a dog, with a proviso that if complaints were received about the dog it would be removed. In the exercise of his discretion under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), the county court judge, confining himself to the breach of covenant up to the date of the hearing and deliberately refraining from any comment as to any possible future breach, refused to make an order for possession on the grounds that it would be unreasonable to do so:

HELD: (i) the covenant against keeping a dog in the flat without permission of the plaintiffs was reasonable.

(ii) it was clearly contemplated by s. 3 (1) and the scheduled provisions of the Act of 1933, that a county court judge might refuse to make an order for possession even although a covenant had been broken, and in certain circumstances it might be reasonable to refuse to make an order even if the breach were being deliberately continued, by the tenant.

(iii) in this case the county court judge had not left out of account the expressed intention of the defendant to continue to keep the dog, had not in any way misdirected himself, acted on a wrong principle, or omitted to take into consideration some fact which he ought to have considered, and, therefore, the court would not interfere with his exercise of his discretion.

[**EDITORIAL NOTE.** By s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, read with the provisions set out in sched. I to the Act, a county court judge can make an order for possession of a dwelling-house which comes within the Rent Restriction Acts if he thinks it reasonable to do so and *inter alia* an obligation of the tenancy has been broken. These matters are not in watertight compartments, and so, in considering whether it is reasonable to make an order, the county court judge can take into account the circumstances in which the obligation has been broken. That is the keynote of the present decision, and it would seem to be a logical application of the language used by LORD GREENE, M.R., in *Cumming* v. *Danson* (1) when he said that the duty of the county court judge was "to take into account all relevant circumstances as they exist at the date of the hearing."

AS TO DISCRETION OF COURT AS TO ORDERS FOR POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, p. 329, para. 392; and FOR CASES, see DIGEST, Vol. 31, p. 577, Nos. 7260-7262.]

Cases referred to:

(1) *Cumming* v. *Danson*, [1942] 2 All E.R. 653; Digest Supp.; 112 L.J.K.B. 145; *sub nom. Cumming* v. *Dawson*, 168 L.T. 35.

(2) *Hyman* v. *Rose*, [1912] A.C. 623; 31 Digest 488, *6356*; 81 L.J.K.B. 1062; 106 L.T. 907, H.L.; *revsg.* S.C. *sub. nom. Rose* v. *Spicer*, *Rose* v. *Hyman*, [1911] 2 K.B. 234, C.A.

APPEAL by plaintiff from DEPUTY JUDGE KONSTAM at Bloomsbury County Court. The facts are set out in the judgment of MORTON, L.J.

R. L. Edwards for the appellants.

F. Hallis for the respondent.

MORTON, L.J.: In this case the county court judge refused an order which the plaintiffs sought for possession of a flat, No. 135 Park West, Marble Arch. The plaintiffs are the lessors and the defendant is the tenant of this flat.

The lease under which the tenant took possession is dated Dec. 27, 1940. It is a lease of the flat in question, together with certain fixtures and fittings and certain other rights, for a term commencing on Dec. 25, 1940, and ending on June 24, 1941, "and thereafter from month to month until determined by either the landlord or the tenant giving to the other party one month's previous notice in writing to expire on the last day of any month." The rent payable was £145 a year, but it is agreed that the flat comes within the protection of the Rent Restriction Acts owing to the fact that its rateable value is below the maximum limit fixed by those Acts. The only covenant which I need read is the second covenant by the tenant with the landlord, and is as follows:

> To observe conform to and be bound by the general rules and regulations for the time being relating to the building set out in the schedule annexed hereto.

To see what those regulations are I turn to the schedule and find that the third regulation is:

> No dog bird or other animal shall be kept in any flat without the permission of the landlords. Dogs whilst in and around the building must be kept on leads.

That provision is, no doubt, intended to promote the general comfort and convenience of the tenants, and I see nothing unreasonable in it. On Nov. 5, 1945, the landlords served a notice on the tenant to quit the premises on Dec. 31, 1945, and it is not contended on behalf of the defendant that there is anything invalid in that notice. The result is that the defendant has been, since Dec. 31, 1945, a statutory tenant.

I now turn to the relevant sections to see what the position is, the plaintiffs having claimed possession in the county court. By the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), it is provided, so far as is material, as follows:

> No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and . . . (*a*) the court has power so to do under the provisions set out in sched. I to this Act . . .

The relevant portion of sched. I is:

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if (*a*) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed . . .

What the plaintiffs rely on is that the defendant keeps a dog without the permission of the plaintiffs, has announced her intention of continuing to keep a dog, and, at the date of the hearing in the county court, still stated her intention to continue to keep a dog. The only other relevant section is s. 15 of the Act of 1920, which is as follows, so far as is material:

> A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .

Therefore, the defendant, as a statutory tenant, was bound to observe *inter alia* this covenant in regard to keeping a dog so far as it was consistent with the provisions of the Act.

I must refer shortly to the correspondence leading up to the proceedings, because I think the judge probably relied on it to some extent in holding, as he did, that it would not be reasonable to make an order for possession. On Feb. 7, 1945, the plaintiffs pointed out to the defendant that a complaint had been made to them of a dog barking in her flat, and they asked her to remove the animal within 24 hours. In fact, the dog in question was removed by the defendant on Feb. 9.

On Feb. 28, the defendant's solicitors wrote a very polite letter to the plaintiffs' solicitors which is of some importance:

> Our client instructs us that the dog referred to in your client's letter was removed immediately the letter was received from your clients, and there can, therefore, be no further complaint on this score. The position, however, is that our client is most anxious to have a dog in the flat. The reason for this is that there has been a recent burglary at her flat, as a result of which she lost a substantial amount of property. The effect of the burglary has been to cause our client's nerves to be seriously affected. She is now under regular medical attention, and it is felt that, if she were permitted to have a dog upon the premises, this would reassure her and have a beneficial effect upon her health. We can, if you so desire, obtain and let you have confirmation of this from our client's doctor. It is appreciated that your clients, as landlords of the property, are anxious that no tenant shall commit a nuisance. If, therefore, permission is granted to our client, she would undertake to have only a properly trained dog, and, in the unlikely event of any further complaints being received, she would undertake to have the dog removed forthwith. We feel that this is a case where your clients ought to relax their regulations and permit our client to keep a dog, particularly in view of the fact that there would appear to be a number of tenants of these flats who, in fact, do keep dogs.

It is to be observed that the defendant had no desire to break the covenant. She desired to get permission. It is also material to notice that she made the proviso that, if complaints were received about the dog, the dog would be removed, and she draws attention to the fact that there is this medical reason why she ought to have a dog. The reply to that was as follows:

> We are in receipt of your letter of yesterday's date, and, although we feel sure our clients would appreciate the reason for the request to keep a dog, we think we should tell you that, after giving the question of dogs their most careful consideration, our clients some little time ago came to the conclusion that they could not have dogs in any of their blocks of flats. You will appreciate that, whilst some owners take every care with regard to their animals, others are not so careful, and attempts to deal with the matter by discriminating have proved a failure, and our clients have, therefore, been compelled to enforce the rule that no dogs would be allowed. You may take it that, through ourselves, our clients are at the moment engaged on ensuring that all dogs are removed from the premises, although as you will understand, this takes some time.

The question of reasonableness under the statute is, of course, a matter for the county court judge, subject to certain well known limitations, and it may be that he thought the initial attitude of the plaintiffs in this matter was somewhat unreasonable, having regard to the reasons of health which the defendant had put forward. Notwithstanding that letter, in April, 1945, the defendant, on medical advice, got another dog. On June 18, 1945, the plaintiffs' solicitors complained, not of any conduct of the dog, but merely of the presence of the dog, and they threatened legal proceedings. Again the defendant's solicitors replied, saying:

> The dog in question is a small one and has been perfectly trained, and our client assures us it has not given any offence to any of the other tenants in the building. The presence of the dog in the flat is necessary to our client's health. Our client does not wish your clients to feel that she is in any way flouting your client's rules, but the presence of the dog in the flat has proved so necessary for her well-being that she feels she cannot be without it, and in these circumstances she intends to keep the dog even though she appreciates that she may involve herself in proceedings. We trust, however, that your clients will see fit not to take any proceedings.

The plaintiff's reply was that they were not prepared to make any exception which might cause dissatisfaction to other tenants. Ultimately, proceedings were taken. Before that, the defendant was twice asked to reconsider her attitude, and in each case her reply, as expressed by her solicitors, was that she felt herself unable to do without the dog. In view of the medical evidence that her state of nerves was still persisting and that she felt she could not do without a dog, I do not think she had any desire to flout the regulation.

The particulars of claim at first made allegations against the conduct of the dog, but these allegations were withdrawn on particulars being asked for, and that allegation was struck out. When the case came before the county court judge, counsel for the plaintiffs stated, as was the fact, that the defendant admitted keeping a dog. That admission was made by a letter from the defendant's solicitors of Mar. 8, 1946, in which she admitted that she kept a dog on the premises from Feb. 5, 1945, until Feb. 9, 1945, and that from a date prior to June 12, 1945, she kept and continued to keep another dog on the same premises. Counsel referred to the regulation in question, and said that the defendant had been requested to give up keeping the dog. The defendant gave evidence of her state of nerves, that she consulted a Dr. Leigh, that on his advice she obtained a dog, that she gave away the first one after four days, and she now had a wire-haired terrier and no complaints had been made of him. The judge's note goes on :

> No longer frightened to be in flat. Husband has to go out of town for nights. Front door of block is often open at night. No porter in attendance.

Her doctor gave evidence saying that the defendant had been his patient for several years, that she was a debilitated subject, and that she had had two very serious operations. He describes her nervous condition in Jan., 1945, and he goes on :

> I advised her to have the company of a dog. She got one and settled down, became more settled. When she got rid of that one she became very run down again. She later got another dog and definitely made progress. If she did not have one, she would definitely be more depressed and lose weight again which she can ill spare. Anything comforting would do her good. Contact with a dog is what she wanted. It has done her a lot of good.

Counsel for the plaintiffs submitted that the court could not allow a breach of covenant to go on in such a way. The judge then gave the following judgment, according to his note :

> No dispute as to facts. Covenant admittedly broken. Find in the circumstances proved by the evidence of defendant and Dr. Leigh it would not be reasonable to make an order for possession in respect of breach of covenant up to this date. Section 3 (1) of the Act of 1933 gives court discretion in spite of presence of s. 15 of the Act of 1920. Of course, I do not say anything about any possible future breach. Judgment for defendant with costs on scale B.

I have arrived at the conclusion that it would not be right for this court to interfere with that decision, but I wish to say at once that I hope that no tenant of a flat in that building, or in any other building, will treat anything I say as an encouragement to break any covenant. A covenant against keeping a dog without the permission of the landlord is, it seems to me, perfectly reasonable. It is only in a very special case indeed that the court could properly refuse to give the landlord possession if a tenant broke that covenant and insisted on breaking it.

What are the circumstances of the present case ? The judge has carefully confined himself to the breach of covenant up to the date of the hearing. Counsel for the plaintiffs suggested that he had left out of account altogether the expressed intention of the defendant to continue keeping the dog. I do not draw that conclusion at all. I think, reading his notes and having regard to the fact that the threat had been very prominently brought before his attention, the judge did take into account that the defendant said : " I cannot do without a dog and I am going to continue to keep a dog." I think his attitude of mind was probably this, if I might hazard a guess from what he has said : " At the moment I do not think it would be reasonable to make an order for possession. What has taken place up to the present, including the observation of the lady that she could not do without the dog and would go on keeping it, is not a sufficient reason for giving the landlord possession in all the circumstances of this case." He goes on to safeguard the position by saying : " Of course, I do not say anything about any possible future breach." I think the judge may well have thought that the defendant, having shown a reasonable spirit, would part with the dog if and when it became no longer necessary. Her state of health might improve. The judge may also have thought that the present state of affairs might continue so long that it would no longer be reasonable to keep the plaintiffs out of possession. Another circumstance which may have influenced the mind of the judge is that the plaintiffs did not bring forward any evidence that the presence of this dog in the defendant's flat had given rise to any complaints or to any untoward events. The judge based himself only on the state of facts at the date of the hearing, and I think he was right in so doing.

In *Cumming* v. *Danson* (1), LORD GREENE, M.R., said this ([1942] 2 All E.R. 653, at p. 655) :

In considering reasonableness under s. 3 (1), it is, in my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.

I should be most reluctant to fetter in any way the very wide discretion which is given by this Act to a county court judge, and, be it observed, it is clearly contemplated by s. 3 (1) and the scheduled provisions which I have read that a county court judge may refuse to give possession even although a covenant has been broken. If an obligation of the tenant has been broken, the county court judge has still this discretion and he is only to exercise it in favour of the landlord if he considers it reasonable so to do. For my part, I cannot find that in this case the county court judge in any way misdirected himself, or acted on a wrong principle, or omitted to take into consideration some fact which he ought to have considered. It certainly is a very strong line to take to refuse possession to a landlord in these circumstances, but I cannot say that the county court judge was not justified in exercising his discretion in this way.

I think that, if I had been trying the case, I might have inserted some safeguard for the assistance of the landlords. I have not thought out the exact form of words, but I might have ordered that possession should be given, the order not taking effect so long as the defendant satisfied the landlords, perhaps monthly or every two months, by some medical certificate, that her health still required the presence of the dog. That, I think, might have been a fair safeguard from the standpoint of the landlords, who at the moment are placed in rather a difficult position, but I cannot say that there are any grounds on which we can interfere with the judge's exercise of his discretion.

We were referred to a number of cases dealing with relief from forfeiture under the Law of Property Act, 1925, s. 146 (2), and the Acts which preceded that Act, dealing with the same subject matter. These cases may be of some use by way of analogy but they were decided on a statute the language of which is different from that of the statute which we are now considering. In *Rose* v. *Spicer* (2) Lord Cozens-Hardy, M.R., laid down certain general principles, one of which was this ([1911] 2 K.B. 234, at p. 241) :

> . . . if the breach is of a negative covenant such as not to carry on a particular business on the demised premises, the applicant must undertake to observe the covenant in future, or at least must not avow his intention to repeat the breach complained of.

When the case came to the House of Lords, *sub. nom. Hyman* v. *Rose* (2), Lord Loreburn, L.C., said this ([1912] A.C. 623, at p. 631) :

> I desire in the first instance to point out that the discretion given by the section is very wide. The court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard any application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted.

I think that those words may well be applied to any attempt to fetter the wide discretion given to county court judges by the section to which I have referred. I think that this appeal must be dismissed.

Somervell, L.J. : I agree. I was at one time inclined to take the view, on the note made by the county court judge, that he had thought he ought to exclude from his consideration the evidence of the intention of the defendant to continue keeping a dog and, therefore, to continue breaking the covenant. If the county court judge had done this he would, to my mind, have been excluding evidence which is plainly material on the issue whether or not it was reasonable to make the order. However, after listening to the arguments, I am satisfied that the judge was taking into account everything that had happened up to the date of the proceedings, including the plain intention of the defendant to continue keeping a dog on the grounds which were put forward. In my view, therefore, that point, which counsel for the plaintiffs took, fails.

There remains the other point, which I think can be formulated in this way. Counsel for the plaintiffs submitted that it can never be reasonable not to make an order if a breach is being deliberately continued by the defendant. That, as a proposition, seems to me to be too wide. Without giving examples, let me put it in this way. If there was evidence in a case that a breach was doing no harm of any kind to the landlord or to his interests, and if there was also evidence that the breach and its continuance was avoiding substantial hardship to the tenant, I am not prepared to say that in those circumstances there would be no discretion. I think, in those circumstances, under the words of this Act the judge is entitled to weigh one matter against another and to come to a conclusion, having regard to the considerations and on the lines which were laid down and stated by LORD GREENE, M.R., in the case to which reference has been made. Therefore, this case, as it seems to me, was one in which the county court judge could exercise his discretion after duly considering all the relevant facts. I am satisfied that he did consider all the relevant facts, and, therefore, there is no ground on which this court should interfere with his discretion. For these reasons I agree that the appeal should be dismissed.

ASQUITH, L.J.: I also agree. At one stage, like SOMERVELL, L.J., I thought the county court judge had exercised his discretion on a wrong principle. If he had ruled out the tenant's declared intention to continue in breach of the covenant as a factor irrelevant to the exercise of that discretion, that would, I think, have involved the application of a wrong principle. What, however, in my view, he meant was that he was taking into account all that had happened up to the date of his judgment, including not only actual breaches but also threats of future breaches uttered up to that time. In these circumstances I do not think that he exercised his discretion on a wrong principle. I do not feel it would be right to rule, as we have been invited to rule, that it can never be reasonable to refuse an order for possession against a tenant who threatens to continue in breach of a covenant. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Blundell, Baker & Co.* (for the appellants); *Tarlo, Lyons & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Applied. REAY *v.* YOUNG. [1949] 1 All E.R. 1102.

Applied. LINES *v.* HERSOM. [1951] 2 All E.R. 650.

WHITTALL *v.* KIRBY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lewis and Oliver, JJ.), November 6, 12, 1946.]

Street and Aerial Traffic—Motor vehicle—Driving while under influence of drink—Disqualification from holding licence—"Special reasons" for refraining from disqualification—Tests to be applied—Road Traffic Act, 1930 (*c.* 43), *s.* 15 (2).

The respondent, a lorry driver, pleaded guilty before a court of summary jurisdiction to charges of driving a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 of the Road Traffic Act, 1930, and driving a motor vehicle recklessly and in a manner which was dangerous to the public, contrary to s. 11 of the Act. On the first charge the justices imposed a fine of £20 and ordered his driving licence to be endorsed, but they refrained from ordering that he should be disqualified from holding a driving licence on the grounds that "special reasons" existed within s. 15 (2) of the Act in that they had no knowledge of any previous motoring convictions against him, the retention of his licence was essential for obtaining his livelihood, and, further, that they had imposed a substantial fine for his offence and in assessing that penalty they took into account that they did not intend to disqualify him. The second charge was dismissed under the Probation of Offenders Act:

HELD: (i) a "special reason" within the exception was one which was special to the facts which constituted the offence, and not one which was special to the offender as distinguished from the offence;

(ii) accordingly, no consideration of financial hardship, or of the offender being before the court for the first time, or that he had driven for a great number of years without complaint, could be regarded as a "special reason," and there was nothing in the Act to entitle the justices to substitute a more severe penalty as the price of refraining from disqualifying an offender;

(iii) none of the reasons stated by the justices, therefore, was a "special reason" within the meaning of the section and the case should be remitted to them with that intimation and with a direction that they should impose a disqualification for at least 12 months.

per LORD GODDARD, C.J.: In cases under s. 35 of the Act of 1930, the test to be applied in determining what is a "special reason" is no different from that which applies in cases under ss. 11 and 15 of the Act.

[**EDITORIAL NOTE.** This decision resolves doubts which have beset benches of magistrates, and on which there have been acutely divergent decisions, for a long time past. It is regrettable that Parliament did not define the phrase "special reason" in the Act of 1930. If it had, a great number of drivers would not have left courts of summary jurisdiction possessing liberty to repeat their homicidal conduct on the road. The magistrates who have failed to disqualify them have not been to blame. They have very properly followed the well-known rule of construction of a penal statute, namely, that it should be interpreted in favour of the accused person. But, in truth, as is pointed out by LORD GODDARD who utters a timely reminder that dangerous driving is a very serious offence, rendering it quite unsuitable that the offender should be dealt with under the Probation of Offenders Act, the cases in which a driver can be excused for dangerous driving must be few. What sort of need can justify an individual in risking other people's lives? The person sent for a doctor in an emergency, the doctor himself attending that emergency, may well be forgiven for exceeding a speed limit, but driving "in a manner which is dangerous to the public" is a very different thing and less forgivable, because it is unlikely to be productive of much extra haste. It is submitted that different constructions must be put on s. 11 (3), on the one hand, and s. 15 (2) and s. 35 (2), on the other. Under s. 11 (3) the convicting court must order the disqualification, while under ss. 15 (2) and 35 (2) disqualification would seem to follow on conviction automatically by operation of law, unless the court for special reasons orders otherwise.

FOR THE ROAD TRAFFIC ACT, 1930, ss. 11, 15, and 35, see HALSBURY'S STATUTES, Vol. 23, pp. 620, 622, 636; and for THE ROAD TRAFFIC ACT, 1934, s. 5, see *ibid*, Vol. 27, p. 539.]

Cases referred to:

(1) *R.* v. *Leicester Recorder, Ex p. Gabbitas,* [1946] 1 All E.R. 615; 175 L.T. 173; 110 J.P. 228.
(2) *R.* v. *Crossen* [1939] 1 N.I. 106.
(3) *Muir* v. *Sutherland,* 1940 S.C. (J) 66; Digest Supp.
(4) *Adair* v. *Munn*; *Adair* v. *Brash,* [1940] S.C. (J) 69; Digest Supp.
(5) *Murray* v. *Macmillan,* [1942] S.C. (J) 10; Digest Supp.
(6) *Fairlie* v. *Hill,* [1944] Sc. L.T. 224.

CASE STATED by Birmingham justices. The facts appear in the judgment of LORD GODDARD, C.J.

Gerald Gardiner for the appellant.

The respondent did not appear and was not represented.

Cur adv. vult.

Nov. 12. LORD GODDARD, C.J., read the following judgment: The respondent in this case was charged before a court of summary jurisdiction for the city of Birmingham on two charges, first, with driving a motor vehicle, to wit, a lorry, while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15, and, secondly, driving a motor vehicle recklessly and in a manner which was dangerous to the public, contrary to s. 11 of the Act. He pleaded guilty to both charges. On the first, the justices imposed a fine of £20 and ordered his driving licence to be endorsed, but, in consideration of certain facts which they state in the Case, they refrained from ordering that he should be disqualified from holding a driving licence. The question raised by the Case is whether on the facts found by them there were any special reasons within the meaning of s. 15 (2) of the Act, which would justify the magistrates in refraining from imposing a period of disqualification. The second charge they dismissed under the Probation of Offenders Act, and, although the Case is not stated with regard to the second charge, as it is referred to I shall have a word to say about it in my judgment.

This is the first occasion on which the question what can amount to special reasons justifying a court refraining from suspending or, in one case, from endorsing a licence has arisen in this country. It raises a question of the utmost importance at the present day, for it is well known that great diversity of opinion and practice prevails in different courts throughout the country. In some courts disqualification is imposed almost as of course. In others various reasons are accepted as constituting special reasons, such as that the defendant earns his living by driving cars, or is a first offender, and these are considered sufficient to justify magistrates from taking a course which Parliament has laid down is to be followed, at any rate, *prima facie* in the event of a conviction.

The matter has been the subject of judicial decisions both in Northern Ireland and in Scotland, and insofar as the provisions of s. 11 and s. 15 of the Act are concerned, the decisions in both countries have been uniform. There is one other section which we shall have to consider, namely, s. 35 of the Act of 1930, on which, in Scotland at least, there seems to have been some difference of opinion among the judges. The opportunity of considering in this court the true effect of the meaning of these sections has now arisen, partly, no doubt, because early this year in *R.* v. *Recorder of Leicester, Ex p. Gabbitas* (1) this court said that when any court refrained from imposing a disqualification on a conviction which carried this penalty, it was their duty to state the facts which they found constituted special reasons entitling them to refrain from imposing disqualification.

The sections of the Road Traffic Act, 1930, which oblige a court to impose disqualification on conviction are s. 11 (3), which provides for disqualification on a second or subsequent conviction for reckless or dangerous driving; s. 15, which deals with driving when under the influence of drink or drugs and s. 35, which deals with using or causing or permitting a vehicle to be on the road unless a policy of insurance is in force in respect of third party risks in respect of the person (speaking compendiously) who uses it or the owner who permits its use. In the Road Traffic Act, 1934, s. 5, there is a provision requiring the endorsement of a licence where a person is convicted of exceeding the speed limit. In cases coming within ss. 15 and 35, the Act of 1930 provides that the offender shall be disqualified from driving for at least a certain period; in the case of s. 11 he may be disqualified for such period as the court thinks fit, and in both cases he is to be disqualified unless for special reasons the court shall think fit to order otherwise. For an offence under s. 11 (1) the court may exercise their power of disqualification on a first conviction, but this is left to their entire discretion. Under s. 5 of the Act of 1934, the court is required to endorse particulars of the conviction on the licence, but again it is provided that for special reasons the court may refrain from taking this step.

The reasons given in the present case by the magistrates as the grounds on which they refrained from ordering disqualification are: (1) that they had no knowledge of any previous motoring convictions against the respondent; (2) that the retention of the licence was essential for obtaining his livelihood, and further (3) that they had imposed a substantial penalty for the offence and in assessing that penalty they took into account that they did not intend to disqualify him. It is quite clear that the two main reasons which influenced the bench were that the respondent was a first offender against the Road Traffic Acts and that he earned his living as a lorry driver and that his employment would be jeopardised by the suspension of his licence. The court cannot but observe with some surprise that, considering the man was charged with driving under the influence of drink, the court stopped a police officer from informing them of the convictions recorded against the defendant for being drunk and disorderly. I should have thought that any court would have considered the question whether a man had been convicted of drunkenness on one or more occasions a most material factor in considering whether special reasons existed for refraining from disqualifying him as a motor driver, but, in my opinion, none of the facts found by the justices can amount to a special reason within the meaning of the section.

It is to be observed that the sections are mandatory and that Parliament has provided that a period of disqualification shall be imposed or, in the case of exceeding the speed limit, that the licence shall be endorsed, but they have given a discretion to the court which obviously is a limited discretion to be exercised only for special reasons. The limited discretion must be exercised judicially. The reasons inducing the court to exercise it must be special, and special is the antithesis of general. The facts that a man is a first offender or that he has committed no motoring offence for many years are reasons of the most general character that can be well imagined. Every year hundreds of first offenders are brought before courts. It frequently happens that people who have driven for very many years have been doing so without offending against the provision of the Act. That a man is a professional driver cannot, as it seems to me, by any possibility be called a special reason. The fact that drivers are professional drivers would of itself indicate that they are more likely to be habitually on the roads than people who drive themselves, so there is all the more reason for protecting the public against them. By exercising discretion in favour of an offender because he is a professional driver or merely because he drives himself for business purposes, it is obvious that the court is taking into account the fact that in such cases disqualification is likely to work greater financial hardship than in the case of a person who uses his car for social or casual purposes. There is no indication in the Act that Parliament meant to draw any distinction between drivers who earn their living by driving or who drive for purposes connected with their business and any other users of motor cars. That in many cases serious hardship will result to a lorry driver or private chauffeur from the imposition of a disqualification is, no doubt, true, but Parliament has chosen to impose this penalty and it is not for courts to disregard the plain provisions of an Act of Parliament merely because they think that the action that Parliament has required them to take in some cases causes some or it may be considerable hardship. Had Parliament intended that special consideration was to be shown to professional drivers or first offenders they would have so provided.

As I have already said, these grounds are of the most general description and cannot by any possibility be construed as amounting to special reasons. If anything were needed to make the intention of Parliament clearer than it is, it can be found by comparing the provisions as to the endorsement of licences for exceeding the speed limit in the Motor Car Act, 1903, now repealed and replaced by s. 5 of the Act of 1934. Under the Act of 1903, it was expressly provided that a licence should not be endorsed for a first or second offence. That indulgence is no longer given in the Act of 1934, which requires endorsement on any conviction for exceeding the speed limit, unless special reasons are found for refraining from taking that course.

What then can be said to be a special reason beyond saying that it must be one that is not of a general character ? This was expressly considered by the King's Bench Division of Northern Ireland in *R.* v. *Crossan* (2). In that case the court adopted a test that I had ventured to use in an address that I gave to the magistrates assembled at the Summer Assizes for Essex in 1937. I suggested that the reasons must be special to the offence, and not to the offender, and the court in adopting what I had said used these words ([1939] 1 N.I. 106, at pp. 112, 113) :

> A " special reason " within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a " special reason " within the exception.

I respectfully and entirely agree with and adopt this passage. While it is impossible to enumerate or define everything that can amount to a special reason, one may give as an illustration a driver exceeding the speed limit because he has suddenly been called to attend a dying relative or a doctor going to an urgent call. It is difficult indeed to visualise any special reason in the case of dangerous driving, except the one actually mentioned in the section itself, namely, the lapse of time from the date of a previous conviction. So, too, it is certainly difficult to visualise what could amount to a special reason in the case of driving under the influence of drink or drugs, though perhaps one might be found if the court was satisfied that a drug had been administered to a driver without his knowledge, as for instance where a driver had taken a dose of medicine which he believed to be an ordinary tonic but which in fact contained a powerful drug.

The same conclusion as was reached by the High Court of Northern Ireland has been come to in the High Court of Justiciary in Scotland in *Muir* v. *Sutherland* (3) and in *Adair* v. *Munn* and *Adair* v. *Brash* (4), and, in my opinion, magistrates both in quarter and petty sessions must take it to be the law that no considerations of financial hardship, or of the offender being before the court for the first time, or that he has driven for a great number of years without complaint, can be regarded as a special reason within these sections.

The justices in this case have stated, though they can hardly have meant it as a special reason, that, as they were refraining from disqualifying, they imposed a heavier fine. With all respect to the magistrates there is no warrant for taking such a course. It is the very converse of what they are entitled to do. The Act has left the penalty whether of fine or imprisonment entirely in the court's discretion. It is, therefore, open to them, if they see fit, to mitigate the penalty because disqualification will follow, but there is nothing in the Act to entitle them to substitute a more severe penalty as the price of refraining from disqualifying the offender.

Although this case is not concerned with s. 35 of the Act of 1930, which deals with disqualification for driving or allowing a vehicle to be driven when the owner or driver is uninsured against third party risks, it appears that in Scotland there has been some divergence of opinion among the Lords of Justiciary as to the tests to be applied in determining what in such cases would amount to special reasons: see *Murray* v. *Macmillan* (5) and *Fairlie* v. *Hill* (6). I do not propose to discuss those cases in detail because, as the present case is not concerned with s. 35, any observations would really be *obiter*, but I may say for myself that I find it very difficult to apply any different test for construing the words "special reasons" in s. 35 from that which applies to s. 11 and s. 15. I confess that I think exactly the same considerations apply, and from the reasoning of the High Court of Northern Ireland it seems that they would take the same view. For myself, I would say that I strongly incline to the opinion that a person who drives or causes or permits a vehicle to be driven when there is no policy in force must be disqualified unless the court can find in relation to the particular offences some mitigating circumstances, and that mere forgetfulness or carelessness in not taking out a policy could not amount to a special reason. In one of the Scottish cases the offender was a doctor whose services were urgently needed in war time. It may, perhaps, be that in a national emergency such as was caused by the late war overwhelming considerations of public benefit might be taken into account and amount to a special reason, but in ordinary circumstances I should find it difficult to hold that the fact that the offender was a doctor was any ground for treating him differently from any other driver. Had the Legislature intended different treatment for medical men they would have said so. As announced at the close of the hearing, all the members of the court were of opinion that none of the reasons stated by the magistrates was a special reason, and accordingly we directed that the Case should go back with that intimation and with a direction that the court should impose a disqualification for at least 12 months.

Before parting with this case I desire to say a word with regard to the action taken by the magistrates in regard to the second of the two informations to which the respondent pleaded guilty and which they dismissed under the Probation of Offenders Act. No Case was asked for with regard to this second charge, though the justices refer to it in the Case they have stated. The offence of dangerous driving is one of a serious character. A man should certainly not be convicted of that offence unless the court is completely satisfied that he has so driven as to endanger the public. If he has, he has put the lives and limbs of others of His Majesty's subjects in peril and deserves severe punishment, and it is difficult to understand how any court can consider this other than as a serious crime. I cannot believe that such an offence as this is one which should ever be dealt with under the Probation of Offenders Act. I agree that the words of the Act are very wide. The court can have regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed. Character, antecedents, age, health or mental condition really have nothing to do with such an offence as driving to the danger of the public, and it must be seldom indeed that extenuating circumstances can be found for it;

moreover, when the offender admits, or it is proved that he was drunk at the time, it is obviously a matter of aggravation. Can it possibly be said that such an offence as this is one of a trivial nature ? The Probation of Offenders Act replaced s. 16 of the Summary Jurisdiction Act, 1879, so far as it enabled the court to dismiss an information on the ground that the offence was trivial. There are many cases under the Act of 1879 in which this court has corrected the decisions of magistrates on the subject whether an offence can be regarded as trivial, and for
A myself I should certainly have done so here if the Case had been stated in respect of that charge. I can only express the hope that in future no court will regard the offence of dangerous driving as one suitable for the application of the Probation of Offenders Act unless in the most exceptional circumstances.

LEWIS, and OLIVER, JJ., agreed.

Appeal allowed. Case remitted.

B Solicitors: *Sharpe, Pritchard & Co., agents for M. P. Pugh,* Prosecuting Solicitor, City of Birmingham (for the appellant).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

C

E. MOSS LTD. *v.* BROWN.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 28, 1946.]

D *Landlord and Tenant—Licence—Permission to occupy furnished flat—Weekly payment—No agreement as to notice.*

Before the outbreak of war in 1939 the landlords let a dwelling-house unfurnished to a tenant on a weekly tenancy at a rent of 17*s.* 6*d.* a week. In 1944 the tenant joined the services and soon afterwards his wife went to Scotland. In March, 1945, she allowed a Mr. and Mrs. C., who were friends of hers, to go into the exclusive possession of the flat and the furniture
E which the tenant had placed in it. Mr. and Mrs. C. paid to the tenant's wife either 30*s.* or 37*s.* 6*d.* a week, but nothing was said about any notice to terminate the arrangement. Mrs. C. stated in evidence that the tenant's wife had "let us have the rooms while she was absent. If she said the word we should go out now," and the county court judge found that both parties intended that the tenant should be able to return and Mr. and Mrs. C. leave at any moment.

F HELD: (by SOMERVELL and ASQUITH, L.JJ., MORTON, L.J., dissenting) that there was evidence to support the finding of the county court judge that Mr. and Mrs. C. occupied the flat under a licence and not under either a weekly tenancy or a tenancy at will.

[**EDITORIAL NOTE.** *Taylor* v. *Caldwell* ((1863), 3 B. & S. 826), made it clear that "an instrument is not a demise although it contains the usual words of demise, if its contents show that such was not the intention of the parties." This test has been
G applied in a large number of cases, terminating in the present case. The Court of Appeal here examine the evidence, one member of the court deciding that the case falls on one side of the line, while the other two Lords Justices take the opposite view.

AS TO DISTINCTION BETWEEN LEASE AND LICENCE, see, HALSBURY. Hailsham Edn., Vol. 22, p. 8, para. 5 ; and FOR CASES, see Digest Vol. 30, pp. 501-510, Nos. 1598-1657.]

Cases referred to :

(1) *Skinner* v. *Geary,* [1931] 2 K.B. 546 ; Digest Supp. ; 100 L.J.K.B. 718 ; 145
H L.T. 675 ; 95 J.P. 194.

(2) *Prout* v. *Hunter,* [1924] 2 K.B. 736 ; 31 Digest 557, *7040* ; 93 L.J.K.B. 993 ; 132 L.T. 193.

APPEAL by landlords from an order of His Honour JUDGE NEAL, made at Willesden County Court, and dated Apr. 30, 1946. The facts are fully set out in the judgment of MORTON, L.J.

H. G. Garland for the landlords.

The tenant did not appear.

Morton, L.J.: Some years ago the plaintiffs, the landlords, let a flat over a shop, 255a, Station Road, Harrow, to the defendant, Brown. We are told that the rent was 17*s.* 6*d.* per week and that the tenancy was a weekly one. Unfortunately, the tenant is not represented here, so we have not had the assistance of an argument on his side. The judge dismissed the landlords' claim to possession, and they now appeal.

It appears that the tenant entered the services in 1944 or earlier. There is no doubt that the Increase of Rent and Mortgage Interest (Restrictions) A Acts applied to the premises up till 1945. They were let unfurnished to the tenant and he furnished them. Some time in 1944 Mrs. Brown, the tenant's wife, who had been living in the flat and had been paying the rent, went to Scotland for reasons which are immaterial to this case, and she appears to have lived in Scotland for a considerable time. The furniture which the tenant had put in the flat was left in it, and the flat was left empty until Mar., 1945, when Mrs. Brown, who was still in Scotland, allowed a Mr. and Mrs. Campbell to go B into possession of the furnished flat, the Campbells paying to Mrs. Brown a rent which, according to the judge's note of the evidence was 30*s.* 0*d.*, but, according to the recollection of counsel for the landlords, was stated to be 37*s.* 6*d.*, described as being £1 for the furniture and 17*s.* 6*d.* for the flat itself. I do not think it matters which sum was paid.

As the other circumstances of the letting are important, I shall read the rather C brief note of the evidence so far as it relates to this matter. Ernest Parry, who was called for the landlords, said: "Mr. and Mrs. Campbell living there last 12 months"—the trial being in 1946. Then Mrs. Campbell was called, on subpoena, by counsel for the landlords, and her evidence is as follows:

> Reside 255a Station Road, Harrow. Been there since March, 1945. No other occupier. Mrs. Brown let us have rooms whilst she was absent. Paid £1 10*s.* 0*d.* Cross-examined: No right to stay in premises. If Mr. and Mrs. Brown said the word we D would go now. Last night Mrs. Brown slept in the house. Mrs. Brown came down Sunday. She has come from Dundee. She would have come in a fortnight anyhow.

The note of Mrs. Brown's evidence—she was the only witness for the tenant—was:

> Left 1944. Ill then—flying bombs. Then Mother ill. Now back permanently. Flat empty to March, 1945.

The landlords, having ascertained that Mr. and Mrs. Campbell were living E in the furnished flat, served a notice to determine the tenancy. I do not gather from the judge's judgment that he felt any doubt about the validity of that notice. It expired in December, 1945, and on Jan. 12, 1946, the landlords began proceedings for possession. In his judgment the judge says:

> The house was left empty though there was no suggestion that any of the furniture was removed or stored. But in March, 1945, Mr. and Mrs. Campbell with the tenant's F permission occupied the rooms in the flat and paid weekly a sum of £1 10*s.* 0*d.*

Then the judge refers to *Skinner* v. *Geary* (1), which does not, with all respect to him, seem to me material for the present purpose.

Pausing there, it would seem to me that from the evidence there is only one possible conclusion, and that is that at the time when the landlord sought possession of these rooms, they were let at a rent which included payments in respect of the use of furniture. Section 12 (2) (i) of the Increase of Rent and G Mortgage Interest (Restrictions) Act, 1920, is as follows:

> Provided that this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture.

It is possible, I think, to deduce from the evidence that Mr. and Mrs. Campbell were tenants at will, although I should have thought the more likely deduction H was that they were weekly tenants. However that may be, it seems to me that all the evidence leads to this conclusion, and only to this conclusion, that these premises were let furnished to Mr. and Mrs. Campbell, and still remained so let on Jan. 12, 1946, and at the date of the hearing.

t is the result of that? The matter was considered by this court in . *Hunter* (2), where a flat had been let unfurnished to the defendant, nter, and she had furnished the flat and sublet it to one Redlar at a rent cluded payments for use of furniture. Bankes, L.J., said ([1924]

2 K.B. 736, at p. 741):

> Mr. Safford has convinced me that it is not only possible but that it is obviously the correct construction of the statute to read it as not applying where the house is let as a furnished house at the time when the landlord seeks to obtain possession . . . The Act is not to apply to a dwelling-house which is let furnished. But at what time is its status of a furnished house to be considered? It would seem that the material time is when the landlord seeks to obtain possession. If at that time the status of the house is that of a house let as a furnished house it is immaterial that at some earlier A date its status was that of an unfurnished house.

The county court judge, however, proceeded to give certain findings of fact which in my view were not justified on the evidence. I can find no evidence on which he could properly arrive at these findings. First, he says:

> In my view, and I find this as a fact, neither the tenant nor Mrs. Campbell intended that the relation of landlord and tenant should be created between them.

B Even if there was evidence to support this finding, the fact remains that the Campbells had exclusive possession of this flat while Mrs. Brown was in Scotland, and they paid a weekly rent for the furnished flat. The judge goes on:

> Both parties intended that the tenant should be able to return and Mrs. Campbell should leave at any moment.

C That intention would not alter the fact that there was, as I think, at least a tenancy at will. Then he goes on:

> Mrs. Campbell was quite emphatic about this, though, of course, she said she would want time to pack her things. In fact, in my view, neither party intended to enter into any legally binding contract . . . I have, however, to consider whether their action created a tenancy by legal implication. In my opinion, had such a transaction taken place in normal peace time circumstances there would have been a very strong D implication of this. But looking at the circumstances as a whole and having heard the evidence of Mrs. Campbell and Mrs. Brown I do not think that I should draw such an inference in this case. Matters were in a state of complete uncertainty. Mrs. Brown did not know when she would be able to return to her home and I am in no doubt was anxious someone should occupy it in order to look after it. On Mrs. Campbell's side I do not think the payment of £1 10*s.* 0*d.* a week was necessarily to be taken as a payment of rent legally due. In fact, I think it equally consistent with the circumstances E of this case that it was no more than a voluntary payment, commensurate, no doubt, with the advantages Mr. and Mrs. Campbell were enjoying. Consequently, Mr. Campbell was no more than a licensee. If I am wrong as to this, in my opinion, the tenancy created was no more than a tenancy at will.

It seems to me in the circumstances, there being for several months an exclusive occupation of this flat by the Campbells, who were paying this rent of 37*s.* 6*d.*, or 30*s.* 0*d.* per week for the use of the flat furnished, and that being F the state of affairs which was in existence at the time when the landlord sought possession, there was before the learned county court judge no room for any other finding than that the dwelling-house was let furnished at the time when the landlord sought possession.

For these reasons, I should allow this appeal and give the landlords an order for possession, subject to any reasonable provision as to the date of such possession.

G

SOMERVELL, L.J.: I differ, with regret and with hesitation, from the conclusion to which MORTON, L.J., has just given expression. If I had thought I might change my mind by further consideration I would have taken that additional time, but I am clear in my own mind that more consideration would not alter the view which I take on the very short subject-matter on which this case turns.

H The question as I see it is a short one—whether counsel for the landlords can satisfy me that there was no evidence on which the learned county court judge could find that Mr. and Mrs. Campbell were licensees. If you find two people living in a flat, and the person who was previously there and with whom they made the arrangement not turning up over a period of months, and they are paying a sum of money, *prima facie*, that is a letting. It is possible that people should come to another arrangement, and, of course, that is more possible when people (as here) were friends. I think it is clear that when Mrs. Brown (whose husband was away serving and might return at any time) originally went to

Scotland she did not intend to stay as long as she did. Her stay became protracted by her own illness and by that of her mother. In those circumstances, the house being empty for some time, it was obviously desirable that some use should be made of it, and she came to an arrangement with friends.

The brief summary of the evidence in the judge's note is not conclusive, but it seems to me consistent with the conclusion at which the judge arrived.

> Mrs. Brown let us have rooms while she was absent. If Mr. and Mrs. Brown said the word we would go out now. Mrs. Brown came down Sunday.

Mrs. Brown said she was now back permanently. The judge seems to have directed himself properly on the issue of law that was raised, namely, the question whether under the arrangement Mr. and Mrs. Campbell were to have an exclusive right to possession. The fact that Mrs. Brown did not come to these premises until the Sunday we have heard about is not in any way conclusive on the matter. In my view, first, the fact that there was no arrangement about a week's notice is some support for the view that this was a licence and for the judge's view that the legal relationship of landlord and tenant was not intended to be created. A week, after all, is not a very long time, and if the intention is to create an ordinary tenancy one would have expected the people who were paying that sum to say : " Very well, you must give us a week's notice." I think the fact that Mrs. Campbell was willing to be turned out at any time is some support for the judge's decision. I think there is also some support from the fact that it would be a very natural arrangement for somebody in Mrs. Brown's position to indicate—no doubt, in general words—that she was to be able to go back when she wanted, with access to the family property which was presumably in these premises, take away what she wanted, and so on. No doubt, she would not have expected to be put up except by arrangement, but she was allowing friends to use and sleep in these rooms on the basis that she could come and go when she needed without interfering with what she intended them to have the use of. In those circumstances, feeling, after reading the judge's note, that he did direct himself to the issue, I find it impossible to come to the conclusion that there was no evidence on which he could so find. For these reasons, I, speaking for myself, would dismiss this appeal.

ASQUITH, L.J. : While appreciating the weight of the considerations upon which MORTON, L.J., has based his judgment, I feel, after great hesitation impelled to the conclusions of SOMERVELL, L.J. .The payment of a weekly sum of 37*s.* 6*d.*, part of which was attributed to the furniture, if standing by itself, might be thought to point to a lease rather than a licence, but the payment of a periodical sum in exchange for a mere licence or other rights short of those of a tenant is by no means unheard of nor even uncommon, and the question here is whether or not there was any evidence on which the judge could find that there was a mere licence. I cannot persuade myself that there was none. The evidence has been read already. I will not repeat it, nor will I repeat the reasoning of SOMERVELL, L.J. I merely say that I agree with his conclusions, and for his reasons. I, therefore, too think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Greenwood & Knocker* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

POTTER & CLARKE, LTD. *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN.

[CHANCERY DIVISION (Wynn-Parry, J.), October 16, 17, 25, 1946.]

Medicine—Appropriate designation on label or container—"Substance recommended as a medicine"—"Proprietary designation"—Pharmacy and Medicines Act, 1941 (*c.* 42), *ss.* 11 (1), 12 (1) (5), 17.

Where a substance is sold in a wrapper or container bearing a label on which merely the name of the substance followed by the name of the vendor appears, the substance is not "a substance recommended as a medicine" within the meaning of the Pharmacy and Medicines Act, 1941, ss. 11, 12. Where, however, under the name of the substance, the label contains a reference to the British Pharmacopœia followed by instructions regarding the dose to be taken, or where the substance is described as a linctus or as pills or powders, "to be taken at bed-time" or "first thing in the morning on an empty stomach," it is clear that the substance is offered for sale as a medicine for "the prevention or treatment of an ailment . . . affecting the human body, and it is, therefore, "a substance recommended as a medicine" within ss. 11 and 12.

To come within the phrase "proprietary designation," in s. 12 (5) of the Act, the set of words for which the claim is made must be intended to be read together and must form a distinctive title or appellation. Further, they must contain, as part of the designation, words indicating that they are the goods of a particular person by virtue of manufacture, selection, certification, dealing with, or offering for sale.

[**EDITORIAL NOTE.** On the first point, WYNN-PARRY, J., draws a distinction between a case where a label contains no more than the name of the substance and a case where other information accompanies the name. Where there is the bare name it is not admissible to consider evidence of what was probably in the mind of the purchaser, but where the label also bears such information as a reference to the British Pharmacopoeia and the proper dosage evidence of the reason of the purchaser for buying the substance can be considered. The use of such terms as "linctus," "pills," "powders," which are only, or, in the case of powders, are *prima facie*, applicable to medicines is held to be conclusive, a *fortiori* when dosage or directions as to times of taking are added. On the second point, for words to constitute a "proprietary designation" they must be continuous or capable of being read together, form a distinctive title or appellation, and indicate that they are the goods of a particular person.

FOR THE PHARMACY AND MEDICINES ACT, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 192.]

Case referred to:

(1) *Nairne* v. *Stephen Smith & Co., Ltd., and the Pharmaceutical Society of Great Britain,* [1942] 2 All E.R. 510; Digest Supp.; [1943] K.B. 17; 112 L.J.K.B. 108; 168 L.T. 175.

ORIGINATING SUMMONS to determine the construction of certain provisions of the Pharmacy and Medicines Act, 1941. The facts appear in the judgment.

H. Glyn-Jones, K.C., G. G. Honeyman and *R. P. Colinvaux* for the plaintiffs.
G. R. Blanco White, K.C., and *E. Holroyd Pearce, K.C.,* for the defendants.

Cur. adv. vult.

October 25. WYNN-PARRY, J., read the following judgment: This is a summons taken out by the plaintiffs under the Pharmacy and Medicines Act, 1941, against the Pharmaceutical Society of Great Britain, who, under s. 15 of the Act, have the duty to take all reasonable steps to enforce the provisions of, *inter alia*, s. 11 of the Act, as defendants. The object of the proceeding, which is friendly in character, is to obtain from the court a construction of certain provisions of the Act, which are said to have given rise to difficulty.

The Act is described as:

> An Act to amend the Pharmacy and Poisons Act, 1933, to prohibit certain advertisements relating to medical matters, and to amend the law relating to medicines.

The provisions of the Act with which I am concerned are portions of ss. 11 and 12 which fall under the heading "Medicines," and s. 17, the definition section. Section 11 reads as follows:

> (1) Subject to the provisions of this Act, no person shall (*a*) sell by retail any article

> consisting of or comprising a substance recommended as a medicine . . . unless there is written so as to be clearly legible on the article or a label affixed thereto . . . (i) the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it has been compounded; and (ii) in a case where the appropriate designation of each of the active constituents or the ingredients is written as aforesaid, the appropriate quantitative particulars of the constituents or ingredients . . . (2) In the preceding sub-s. (*a*) the expression "appropriate designation", in relation to a substance, constituent or ingredient, means (i) in a case where the substance, constituent or ingredient is a poison included in the Poisons List, the name with which the container of the poison is for the time being required to be labelled in pursuance of para. (*c*) of sub-s. (1) of s. 18 of the principal Act; (ii) in a case where the substance, constituent or ingredient is not such a poison and is described in any of the monographs contained in the edition of the British Pharmacopœia or the British Pharmaceutical Codex which was last published before the date on which the article was sold or supplied, the description set out at the head of that monograph; (iii) in a case where the substance, constituent or ingredient is not such a poison and is not so described, the accepted scientific name, or other name descriptive of the true nature, of the substance constituent or ingredient . . . (*c*) the expression "container" includes a wrapper.

Section 12 provides:

> (1) Subject to the provisions of this Act, no person shall sell by retail any article consisting of or comprising a substance recommended as a medicine unless he is [an authorised person as described in the section].

Sub-section (4) refers to a defence, and sub-s. (5) says:

> It shall also be a defence for a person charged with selling in contravention of sub-s. (1) or sub-s. (2) of this section an article consisting of or comprising a substance recommended as a medicine to prove that the sale was effected at a shop and that the article was sold under a proprietary designation . . .

By s. 17 (1) it is provided:

> In this Act the following expressions have the meanings hereby respectively assigned to them—"advertisement" includes any notice, circular, label, wrapper or other document, and any announcement made orally or by any means of producing or transmitting light or sound . . . "proprietary designation", in relation to the sale of an article consisting of or comprising a substance recommended as a medicine, means a word or words used . . . in connection with the sale of articles consisting of or comprising the substance for the purpose of indicating that they are the goods of a particular person by virtue of manufacture, selection, certification, dealing with or offering for sale; and the expression "proprietor", in relation to such a designation means the person whose goods are indicated or intended to be indicated as aforesaid by the designation . . . "substance recommended as a medicine", in relation to the sale of an article consisting of or comprising a substance so recommended, means a substance which is referred to (*a*) on the article, or on any wrapper or container in which the article is sold, or on any label affixed to, or in any document enclosed in, the article or such a wrapper or container; or (*b*) in any placard or other document exhibited at the place where the article is sold; or (*c*) in any advertisement published after the passing of this Act by or on behalf of the manufacturer of the article, or the person carrying on the business in the course of which the article was sold, or in a case where the article was sold under a proprietary designation, the proprietor of the designation; in terms which are calculated to lead to the use of the substance for the prevention or treatment of any ailment, infirmity or injury affecting the human body . . .

Sub-section (2) provides:

> For the purposes of this Act (*a*) an article shall be deemed to be sold under a designation or title if, but not unless, the designation or title is used for making the article or the substance which it consists of or comprises (i) by any person in connection with the sale; or (ii) on the article, or on any wrapper or container in which the article is sold, or on any label affixed to, or in any document enclosed in, the article or such a wrapper or container.

Question 1 of the originating summons is in these terms:

> Whether, on a true construction of the Pharmacy and Medicines Act, 1941, (and on the agreed facts of this case), any and which of the substances specified in the first column of the first schedule hereto when sold in a wrapper or container labelled as described opposite each in the second column of the said schedule are substances recommended as a medicine.

The object of that question is to obtain, by reference to the selected substances and the manner in which they are labelled, guidance as to the meaning and effect of the phrase used in ss. 11 and 12 of the Act, and defined in s. 17, namely, "substance recommended as a medicine."

The first substance mentioned in the first schedule to the originating summons is senna pods (exhibit "R.W.W.1"). The effect of the agreed evidence on this substance is as follows:

> Senna pods consist of the dried ripe fruits of *cassia acutifolia* (Egypt) or *cassia angustifolia* (India) . . . When purchased by retail customers, senna pods are purchased only for the purpose of making an infusion which is used as a laxative or purgative for which purpose their use is well known to the public. They are not . . . used for veterinary purposes. When sold by the plaintiff company they are sold in paper packets to which are gummed labels a specimen of which [constitutes exhibit "R.W.W.1."]

The label is in the following form. In the middle appear the words "Senna Pods", and below under two ruled lines the legend "Potter & Clark, Ltd., Viaduct House, Farringdon Street, London, E.C.4." The question, therefore, which I have to consider is whether, when senna pods are sold in a wrapper or container bearing a label in the form to which I have referred, they are "substances recommended as a medicine," within the meaning of that phrase as used in the Act. It is to be observed, in the first place, that the prohibition in s. 11 (that in s. 12 is in similar terms) is not against the sale of medicine *simpliciter*—indeed, the term "medicine" is not defined in the Act—but against the sale of "any article consisting of or comprising a substance recommended as a medicine." Looking for the moment no further than those two sections, it appears to me to follow, as a matter of construction, that a sale does not contravene the Act unless it can fairly be said that in some form or another there is a recommendation of the substance as a medicine. Whether or not the substance is, in fact, a medicine appears to me to be wholly irrelevant. In my judgment, this construction is borne out by a consideration of the definition of "substance recommended as a medicine" in s. 17. From this definition it appears clearly that, before a substance can be regarded as a "substance recommended as a medicine," it must be referred to on the container (to take one example) in terms which are calculated to lead to its use for the prevention or treatment of an ailment affecting the human body. The word "calculated," as used in that definition includes the sense in which it is frequently used, namely, "likely."

In every case requiring consideration under s. 11 or s. 12 of the Act, therefore, the question appears to me to be reduced to this: Whether, having regard to the terms of the document or announcement by which reference is made to the substance, and having regard to the surrounding circumstances, properly to be taken into consideration in the light of the established rules of construction, those terms can fairly be said to be "calculated to lead to the use of the substance for the prevention or treatment of any ailment . . . affecting the human body." Turning again to exhibit "R.W.W.1," and applying the principle I have mentioned, I can find nothing in the terms by which reference is made to the substance which, of themselves, could fairly be said to be calculated to lead to the use of senna pods for the prevention or treatment of any ailment, because, apart from the name and address of the plaintiffs, the vendor, the label contains nothing but the words: "Senna Pods," which are no more than a bare, but accurate, identification of the contents. I, therefore, conclude that there is nothing on the face of the label which amounts to a reference to the substance in terms which are calculated to lead to its use "for the prevention or treatment of any ailment . . . affecting the human body." It has, however, been argued on behalf of the defendant society that, in view of the evidence that "when purchased by retail customers, senna pods are purchased only for the purpose of making an infusion which is used as a laxative or purgative for which purpose their use is well known to the public," it follows that to place the words "Senna Pods" on the label, and nothing more, necessarily amounts to a recommendation of senna pods within the Act. I do not accept this reasoning. The words "Senna Pods," taken by themselves, contain no recommendation of any description. If, therefore, a person buys a packet labelled "Senna Pods" for use as a laxative, he does so, not because of any recommendation on the label that senna pods are useful as a laxative (for the label is silent on that point) but because of a further circumstance, namely, his knowledge, not in any degree acquired from a perusal of the label, but *aliunde*, that senna pods are useful as a laxative. So far, therefore, as senna pods are concerned, I answer question 1 of the originating summons in the negative.

The next substance mentioned in the first schedule to the originating summons is "Fluid Extract of Cascara Sagrada." The effect of the agreed evidence on this substance is as follows:

> Fluid extract of cascara sagrada is an extract of cascara sagrada which is prepared with distilled water and preserved with alcohol. One fluid ounce of the extract represents one ounce of the original drug. Cascara sagrada is the dried bark of *rhamnus purshiana*, collected and dried, the collection being made at least a year before use. It is a popular mild laxative acting principally on the large intestine . . . When purchased A by retail customers, cascara is purchased for human use as a laxative. When sold by the plaintiff company, fluid extract of cascara sagrada is sold in bottles labelled in accordance with the specimen [which constitutes exhibit "R.W.W.2]."

The label is in the following form. First appears the trade mark of the vendor, and then are these words: "Fluid Extract of Cascara Sagrada"; underneath that, "British Pharmacopœia;" and below that, "Dose, half to one teaspoonful in half a wineglassful of water." Here, therefore, the question which I have to B consider is whether, when fluid extract of cascara sagrada is sold in a bottle bearing a label in the form to which I have referred, it is a substance recommended as a medicine within the meaning of that phrase as used in the Act.

This case appears to me to stand on a different footing from the previous case. In my view, the label which I have read contains words which are clearly calculated to lead a purchaser to purchase the bottle for the sole purpose of preventing or treating an "ailment . . . affecting the human body." The C two strong pointers which support this view, are, first, the reference to the British Pharmacopœia, and, secondly, the reference to the dosage. The reference to the British Pharmacopœia informs the reader that the particular extract of cascara sagrada, in accordance with which the contents of the bottle have been prepared, are the subject of a monograph in the relevant edition of the British Pharmacopœia, while the reference to dosage makes it clear beyond doubt D that the contents of the bottle are offered for sale for no other purpose than, broadly speaking, as a medicine. It has, however, been argued on behalf of the plaintiffs that the true construction of the definition of the phrase "substance recommended as a medicine," contained in s. 17 of the Act, demands that the terms in which the substance is referred to should be fairly calculated to lead to the use of the substance for the prevention or treatment of some particular ailment, infirmity or injury, or of some particular group of ailments, infirmities or injuries, E affecting the human body. In support of this contention. I was referred to a passage from the judgment of ATKINSON, J., in *Nairne* v. *Stephen Smith & Co., and the Pharmaceutical Society of Great Britain* (1), where the judge said ([1942] 2 All E.R. 510, at p. 512):

> It is said [on behalf of the defendant company] that the words "any ailment" mean some specific ailment, or at any rate that there must be something specific about the claim. I think that is right. F

I respectfully agree with the view of ATKINSON, J., that on the true construction of the definition the reference must be to some particular ailment—or group of ailments—affecting the human body. This does not, however, conclude the question. As I have said, the terms of the label in question make it clear that the contents of the bottle are offered for sale as a medicine. The effect of the evidence is that retail customers always purchase cascara for human use as a G laxative. In other words, it is common knowledge that cascara is a laxative. Now, it is one thing to place on the label nothing more than an accurate description of the contents of a packet or container—a set of circumstances which I have had to consider in the case of senna pods—where no words of recommendation are used. It is quite another thing to use words which, properly construed, recommend the contents for use as a human medicine. In the first case, one never reaches the area of recommendation. In the second case, there is the H clearest recommendation. In the first case, the recommendation being entirely lacking, it is, in my judgment, inadmissible to introduce evidence of public knowledge to supply the complete absence of recommendation, but in the second case, as the recommendation appears on the face of the label, it is proper to admit the evidence of public knowledge of the use of the substance to identify the recommendation with a particular ailment or group of ailments affecting the human body. To do otherwise would be, in my judgment, to shut one's eyes to the clear facts of the matter. As regards fluid extract of cascara sagrada, therefore, labelled as in exhibit "R.W.W.2," I answer question 1 of the originating summons in the affirmative.

The third substance mentioned in the first schedule to the originating summons is lemon and squill linctus. The effect of the agreed evidence on this substance is as follows:

> Lemon and squill linctus is a preparation which . . . the public purchase only for the treatment of coughs for which purpose the public know it to be suitable. A linctus A is a liquid preparation of a mucilaginous, syrupy or viscous nature composed of substances which have demulcent, expectorant or sedative properties, and is used in the treatment of coughs. In addition to its many well known uses, lemon is regarded as a popular remedy for coughs. Squill is the dried bulb of *urginea scilla* and is used as an expectorant in the treatment of coughs. When sold by the plaintiff company, lemon and squill linctus is labelled in accordance with the specimen [which constitutes exhibit "R.W.W.3]."

B The label reads as follows. First appear the words "Lemon and Squill Linctus" and then under two ruled lines, the name and address of the plaintiffs. In the course of the argument, counsel for the plaintiffs was constrained to admit, rightly as I think, that in view of that evidence, linctus must be regarded as equivalent to "cough medicine," and the label, therefore, as equivalent to "Lemon and Squill Cough Medicine," and thus that he could not succeed on C this part of the question. Consequently, so far as lemon and squill linctus is concerned, I answer question 1 of the originating summons in the affirmative.

The fourth substance mentioned in the first schedule to the originating summons is compound rhubarb pills. The effect of the agreed evidence on this substance is as follows:

> Compound rhubarb pills contain rhubarb as the principal ingredient. Rhubarb is the dried rhizome of various species of *rheum*, and is a well known household remedy D as a vegetable laxative. Pills are any smallish round body and for medical and veterinary purposes are prepared by incorporating medicaments with suitable bases and are shaped to a convenient size and form for swallowing. When sold by the plaintiff company compound rhubarb pills are sold in a box to which is gummed a label.

A specimen constitutes exhibit "R.W.W.4." The label is in the following form. Round a photograph, in the centre of the head and shoulders of a E man, who is unidentified, appear the words: "Compound Rhubarb Pills," and the lower part of the circle is taken up with the words "Parkinson, Ltd., Birmingham." On the left hand side appear the words: "Dose: one or two," and on the right hand side, "At bed time." Thus, the question which I have now to consider is whether, when pills composed as stated in the evidence are sold in a box bearing a label in the form to which I have referred, each pill is a "sub- F stance recommended as a medicine" within the meaning of that phrase as used in the Act. This case appears to me to stand on the same footing as the case regarding fluid extract of cascara sagrada. The words "Compound Rhubarb Pills" indicate that the box contains a preparation in the form of pills, of which the chief ingredient is rhubarb. "Pills" indicates of itself that the substance is offered as a medicine. This circumstance is emphasised by the words: "Dose: One or two at bed-time," while the words, "at bed-time" indicate G beyond any reasonable doubt that the substance is put forward as a medicine for human consumption, and, therefore, for the prevention or treatment of an ailment or ailments affecting the human body. It is true that no express reference is made on the label to the ailment or group of ailments for which it is recommended, but, in my view, the same reasoning which I have adopted in the case of fluid extract of cascara applies in this case. Therefore, as regards compound rhubarb pills, I answer question 1 of the originating summons in the H affirmative.

The last substance mentioned in the first schedule to the originating summons is effervescing powders. The effect of the agreed evidence on this substance is as follows:

> Effervescing powders were sold by the plaintiff company during the war and were sold in packages each wrapped with a label [a photostatic copy of which constitutes exhibit "R.W.W.5"]. Effervescing powders consist of a blue paper containing exsiccated magnesium sulphate (11.25 grammes) and bicarbonate of soda (2.5 grammes) and a white paper containing tartaric acid (2.5 grammes). The powders dissolved in a

> tumbler of water form an effervescent saline aperient . . . When purchased by retail customers, the said effervescing powders were purchased as a war-time substitute for seidlitz powders when the ingredients for seidlitz powders were not readily available. Seidlitz powder is a well known mild purgative in which the contents of the blue paper are Rochelle salt and bicarbonate of soda, the contents of the white paper tartaric acid, and the method of preparation for use is the same. [as in the case of these effervescing powders].

The label is in the following form. On the front appear the words in bold lettering: "Extra Strong Effervescing Powders." Between the two sets of words appear the words: "Prepared by Carter & Sons, Sheffield," and at the foot, the phrase: "A War-time Substitute for Seidlitz Powders." On the back of the label appear the words in bold lettering: "Carters, Sheffield," between which words are set out the directions for use in the following terms:

> Dissolve the contents of the blue paper in half a tumbler of water, then add the powder in the white paper, and drink while effervescing. Take first thing in the morning on an empty stomach.

Here, therefore, the question which I have to determine is whether, when powders composed as stated in the evidence are sold in a package bearing a label in the form to which I have referred, the powders are a "substance recommended as a medicine" within the meaning of that phrase as used in the Act. This case appears to me to be an even stronger case than the case regarding fluid extract of cascara sagrada. The use of the word "powders" indicates that the contents are offered as—broadly speaking—a medicine, while their description as a war-time substitute for seidlitz powders is tantamount to describing them as having the same effect and being offered for the same use as seidlitz powders, *i.e.*, the description is equivalent to describing them as a mild purgative. Finally, the direction: "Take first thing in the morning on an empty stomach," makes it clear that they are offered for human consumption. Therefore, as regards "Effervescing Powders" of the type mentioned in the first schedule to the originating summons, I answer question 1 of the originating summons in the affirmative.

Question 2 of the originating summons is in these terms:

> Whether, on a true construction of the said Act (and on the agreed facts of this case), the substance known as All Fours Chest and Lung Mixture and manufactured by the firm or companies specified in the first column of the second schedule hereto is in any and, if so, what, case sold under a proprietary designation when sold in bottles labelled as described opposite each in the second column of the said schedule.

The object of that question is to obtain, by reference to the selected labels, guidance as to the meaning of the phrase "proprietary designation" used in s. 12 (5) of the Act, where it is provided that it is to be:

> . . . a defence for a person charged with selling in contravention of sub-s. (1) or sub-s. (2) of [that] section an article consisting of or comprising a substance recommended as a medicine to prove that the sale was effected at a shop, and that the article was sold under a proprietary designation . . .

The word "designation" is defined in WEBSTER'S DICTIONARY in its third sense as:

> . That which designates; a distinguishing mark or name; distinctive title; appellation.

In my view, it is in this sense of distinctive title or appellation that the word is used in the Act. It follows that (putting aside the case of a single word amounting to a proprietary designation, which must be a rare case) where a set of words are said to amount to a proprietary designation, it must, first, be possible to say of them that on a fair construction, and having regard to the context in which they appear, they are to be read together, and secondly, that when they are read together, they form a distinctive title or appellation. Thus "Beecham's Pills" amounts to a designation, while "Pills—manufactured by Beechams" does not amount to a designation. Further, to come within the phrase under consideration, "proprietary designation," the set of words must contain, as part of the designation, words indicating that they are the goods of a particular person by virtue of manufacture, selection, certification, dealing with, or offering for sale. It follows, in my view, that it cannot be said of the first two labels that they contain a proprietary designation, for in each case the description of the substance, "All Fours Chest and Lung Mixture" is separated from the name of the manufacturer by a statement of the price and directions as to dosage, and, in the first case, by a statement of the formula. This appears to me to be fatal to the plaintiffs' contention as regards these two labels. For a set of words to amount to a designation, they must be continuous, or at any rate, intended by necessary implication to be read together. In the case of neither of the first two labels are either of those conditions present. As regards the substances sold under these first two labels, therefore, I propose to answer question 2 of the originating summons in the negative.

The remaining label presents a little more difficulty. The description on the front of the bottle is "Pritchards' Extra Strong All Fours Chest and Lung Mixture." The question arises: How many of those words are to be regarded as part of a designation ? If the whole of them, then, in my view, the designation is a proprietary designation within the meaning of that phrase as defined in s. 17, because the substance is designated, and as part of the designation the word "Pritchards" is used to indicate that the substance is by manufacture that of Pritchards, Ltd. It is to be observed that the word "Pritchards" is separated from the words: "All Fours Chest and Lung Mixture" by the words "Extra Strong." The words "Extra Strong" are words which indicate the quality of the substance, but I can see no reason for holding that a manufacturer is not entitled to use such words as part of the designation under which he sells his product, any less than other words of description, such as, "Dr. Mackenzie's One Day Cold Cure," or somebody else's "Lightning Headache Cure." If, as I assume to be the case, Pritchards, Ltd. consistently sell their preparation under these words, "Pritchards' Extra Strong All Fours Chest and Lung Mixture," they are entitled to claim that those words are all part of the designation under which they sell. I have given consideration to the different wording on the side of the label, which reads: "Pritchards' All Fours Extra Strong." It may be said that this arrangement of the words shows that the words "Extra Strong" do not, in fact, form part of the designation. I think, however, that to accept this argument would involve taking too narrow a view of the matter. From the point of view of attractiveness of the label, it would not be practicable on the side of the label to follow the same order of words as on the front of the label. It would be truer to say that there are two designations, each of which is proprietary, within the meaning of this Act, because the word "Pritchards" forms part of it. For these reasons, I conclude that in the case of the third label, it does contain a proprietary designation within the meaning of that phrase as used in the Act, and therefore as regards this third label, I answer question 2 of the originating summons in the affirmative.

Declaration accordingly.

Solicitors: *Constant & Constant* (for the plaintiffs); *Thompson, Quarrell & Co.* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

M.W. INVESTMENTS, LTD. *v.* KILBURN ENVOY, LTD.

[CHANCERY DIVISION (Vaisey, J.), October 15, 25, 1946.]

Landlord and Tenant—Lease for term of years or duration of hostilities, whichever the longer—Lessee's option for further term—Yearly rent calculable by highest aggregate rents paid in any year of lease—Validation of War-Time Leases Act, 1944 (*c.* 34), *s.* 3 (3).

M.W.I., Ltd., the lessors, granted to K.E., Ltd., the lessees, a lease for a term of 3 years from Jan. 5, 1942, or for a period covering the duration of hostilities between Great Britain and Germany and Italy and 12 months after the termination of hostilities, whichever period should be the longer. The rent reserved was a minimum rent of £500 a year *plus* additional rents calculated by reference to the net takings at the premises in each year and the amount of fire insurance premiums. Clause 5 (4) of the lease provided that, if the term of the lease should not extend for a period of 7 years from Jan. 5, 1942, and the lessee should wish to continue the term, the lessor should grant a further term up to Jan. 5, 1949, at a yearly rent "equivalent to the highest aggregate certain and contingent rents paid in any year during the term of the lease.

HELD: (i) apart from the Validation of War-Time Leases Act, 1944, (*a*) the lease was a good lease for 3 years; but (*b*) since the basis of the calculation of the new rent rested upon the amount of the rent paid in any year during one of two periods and the termination of one of those periods, *viz.*, the period of hostilities, was not ascertainable, the option purported to be given by cl. 5 (4) was not exercisable. A

(ii) on the true construction and combined operation of the lease and the Act (as prescribed by s. 3 (3) of the Act), the purported option was not exercisable at any relevant time, and, further, the option was not exercisable because it related to "the duration of the tenancy" within the meaning of s. 3 (3) of the Act.

[**EDITORIAL NOTE.** This case contains an important decision on the construction of s. 3 (3) of the Validation of War-Time Leases Act, 1944. This Act was passed in B consequence of the decision of the Court of Appeal in *Lace* v. *Chantler* (1), the result of which was to render invalid a very great number of tenancy agreements the terms of which were expressed to be "for the duration of the war" or some similar phrase. Section 1 (1) of the Act superimposes on the agreement arrived at by the parties a definite term of 10 years, subject to a month's notice by either party. Section 3 (3) contains provisions comparable to those of the familiar s. 15 of the Increase of Rent and Mortgage (Restrictions) Act, 1920, by which the terms and conditions of an original C tenancy are imported into a statutory tenancy so far as they are consistent with the provisions of the Act. By s. 3 (3) any provision in the original agreement, save one relating to the duration of the tenancy, is to remain in the new agreement produced by the combination of the original agreement and the terms of the Act. The subsection does not contain any words equivalent to "so far as the same are consistent with the provisions of this Act" in s. 15 of the Act of 1920, but the judge reads into s. 3 (3) the words "so far as possible" and holds that, when that test is applied, cl. 5 (4) cannot be reconciled with the altered position of the parties. D

FOR THE VALIDATION OF WAR-TIME LEASES ACT, 1944, see HALSBURY'S STATUTES, Vol. 37, p. 344.]

Case referred to:

(1) *Lace* v. *Chantler*, [1944] 1 All E.R. 305; [1944] 1 K.B. 368; 113 L.J.K.B. 282; 170 L.T. 185; 60 T.L.R. 244; Digest Supp.

ADJOURNED SUMMONS to determine the construction and validity of a clause E in a lease subject to the Validation of War-Time Leases Act, 1944. The facts are set out in the judgment of VAISEY, J.

Neville Gray, K.C., and *A. De W. Mulligan* for the plaintiffs.
C. R. Russell for the defendants.

Cur. adv. vult.

Oct. 25. VAISEY, J., read the following judgment: By a lease dated Feb. 10, 1942, the plaintiff company as lessor demised to the defendant company as lessee F the Envoy Picture Theatre in the Kilburn High Road with the adjoining car park, and certain plant, furniture and effects. The term of the lease as therein expressed was "for the term of three years from Jan. 5, 1942, or for a period covering the duration of hostilities between Great Britain and Germany and Italy and twelve months after the date of the termination of hostilities"—meaning, no doubt, hostilities between those combatants—"whichever period G shall be the longer subject to the extension of such period as provided by cl. 5 (4) hereof." The rents reserved were, first, a minimum rent of £500 per annum payable by monthly instalments of £41 13s. 4d. on the first (*sic*) day of every month commencing on the fifth (*sic*) day of February, 1942; secondly, an additional rent calculated by reference to the net takings as therein defined of the theatre in each year ending on Jan. 4, and payable within one month after that day in each year, and, thirdly, a rent equivalent to the amount of the pre- H miums payable for fire insurance. The lessee's covenants as set out in cl. 2 of the lease are expressed to impose obligations to continue throughout the term thereby created, and there are references in the particular covenants and elsewhere in the lease to "the said term," "the said term hereby created," "the term hereof" and "the term of this lease."

Clause 5 (4) of the lease already mentioned is as follows:

If the term of this lease shall not extend for a period of seven years from the said Jan. 5, 1942, and the lessee shall be desirous of continuing the term for a full period

> of seven years from such date and of such desire shall give not less than three calendar months' notice in writing prior to the expiration of the term granted by this lease, then the lessor will grant a further term up to Jan. 5, 1949, at a yearly rent equivalent to the highest aggregate certain and contingent rents paid under cl. 1 hereof in any year during the term of this lease and insurance rent but otherwise upon the same terms and conditions as are herein contained except this present clause.

I must first approach the matter without regard to the Validation of War Time Leases Act, 1944, and the preliminary question which I think I have to consider is whether this lease, apart from that Act, was valid to any and, if so, what extent. In *Lace* v. *Chantler* (1) it was held by the Court of Appeal that a tenancy " for the duration of the war " did not create a good leasehold interest, on the ground of the uncertainty of the term. In the present case I find a similar uncertainty in " the duration of hostilities between Great Britain and Germany and Italy." But here there was a term of three years certain, and the *habendum* was for whichever should be the longer of (*a*) that term and (*b*) something of which the length is either indeterminate or of which length cannot be predicated at all. I am, on the whole, disposed to think that the lessor could not have been heard to say that the lease was not a good lease for the term of three years.

That, however, is only the first step, and I have next to consider what was, or rather would have been, the effect of cl. 5 (4). Had the provision been merely for the extension of the term at the option of the lessee, I think it might well have been urged that four years could have been added to the original three years, making seven years certain in all. But the difficulty would have been as to the rents, which are to be the highest aggregate rents paid in any year during the term of the lease, which for this purpose I must regard not necessarily as the three years, but as a term ending either on Jan. 4, 1945, or on the first anniversary of the termination of hostilities between Great Britain and Germany and Italy, whichever of such two dates should be the later. The second of the two dates is, according to *Lace* v. *Chantler* (1), unascertainable, and I, therefore come to the conclusion that, apart from the Act, the lease was, or might have been, a good lease for three years, but that no effect could have been given to cl. 5 (4).

I must now consider the provisions of the before-mentioned Act. It received the Royal Assent on Aug. 3, 1944, but by s. 7 (3) it is, subject to s. 3, to which I must presently refer, to be deemed to have had effect in relation to any agreement as from the date on which the agreement was entered into. By s. 1 (6) the expression " agreement " in that section was to include an agreement in the form of a lease, and I think the word must be similarly construed in s. 7 (3). The Act is entitled :

> An Act to validate agreements purporting to grant or provide for the grant of tenancies for periods depending on the duration of the war and certain other events ; to provide for the construction of such agreements and other tenancy agreements, and for purposes connected with the matters aforesaid.

I will now read those provisions of the Act which seem to me to be relevant. Section 1 (1) :

> Subject to the provisions of this section, any agreement, whether entered into before or after the passing of this Act, which purports to grant . . . a tenancy for the duration of the war shall have effect as if it granted . . . a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term, by at least one month's notice in writing given after the end of the war.

After certain provisions not material to be stated, I read s. 1 (2), which is (so far as relevant) in these terms :

> In this section the expression " the duration of the war," in relation to any agreement, means a period which, on the proper construction of the words used in the agreement whatever they may be, ends with, or within, a specified time after, one of the following events—(*inter alia*) (*b*) the end . . . of hostilities as respects any particular state or states . . . and any reference in this section (other than this sub-section) to the end of the war shall, in relation to any agreement, be construed as referring to the end of such one of the aforesaid periods as is appropriate to that agreement.

So much as I need state of s. 1 (3) is as follows :

> Any reference in this section to an agreement purporting to grant . . . a tenancy for the duration of the war shall be construed as including a reference to (*a*) an agreement

purporting to grant . . . (ii) a tenancy for a specified term or for the duration of the war, whichever is the longer.

Section 2 (2) enacts that His Majesty may by Order in Council declare what date is to be treated for the purposes of any tenancy agreement as (*inter alia*) the date of the end of hostilities as respects any particular state or states, and s. 2 (3) defines "tenancy agreement" in a manner which clearly makes it apply to the lease now in question.

I may at this point observe that by the Tenancy Agreements (End of the War A
in Europe) Order, 1945, it was, pursuant to the said s. 2 (2), ordered by His Majesty that May 9, 1945, should . . . be treated as the date of the end . . . of hostilities as respects each and all of the states in Europe with which His Majesty had been at war at any time since Sept. 3, 1939. Such states, of course, included Germany and Italy. Returning to the Act, I need only, I think, refer to s. 3 (3), which is important, and reads as follows:

> Nothing in the said s. 1 shall affect any provision of an agreement to which that B
> section applies, being a provision which does not relate to the duration of the tenancy, and any such provision shall continue to apply in relation to the tenancy as it takes effect under that section.

By a notice in writing dated Dec. 4, 1945, the defendant company exercised or purported to exercise the option created or purported to be created by cl. 5 (4) of the lease, and the substantive question which I have now to decide is
whether, on the true construction and combined operation of the lease and the C
Act, that option was exercisable at the date of the notice or at any other relevant time. Now, I think that the question is a difficult one. I read s. 3 (3) of the Act as indicating (though not in very clear language) that the provisions of the invalid lease should so far as possible survive the process of its statutory validation and should continue to operate as provisions of the hybrid production resulting from the combination of the statutory variations with the terms of D
the original bargain made or attempted to be made by the parties themselves. Even apart from s. 3 (3) I should be disposed to hold that the interference by the legislature with the original bargain was not intended to go further than was necessary to give full effect to the positive provisions of the Act and that every provision of the original arrangement which is capable of standing consistently with such positive provisions ought to continue so to stand. On the other hand,
such of the original provisions as contradict or conflict with or are incompatible E
with the positive provisions of the Act must be rejected, or at any rate modified, when and so far as they are susceptible of modification. What am I to say of cl. 5 (4) of the lease?

The Act provides in effect, that the lease must be treated as having in the events which have happened, created a term of 10 years from Jan. 5, 1942, determinable by either party by a month's notice in writing given after May
9, 1946. I have tried, without success, to reconcile with the altered position of F
the parties the provisions of cl. 5 (4), or to modify those provisions with a view to such a reconciliation in some manner short of transforming them into something hardly recognisable which could not, in my opinion, be justified. If cl. 5 (4) had merely empowered, or could be read as merely empowering, the lessee to extend the fixed term of the demise to Jan. 5, 1949, I might have found
such reconciliation possible, but the chief trouble, as it seems to me, is due to G
the provision which it embodies in regard to the rent. I do not find it possible to modify the clause so as to fit it in with its new surroundings.

In my judgment, cl. 5 (4) no longer applies, if it ever did apply, either because it "relates to the duration of the tenancy" within the meaning of s. 3 (3) of the Act or because it cannot be fitted into the scheme of what I have called a hybrid production. With some reluctance, and some hesitation also, I feel
bound to declare that the option purported to be created by cl. 5 (4) of the lease H
has never been and never can be exercisable, and I put it in this way by reason of the particular and unusual terms of s. 7 (3) of the Act to which I have already made a reference.

Declaration accordingly.

Solicitors: *Harringtons* (for the plaintiffs); *J. G. Bosman, Robinson & Co.* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

HENDERSON *v.* ROCK ASPHALTE CO., LTD.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 24, 1946.]

Emergency Legislation—Essential work—Unjustifiable dismissal of workman—Wages due—" Normal working hours "—Lodging allowance—Essential Work (Building and Civil Engineering) Order, 1942 (*S.R. & O.*, 1942, *No.* 2044), *art.* 4 (10), *as substituted by Essential Work (Building and Civil Engineering) Order,* 1944 (*S.R. & O.*, 1944, *No.* 1435), *art.* 3.

H., a workman, was employed by the R.A. Co., Ltd. He worked 67 hours a week and received a lodging allowance. Both he and his employers were subject to the Essential Work (Building and Civil Engineering) Orders, 1942 and 1944. On Aug. 12, 1944, the employers purported to terminate his employment on the ground of serious misconduct. The workman appealed to a local appeal board, and on Jan. 16, 1945, a national service officer gave a notice under art. 5 (3) of the Order of 1942 stating that the workman's dismissal was not justified, the effect of that notice, under art. 4 (9) of the Order of 1942 (as substituted by the Order of 1944), being that the workman's employment was to be treated as having been terminated on the date of the notice, Jan. 16, 1945. The workman then claimed under art. 4 (1) (*d*) and 4 (10) of the Order of 1942 (as amended by the Order of 1944), wages and lodging allowance for the period from the date of his dismissal to the date of the notice, the amount of wages claimed being based on a 67 hour week. The employers contended that he should be paid on the basis of a 44 hours week, being the " normal working hours " in relation to a week under art. 4 (1) (*d*) (ii), and that no lodging allowance was due.

HELD : (i) the proper basis for the calculation of wages was the number of hours a week which the workman had actually worked before the period in question, *viz.*, 67 hours, that is to say 44 " normal working hours " *plus* 23 hours " time worked in excess " thereof, the extra hours to be paid for " at the ordinary time rate."

(ii) the workman was not entitled to any lodging allowance, since neither Order provided for it.

[**EDITORIAL NOTE.** The scope and effect of the Essential Work Orders—for, whether they are the general orders or, like those in the present case, confined to particular trades, their terms are the same—is discussed here. SOMERVELL, L.J., points out that art. 4 of the Orders is a complete code which excludes any right in the workman to prosecute an action for wrongful dismissal at common law. The Orders prescribe procedure, the remedy, and the measure of damages. In doing so, they endeavour to strike a fair balance between employer and employed in cases where their ordinary rights freely to enter into and terminate contracts are abrogated.

APPEAL by the defendants, the Rock Asphalte Co., Ltd., from an order of JUDGE HARGRAVES, at West London County Court, dated Mar. 25, 1946. The facts appear in the judgment of MORTON, L.J.

Melford Stevenson, K.C., and *Harold Paton* for the defendant company.
Marcus Grantham for the plaintiff workman.

MORTON, L.J. : This is, in my view, a very difficult case which turns on the construction of words in certain Orders which are not at all easy to construe. I do not feel any confidence that the construction which I place on them is correct, but I do not think I should get any further light on the matter by reserving judgment.

The plaintiff in the county court claimed that the defendants owed him certain sums in respect of loss of wages, a sum by way of lodging allowance, and a sum by way of travelling expenses. I need not trouble about the travelling expenses because the defendants have admitted that that sum is payable to the plaintiff. The two points in controversy are : (1) Is the plaintiff entitled to wages on the basis of a 67-hour week (as the county court judge held) or is he entitled to wages on the basis of a 44-hour week (as the defendants say) ? ; (2) Is he entitled to a sum by way of lodging allowance ? The answers to these questions depend on the construction of two Orders, the Essential Work

(Building and Civil Engineering) Order, 1942, and the Essential Work (Building and Civil Engineering) Order, 1944.

The facts, so far as they are material, are as follows. The defendants are asphalte manufacturers and they carried on a "scheduled undertaking" within the meaning of these Orders at all material times. The plaintiff, Henderson, is a pot-man or asphalte mixer and was at all material times a "specified person" within the meaning of the Orders. In May, 1944, the plaintiff was directed, under the Order then in force, to work for the defendants. The defendants first sent him to work in Wales for some five weeks. They then sent him to work in Berkshire for three weeks, and he was then sent to Crimond, Aberdeenshire, where he was working with a mechanical mixer. The wages which he was paid were 1*s.* 11½*d.* an hour. He actually worked 67 hours a week, but he was, apparently, a very good workman, and the judge found that his employers paid him on the basis of an 82-hour week. He also received lodging allowance, which was, for the first week or two of his employment at Crimond, 35*s.* 0*d.* a week and, later, 29*s.* 9*d.* a week. The defendants purported to terminate the employment of the plaintiff on Aug. 12, 1944. There has been a little doubt as to the precise circumstances in which that purported termination took place, but it is common ground between the parties to this appeal that we should treat the matter as if the employers purported to dismiss the plaintiff on the ground of serious misconduct. The defendants had not the consent of the national service officer to such purported dismissal. The plaintiff went away from Crimond, and it is immaterial at the moment to trace what he did. At any rate, he was not after that date working for the defendants. The plaintiff made an application in the nature of an appeal against his dismissal and his application was heard by a local appeal board on Nov. 20, 1944.

On Jan. 16, 1945, a letter was written which is of considerable importance. It comes from the Ministry of Labour, Employment Exchange, Fraserburgh, and is addressed to the plaintiff at an address in Glasgow. It is as follows:

> Dear Sir, Essential Work (Building and Civil Engineering) Orders, 1942 and 1944. I, the undersigned, have considered the recommendation of the local appeal board which, on Nov. 20, 1944, heard your appeal against dismissal on the ground of alleged serious misconduct. I have to inform you that I am not giving a direction for your re-instatement, but I hereby give you notice that the board were of the opinion that the dismissal was not justified on the ground of serious misconduct. I have further to state that under art. 4 (10) (*a*) (*sic*) of the principal Order the dismissal will be treated as having been ineffective up to the date of this notice and that on this date the employment of the specified person shall be treated as being properly terminated. In accordance with the provisions of the above-mentioned Order, (1) a worker is entitled, subject to the usual conditions, to a guaranteed wage for the period between dismissal and the date of this notice; (2) a worker shall not be treated as not having been capable of and available for work and willing to perform alternative services (*a*) during the time spent in attending the appeal board hearing, and (*b*) during the time spent in any alternative temporary employment between dismissal and the date of this notice, though in this case there shall be deducted from any sums to which he is entitled in respect of any prescribed period falling within the date of dismissal and the date of this notice any sums earned by him in other employment during the prescribed period.

That is signed by a national service officer.

The period in respect of which the plaintiff claims wages and lodging allowance is from Aug. 14, 1944, to Jan. 13, 1945. The county court judge awarded the plaintiff the sum of £155 15*s.* 2*d.* He held that the plaintiff was entitled to wages at the rate of 67 hours a week and that he was entitled to lodging allowance. A further claim to £4 13*s.* 2*d.* in respect of travelling expenses had been admitted. The learned judge does not, as I read his judgment, give any reasons for selecting the period of 67 hours rather than the period of 44 hours contended for by the defendants. From that decision the defendants appeal.

I must now refer to the relevant provisions of the two Orders which I have mentioned. I think the only article which I need read in the Order of 1942 is art. 4:

> (1) Subject as hereinafter provided, where a person carries on a scheduled undertaking the following provisions shall apply: (*a*) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person . . . except with the permission in writing of a national service officer.

In the present case the defendants believed (as it appears, mistakenly) that the plaintiff had been guilty of serious misconduct, and, therefore, they purported to terminate his employment without the permission of a national service officer. The article continues:

> (*b*) a specified person shall not leave his employment in the undertaking except with such permission as aforesaid; (*c*) not less than one week's notice of the termination of the employment in the undertaking of a specified person shall be given by that person or by the person carrying on the undertaking as the case may be, so, however, that this provision shall not apply where the specified person is dismissed for serious misconduct; (*d*) without prejudice to any terms and conditions of employment more favourable to specified persons that may be provided for by the Conditions of Employment and National Arbitration Order, 1940, or by that Order as amended by any subsequent Order, the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person a sum which is not less than the normal wage for the prescribed period if that person is during the normal working hours (i) capable of and available for work; and (ii) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.

Then follows a definition paragraph, a portion of which I must read:

> For the purposes of this sub-paragraph, "prescribed period" means, in relation to a person paid on a time rate basis [that applies to the plaintiff] a week . . . "normal working hours" means in relation to a week forty-four hours . . . "normal wage" means a wage calculated as follows, that is to say . . . (i) by reference to the time rate applicable to the person concerned and to the normal working hours on or during the prescribed period as the case may be . . . all time worked in excess of the normal working hours shall be treated as if it had been paid for at the ordinary time rate.

The next paragraphs which are relevant are paras. 9 and 10 of art. 4. These have been amended by the 1944 Order, so I must now turn to that Order. Article 3 of the 1944 Order, so far as material, is as follows:

> In art. 4 of the principle Order, for paras. 9 and 10 (which deal with the dismissal of specified persons for serious misconduct) there shall be substituted the following paragraphs.

One has there a definite statement in the Order that both para. 9 and para. 10 of the Order of 1942—and, I think it follows, the paras. 9 and 10 which are substituted for them—relate to the dismissal of specified persons for serious misconduct. A suggestion was made that a distinction might be drawn between those two paragraphs, that para. 9 was referring to serious misconduct while para. 10 was referring to something else. I do not think that the contention can be supported. I now read the substituted paras. 9 and 10:

> (9) The dismissal of a specified person for serious misconduct shall, in the first instance, be provisional only, and if (*a*) within the period allowed by para. (1) of the next succeeding article he requires a national service officer to submit the matter to a local appeal board [the plaintiff did that in this case within the time laid down] and (*b*) a national service officer under para. (3) of that article directs the re-instatement of the specified person, or without so directing gives a notice under that paragraph to the person carrying on the scheduled undertaking and to the specified person [that notice was given in the present case] the dismissal shall, in the case of a direction, be treated as having been ineffective, and in the case of a notice, be treated as having been ineffective up to the date upon which the notice is given, and on that date the employment of the specified person shall be treated as being properly terminated.

So that the position here is that up to the date of the notice in January, 1945, the purported dismissal is ineffective, but at the date of the notice the employment of the plaintiff is treated as being properly terminated. Paragraph 10, so far as material, is as follows:

> Where the dismissal of a specified person is treated as having been ineffective (*a*) sub-para. (*d*) of para. 1 of this article shall have effect in respect of any period elapsing after the dismissal until the re-instatement takes place, or until the date upon which the notice is given as aforesaid, as the case may require; and (*b*) the specified person shall not for the purposes of the said sub-paragraph be treated as not having been capable of and available for work and willing to perform any services which he could reasonably have been asked to perform by reason of his attendance at the hearing of his case by a local appeal board, or by reason of his having taken other employment, but in the latter case there shall be deducted from any sums to which he may be entitled under the said sub-para. (*d*) in respect of any prescribed period falling within that one of the periods mentioned in sub-paragraph (*a*) hereof which is relevant, any sums earned by him in that other employment during that prescribed period.

I should say at this point that, in calculating the amount due to the plaintiff from the defendants, the county court judge properly deducted the sum of £22 9*s*. 8*d*., which had been earned by the plaintiff during the period in question.

The terms of the Orders which I have read explain the terms of the letter of Jan. 16, 1945. The result is that one is thrown back to art. 4 of the Order of 1942. It is said by counsel for the defendants that that paragraph lays down the normal wage, to be calculated " by reference to the time rate applicable to the person concerned and to the normal working hours on or during the prescribed period " ; that " normal working hours " is defined as meaning, in relation to a week, forty-four hours ; and, therefore, that the plaintiff was entitled to be paid only on the basis of the time rate applicable to him for a working week of forty-four hours. I should have been inclined to agree with that submission but for the words which follow : A

> All time worked in excess of the normal working hours shall be treated as if it had been paid for at the ordinary time rate. B

Counsel for the defendants seeks to explain those words by saying that they refer to time actually worked, and that, as the plaintiff did not work during the period in question these words have no application to him. I cannot accept that argument. I think that it is rendered impossible by the words " shall be treated as if it had been paid for at the ordinary time rate." I think what is contemplated is this. This part of the article looks back to the time when the man was actually working and contemplates a case in which he was ordinarily working more than 44 hours a week. The legislature has thought that in those circumstances it would not be fair that he should be paid during the period in question only the wages applicable to a 44-hour week, and, therefore, has provided that : " All time worked in excess of the normal working hours " —in the present case 23 hours, for the plaintiff worked 67 hours a week—" shall be treated as if it had been paid for at the ordinary time rate." I think the intention is that if a workman had, before the beginning of the period in question, worked more than 44 hours a week, he should be paid during the period in question for more than 44 hours a week, which strikes one as a very fair provision. At the same time it is said that he is not to be paid some exceptional rate, but is to be paid for these extra hours at the ordinary time rate. C D

I would add (although it has only occurred to me during the course of delivering this judgment and, therefore, it may be a little rash) that the words, " Sundays and all time worked on Sundays and all remuneration paid in respect thereof shall be excluded " seem to me to fit into that construction of the article very happily, because, again, they contemplate the case of a man who, immediately before the period in question, had been working on Sundays. It provides notwithstanding this, that during this period no payment for Sunday work is to be included. E

As I have said, I think the construction of this Order is very difficult, but it seems to me that the result of the construction which I have placed on it is certainly not unfair. The workman will get the ordinary time rate and no more for the 67 hours a week which he would have worked if the employers had not, mistakenly, thought that they had good cause to dismiss him without leave. He will not get his lodging allowance, which is really only applicable to the case of a man who is working and has to reside somewhere in the neighbourhood of his work. The employers, on the other hand, have to pay this substantial wage for a period when they were getting no work out of the workman because they made the mistake of thinking that he had been guilty of such conduct as entitled them to dismiss him without leave. The result is that this appeal in part succeeds, because I can find no provision in art. 4 for the payment of any lodging allowance. I think, therefore, that the judge was wrong in giving the plaintiff a sum by way of lodging allowance. On the other hand, for the reasons which I have stated, I think that the proper period for the calculation of the wages to be paid to the plaintiff is 67 hours a week and not 44 hours a week, and on this point the appeal fails. F G H

SOMERVELL, L.J. : I agree. This case raises difficult points of construction. Turning, first, to paras. 9 and 10 of art. 4 of the 1942 Order, as amended by the 1944 Order, it is, I think, worth noting in para. 9 that dismissal for serious misconduct is, in the first instance, to be provisional, and in certain events (one of which happened in this case) it is to be treated as having been ineffective. I do not place any great reliance on this point, but it does not say that it is to be treated as wrongful. It is provisional, and if the specified person takes a certain action and is successful in getting a certain result it is to be treated as having been ineffective. Paragraph 10, as my Lord has already pointed out, applies para. 1 (*d*) of art. 4. If it had been intended that the person so dismissed or purported to be dismissed in the first instance should, during the period covered, A get what he would have earned under his contract on the basis that the employer had continued to employ him and work had been available for him, it would have been very easy to say so. Quite plainly, the article applicable here does not say anything of this kind. I am also clear that the article is a complete code. It does not leave in the plaintiff any right to claim for wrongful dismissal or to claim damages outside the sums, whatever they may be, which the article gives him. It is, of course, possible that in the result the application of the B article may diminish the sum which the employer would have had to pay if the man had worked for him during the period in question. It cannot, of course, be said that it diminishes what might have been his liability at common law if the Essential Work Order code had not intervened in the matter at all, because at common law I think under this contract he could have given an hour's notice. Under an ordinary contract he could have terminated the contract within a week and that would have set a limit to the damages. If the result is that the C sum the workman is entitled to in the present case is, and in other cases may be, less than what he would have earned if he had worked and if work had been available for him, that result does not seem to me either necessarily surprising or unfair. The code, having fettered the employers' rights (and, of course, it also fetters the workman's) may well provide for a sum which is, no doubt, designed to be, and I should think is, reasonable for such period, though less D than the workman might, in fact, have been able to earn if he had worked.

Turning, then, to art. 4 (1) (*d*) of the Order, I agree with what my Lord has said regarding the argument put before us by counsel for the plaintiff, based on the opening words, " without prejudice to any terms and conditions of employment," and so on. I do not desire to add anything on that point. I do not think on what has been proved before us that any point can be made on that. The question, I think, turns on the words which are to be found under (i) and E (ii), the words being :

> All time worked in excess of the normal working hours shall be treated as if it had been paid for at the ordinary time rate.

The question, as it seems to me, is : Are those words to be applied to the period in respect of which you are seeking to calculate the minimum sum or are they F to be construed as applying to the earlier period, the period which, no doubt, is to be looked at in order to decide what is a normal wage ? I think there is great difficulty in reading these words as applicable to the period in respect of which the minimum is being calculated. The words " shall be treated as if it had been paid for " seem to me to contemplate time worked which has, in fact, been paid for. If in the period for which the minimum is being calculated time has been worked in excess of 44 hours, I find great difficulty in seeing how any G question of what the minimum was would arise because from these very facts, I should have thought, the specified person would, through his labours, have earned more than the minimum which the paragraph, on this construction of the words in issue, guarantees. For these reasons, it seems to me that the words must be read as applying to the period before this part of the Order comes to be applied and, in the case before us, read as applying to the period before the notice of dismissal was given. I think they mean, at least, that where you H find the normal wage for the person or his grade is based on a week longer than 44 hours you take that into account, but that you disregard any extra rate, if there is such an extra rate, for the excess hours. The provision would be unnecessary if it was not intended that you should take the extra hours into account. What the position would be if the regular working week was 44 hours and the man at occasional intervals did overtime it is unnecessary to decide, but in the present case, where there was a regular working day of 12 hours and that was the basis on which this man was employed, it seems to me the application of the words is reasonably plain. That entitles the plaintiff to get his remuneration on the basis of a 67-hour week. I do not think he can claim the lodging allowance for the simple reason that this code does not seem to me to provide for lodging allowance. Whether that is for the reason which my brother has suggested or whether it was an oversight is immaterial. For these reasons, I agree with the conclusion which has already been expressed by MORTON, L.J.

ASQUITH, L.J.: I entirely agree.

Order accordingly.

Solicitors: *L. O. Glenister & Sons* (for the defendants); *A. L. Philips & Co.* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SCOTT *v.* SCOTT.

[CHANCERY DIVISION (Wynn-Parry, J.), October 24, 1946.]

Infants and children—Education—Maintenance—School—Boarding fees—Covenant by father to pay half " the expenses of educating " son " in manner suitable to station in life "—Son educated at public school—Liability of father for boarding expenses and school clothing.

By a deed made between a husband and wife, the husband covenanted, by cl. 1 (3), to pay half " the expenses of educating " his son " in a manner suitable to his station in life." The deed further provided that the wife was to maintain and educate the son in a suitable manner and " pay for all such board lodging clothes . . . tuition instruction and other matters " as he might require, " subject as regards education to cl. 1 (3) hereof." The boy was sent to Oundle School which, it was agreed, was suitable to his station in life. The question to be determined was whether the husband's liability was limited to one half of the general tuition fees, or whether it extended to the boarding fees:—

HELD: (i) on the true construction of the deed, the word " educating " was used in its widest sense, and, since the education at Oundle School could not be successfully carried out without the boy being received as a boarder, the husband's liability extended not only to one half of the general tuition fees, but also to one half of the boarding fees.

(ii) the wife was liable to pay the cost of ordinary school clothing, but a charge for " school blazer and crest " must be regarded as something special to the school and must be shared by the two parties.

[**EDITORIAL NOTE.** An interesting case which shows that the intention of the parties, as deduced by the court by applying the accepted rules of construction to a document, is not necessarily the intention of one of them in fact. Parties to an instrument must stand or fall by what they say in it, not what they mean to say. The decision turns purely on the construction of the deed. To ascertain the intention of the parties as shown by the document, the judge looks at the whole of the document and interprets the relevant words in the light of that review. No parol explanation of the terms of a written document can be received, and, therefore, the judge ignores evidence by the father in an affidavit of what his *actual* intention was when he entered into the deed.

AS TO " EDUCATION," see WORDS AND PHRASES, Vol. 2, p. 172].

Cases referred to:

(1) *Re Mariette, Mariette* v. *Aldenham School Governing Body*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 8 Digest 246, 57.

(2) *Re Christ's Hospital* (1889), 15 App. Cas. 172; 59 L.J.P.C. 52; *sub. nom. Christ's Hospital* (*Governors*) v. *Charity Comrs.*, 62 L.T. 10; 19 Digest 590, *204*.

ADJOURNED SUMMONS to determine a question arising under a deed of covenant. The facts and the relevant clauses of the deed appear in the judgment.

Wilfrid M. Hunt for the plaintiff.
E. M. Winterbotham for the defendant.

WYNN-PARRY, J.: This is a question which arises under a deed of covenant dated Sept. 6, 1940, and made between a husband and wife to provide in the events which happened (*inter alia*) for the payment of the cost of the education of one of their sons at Oundle School. The husband therein covenanted to pay to the wife a monthly sum for her support and use and for the maintenance of herself, his daughter and the son. By cl. 1 (3), it was covenanted as follows :

> That the husband will pay one moiety of the expenses of educating the said Sonia and David Murray Scott in a manner suitable to their station in life.

Clause 2 provided :

A
> In consideration of the premises the wife hereby covenants with the husband as follows (1) That the wife will out of the allowance or otherwise at all future times support and maintain herself and support, maintain and bring up and educate in a manner suitable to their position in life and until capable of fully maintaining themselves the said Sonia and David Murray Scott and pay for all such board lodging clothes medical attendance tuition instruction and other matters as she or the children may require subject as regards education to cl. 1 (3) hereof.

B The husband, by his affidavit, makes it clear that his intention was that his liability was to be limited to the general tuition fees and such other parts of the school bill as related directly to the education of his son. I, however, think I should address myself to the construction of the document. In my judgment, *prima facie*, the word " educating " in cl. 1 (3) is used in the widest sense of that term. There is nothing in the document which limits the sense in which the word is used. In that connection it is to be observed that the expenses of C education are being dealt with. I think some help in the interpretation of that clause is to be found in the consideration of the language of cl. 2 (1). In that sub-clause it is provided that the wife is to support, maintain and educate the child " in a manner suitable . . ." Then follows the provision :

> . . . and pay for all such board lodging clothes medical attendance tuition instruction and other matters as she or the children may require subject as regards education to cl. 1 (3) hereof.

D The word " tuition " appears to me to be of narrower import than the word " education." It will be perceived that there are to be found the three words " educating," " educate " and " education," and among them appears the narrower word " tuition." That, in any event, tends, in my view, to emphasise that the word " educate " is used in the widest sense.

It is an essential aspect of the form of education which is offered by Oundle E School that a pupil should reside at the school or in a boarding house. Without that residence it would be difficult to reap the advantages of the tuition at that school. The advantages of education, using the term in its widest sense, *prima facie*, could not, otherwise, be enjoyed there. On the construction of cl. 1 (3) of this document, looking no further, I should come to the conclusion that the husband was under a liability to pay one half, not only of the general tuition expenses, but also of the expenses of " boarding " the boy during the term.

F I think that that view is supported by a reference to two authorities. The first is *Re Mariette* (1) where EVE, J., had to consider the gift of £1,000 to Aldenham School. In the course of his judgment, EVE, J., said ([1915] 2 Ch. 284, at p. 288) :

> The object of this charity is the education, in the widest sense, of boys and young men between the ages of 10 and 19.

G Then, having stated that, in his judgment, it was as important to develop the body as to develop the minds of the boys, he said (ibid at pp. 288, 289) :

> . . . I think it is essential that in a school of learning of this description, a school receiving and retaining as boarders boys of these ages, there should be organized games as part of the daily routine, and I do not see how the other part of the education can be successfully carried on without them.

It appears to me that it would be no distortion of language to say that by parity H of reasoning it is impossible to see how the education—using that word in its broadest sense—which is offered at Oundle School can be successfully carried out without the boys being received as " boarders." In my view, that must be an essential part of the education of a boy at Oundle. It is not disputed that it is " in a manner suitable to the position in life " of the boy in question that he should be educated at Oundle.

In the Endowed Schools Act, 1869, it is provided by s. 5 that :

> In this Act, unless the context otherwise requires, the term " educational endowment " means an endowment or any part of an endowment which, or the income

whereof, has been made applicable or is applied for the purposes of education at school of boys and girls or either of them . . .

In *Re Christ's Hospital* (2) where the Privy Council had to consider a case arising under s. 29 of the Act, this passage appears (15 App. Cas. 172, at pp. 180, 181) :

> In their judgment [*i.e.*, in their Lordships' judgment] funds are applied for the purposes of education at school within the meaning of s. 5, whether the system followed be that of teaching only, or that of taking in the scholars and maintaining as well as teaching them. A

I can see no good reason for not treating those words—in view of the wording of s. 5 of the Act—as a guide in this case, and, therefore, regarding the matter not merely in the light of the language used but also in the light of the authorities to which I have referred, I come to the conclusion that the phrase " expenses of educating " in cl. 1 (3) is not limited to the item which is described in the account as " general tuition fee," but extends to the item in the account " boarding fee," which covers the fee for boarding the boy for each term and which amounts, B according to the exhibits to the husband's affidavit, to £29 per term.

That disposes of the main dispute between the parties, but I think it is desirable that I should refer to an exhibit in the wife's affidavit. Therein is a passage headed " School Account " which contains a number of items. Generally speaking, I think that, in applying the provisions of this deed of covenant, in view of the construction that I have placed on cl. 1 (3), the correct course is to assume in the first instance C that all the items appearing in that account are items properly falling within the phrase " expenses of educating " in the sub-clause, but it ought to be open to the husband to challenge any particular item with a view to establishing that, as regards that particular item, it is not, in fact, an expense of education. One item will form an example. In that account, which applies to the Michaelmas term, 1944, there is a printed item: " Flannel suit, jacket and trousers, £5 4*s*. 8*d*.." *Prima facie*, it appears to me that the mother is under the liability D of providing the boy with clothes with which to go to school, such as the ordinary suits worn by boys, underclothing, shoes, and so forth, and if it be the fact that the jacket and trousers were provided by the school during the term in question because a suit provided by the mother had worn out or had become otherwise unusable, then I think that hers would be the liability in respect of that £5 4*s*. 8*d*. On the other hand, a charge by the school in respect of the item " School blazer and crest, £2 19*s*. " *prima facie* ought to be regarded as something which is special E to the school, and, therefore, an expense of education which should be shared by the two parties.

The result is that I propose to declare that, on the true construction of cl. 1 (3) of the deed, the defendant is liable for, and should pay to the plaintiff, one half of not only the general tuition fees, but also of the house fees, including the boarding fees and such other items making up the house fees as can be said to F have been necessarily incurred by the school on the boy's behalf as part of the expenses of his education in the sense in which I have interpreted that term, and that, *prima facie*, all the items appearing in the document headed " School Account " should be borne by the parties in equal shares, but that the husband is to be at liberty to challenge any particular item if he can show that, using the phrase in the sense in which I have interpreted it, that particular item does not fall within the expenses of education. G

Declaration accordingly.

Solicitors : *H. B. Wedlake, Saint & Co.* (for the plaintiff) ; *Bentleys, Stokes and Lowless* (for the defendant).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re ARNOLD'S TRUSTS, WAINWRIGHT *v.* HOWLETT.

[CHANCERY DIVISION (Wynn-Parry, J.), October 23, 1946.]

Powers—Power of appointment by deed or will—Failure to exercise power—Trust implied in favour of objects of power—Class benefiting—Construction.

A declaration of trust, made between G.A. and another, having made provision, in the operative part, for the constitution of what was described therein as the residuary trust funds, and having provided for the income thereof to G.A., and then for provision of a life interest to her daughter, also called G.A., proceeded as follows: " and from and after the decease of the said G.A. the daughter and subject to any appointment which may be made to her husband as aforesaid In trust for the children of the said G.A. the daughter or any of her issue in such shares (if more than one) and in such manner as she shall by any deed or deeds or by her will appoint And in case there shall be no issue of the said G.A. the daughter who being male shall attain the age of 21 years or being female shall attain that age or marry under that age then upon such trusts and in such manner as G.A. the daughter shall by deed or will when not under coverture or by will while under coverture appoint." The daughter died on Dec. 31, 1944, without exercising the power:

HELD: (i) reading the provision in the proper way, *viz.*, in such a way as to link the words " the children of the said G.A. the daughter " with the words " any of her issue " and to treat all those words as qualified by the context of the words—no provision was made for the children of G.A. the daughter in the event of her not exercising the power of appointment and dying leaving such children or issue;

(ii) in view of the presence of the word " any " it was impossible to spell out of that language a gift of the property to a class, giving only a power to the tenant for life to appoint what shares and in what manner the members of the class should take;

(iii) where a power was exercisable by deed as well as by will, the result must be to let more persons into the class than would be the case if the right to exercise the power were confined to a will, and, consequently, there was, in this case, no contingency on any issue that any person should survive the tenant for life, nor was there any indication on the face of the document that required that any person to become a member of the class should reach the age of 21.

(iv) upon the true construction of the declaration of trust the trust funds subject thereto became on the death of G.A. the daughter divisible between all the children and remoter issue of G.A. the daughter born in her lifetime whether or not living at her death and whether or not they had attained or attain the age of 21 years or being female had married or marry in equal shares *per capita*.

[**EDITORIAL NOTE.** WYNN-PARRY, J., examines the words which fall to be interpreted and applies to them the primary rule of construction, namely, that they are to be given the natural, ordinary meaning which they bear in relation to the context in which they stand. The judge's view that where a power is exercisable by deed as well as by will the result must be to let more persons into the class than would be the case if the right to exercise the power were confined to a will and the application here of that view to the issue of the need of survival is worthy of note.

AS TO EFFECT OF FAILURE TO EXERCISE POWER, see HALSBURY, Hailsham Edn., Vol. 25, pp. 596-600, paras. 1052-1056; and FOR CASES, see DIGEST, Vol. 37, pp. 526-532, Nos. 1166-1233.]

Cases referred to:

(1) *Lambert* v. *Thwaites* (1866), L.R. 2 Eq. 151; 35 L.J.Ch. 406; 14 L.T. 159; 37 Digest 478, *758*.

(2) *Doe d. Willis* v. *Martin* (1790), 4 Term Rep. 39; 100 E.R. 882; 37 Digest 477, *751*.

(3) *Re Combe, Combe* v. *Combe*, [1925] 1 Ch. 210; 94 L.J.Ch. 267; *sub nom. Re Combe, Coombe* v. *Coombe*, 133 L.T. 473; 37 Digest 527, *1181*.

(4) *Brown* v. *Pocock* (1833), 6 Sim. 257; 44 Digest 529, *3462*.

(5) *Brown* v. *Higgs* (1799), 4 Ves. 708; 31 E.R. 366; *re-heard* (1800), 5 Ves. 495; *affd.* (1801), 8 Ves. 561, L.C.; (1813), 18 Ves. 192, H.L.; 37 Digest 526, *1168*.

(6) *Casterton* v. *Sutherland* (1804), 9 Ves. 445; 32 E.R. 674; 37 Digest 530, *1207*.

(7) *Re White's Trusts, Re* (1860), John. 656; 70 E.R. 582; 37 Digest 529, *1201*.

ADJOURNED SUMMONS to determine a question of construction of a provision in a declaration of trust. Relevant extracts from the deed are set out in the judgment. The defendants who claimed to be beneficially interested in the trust funds were four children of the daughter referred to in the deed, the administrator of a child who had attained the age of 21 and died in her lifetime and of three children who had died infants in her lifetime, and five grandchildren born in her lifetime. The question for determination was whether, on the true construction of the declaration of trust, the trust funds subject thereto became, A
on the death of the daughter (who died on Dec. 31, 1944), divisible between (*a*) all the children and remoter issue of the daughter born in her lifetime " who have attained or attain the age of 21 years or being female have attained or attain that age or have married or marry whether living at the death of the [daughter] or not in equal shares *per capita*; (*b*) such of the children and remoter issue of the [daughter] born in her lifetime as survive her and whether they have attained or attain the age of 21 years or being female have married or marry or B
not in equal shares *per capita*; (*c*) all the children and remoter issue of the [daughter] born in her lifetime whether or not living at her death and whether or not they have attained or attain the age of 21 years or being female have married or marry in equal shares *per capita*."

A. H. Droop for the plaintiffs.
H. F. Teague for the first two living children. C
E. M. Winterbotham for the fourth living child.
W. M. Hunt for the administrator of the deceased children.
E. G. Wright for the grandchildren.
The third living child was not represented.

WYNN-PARRY, J.: This summons raises a question of the construction of a provision in a declaration of trust dated Nov. 3, 1897, and made between Grace Arnold, of the one part, and that same lady and one John Hitchings, of the other D
part.

The declaration of trust was brought into existence in circumstances to which I need not refer in any detail to evidence a compromise, and having with particularity set out the circumstances leading up to its execution and having made in the operative part certain provisions, to which I need not refer in any detail, but which, put shortly, provided for the constitution of what is described therein E
as the residuary trust funds, and having provided for the payment of the income thereof to Grace Arnold, mentioned as one of the parties to the deed, and then for provision of a life interest to her daughter, also called Grace Arnold, to whom I will refer as " the daughter," the deed proceeds as follows:

> . . . and from and after the decease of the said Grace Arnold the daughter and subject to any appointment which may be made to her husband as aforesaid in trust for the children of the said Grace Arnold the daughter or any of her issue in such shares F
> (if more than one) and in such manner as she shall by any deed or deeds or by her will appoint And in case there shall be no issue of the said Grace Arnold the daughter who being male shall attain the age of 21 years or being female shall attain that age or marry under that age then upon such trusts and in such manner as Grace Arnold the daughter shall by deed or will when not under coverture or by will while under coverture appoint.

The summons proceeds on the basis of two assumptions. First, that on the G
true construction of the provision which I have read there is no gift over and no provision made for the children or remoter issue of the daughter in the event of the daughter not having exercised the power of appointment contained in the deed, that the language is sufficiently plain to indicate that either there is a trust in the true sense of the word or a power in the nature of a trust, and that, therefore, the court will imply a trust for some class of issue. The second assumption on which the matter proceeds is that class is closed. Whatever H
the class may be, the class must be considered closed at the date of the death of the daughter. Upon that basis, certain possibilities are put forward, and I am asked to say which, in my view, is the correct statement of the class in favour of whom the court will imply a trust.

Counsel for the fourth defendant—*i.e.*, a living child of the daughter having no children—has argued that on the true construction of this deed there is what the court can properly regard as a gift over. He asks me, first of all, to read the relevant provision without any reference to authority, a request which I, of course, accept as the correct way of approaching the construction of any document, and he says that when one reads this provision one can, without doing any violence to the language, extract from it a gift over. The way he puts it is this. He says that the words " in such shares (if more than one) and in such manner as she shall by any deed or deeds or by her will appoint " are words which only qualify the immediately preceding words, " any of her issue," so that the phrase should read: " In trust for the children of the said Grace Arnold the daughter," as one provision, and, secondly, as a separate alternative provision, " any of her issue in such shares," etc., as I have read. He points out that, if the alternative construction is to be adopted and the words " the children of the said Grace Arnold the daughter " are to be considered as linked with " any of her issue " and qualified by the following words, the words " the children of the said Grace Arnold the daughter " are useless, but he is constrained to admit that, upon his construction, the two separate provisions for which he contends are clearly in the wrong order, and, although in certain cases it may not be said to be doing violence to a deed to reverse provisions therein, I feel no doubt in this case that the proper way to read the provision is in such a way as to link the words " the children of the said Grace Arnold the daughter " with the words " any of her issue " and to treat all those words as qualified by the context of the words, so that it follows that there is clearly a gap in this document and no provision is made for the children or issue of Grace Arnold in the event of her not exercising the power of appointment and dying leaving such children or issue.

The question then arises : In favour of what class is a trust to be implied ? On this point I have what appears to me to be clear guidance in the form of a passage from the judgment of Kindersley, V.-C., in *Lambert* v. *Thwaites* (1), (L.R. 2 Eq. 151, at p. 155) :

> The question is whether, in default of execution of the power, the property is to be divided amongst the six children who survived the father, excluding Alfred, or among the seven, including him. In order to determine this question it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one time it was disputed, and indeed held the other way—I mean the principle that the existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate ; but until the power is exercised, it remains vested in those who are to take in default of appointment. That is now perfectly well settled, and has been so ever since the well known case of *Doe* v. *Martin* (2) in 1790. But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this : If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment ; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it.

That statement of the law has, so far as I am aware, stood without criticism ever since, and, indeed, has from time to time been followed and applied.

Many cases have been cited with a view to showing that the present case falls within one or the other of those two classes, but, in the end, it must come back to a question of construction of the particular document and, indeed, that is the course which I am directed to take by the judgment of Tomlin, J., as he then was, in *Re Combe* (3). I, therefore, turn back on this question to the document. The vital words are : " in trust for the children of the said Grace Arnold the daughter or any of her issue." I can state my conclusion quite shortly. In my view, it is impossible to spell out of that language a gift of the property to a class, giving only a power to the tenant for life to appoint what shares and in what manner the members of the class shall take, because of the presence of the word " any." It will be seen that whereas at the beginning of the phrase the language is : " In trust for the children of Grace Arnold the daughter," it proceeds " or any of her issue," and that seems to me to result in this case falling within the second of the two cases defined by Kindersley, V.-C., in *Lambert* v. *Thwaites* (1).

The question then arises whether those only who survive the tenant for life are entitled to take. It does not appear that there is any direct authority on the question, where a case falls within the second of the two cases, what will be the effect if, as in the present case, the power of appointment is given so as to be exercisable not only by will but by deed. In my view, it must follow that where the power is exercisable by deed as well as by will, the result must be to let in more persons into the class than would be the case if the right to exercise the power was confined to a will, and, in those circumstances, I hold that in this case there is no contingency on any issue that he or she should survive the tenant for life, nor can I find any indication on the face of the document that requires that any person to become a member of the class should reach the age of 21. For that purpose I do not propose to refer to or import anything from the gift over in the document.

There remains the question whether the class is to take *per capita* or whether they are to take as joint tenants. Counsel for the fourth defendant referred me to *Brown* v. *Pocock* (4). The headnote is:

> Testatrix gave a weekly sum to A. for his life or until he should attempt to assign, etc., the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should, by will duly executed, give and bequeath the same. A. died having made an invalid appointment of the stock:—*Held*: there was an implied gift to his wife and children, in default of appointment.

Shadwell, V.-C., in a very short judgment said (6 Sim. 257, at p. 259):

> The codicil contains no express gift over in default of appointment; but it is clear that the testatrix intended the wife and children to take the fund, and, therefore, I am of opinion that there is a gift to them, by implication, subject to the power. Declare that the surviving children of James Edward Brown are entitled to a moiety of the stock as joint-tenants.

The question of joint tenancy does not appear to have been argued in that matter. The case, so far as I can see, is an isolated case and, in my view, it is against the modern trend of authority. I think the true view is accurately stated in Hawkins on Wills, 3rd ed., p. 75, under the heading "Tenancy in Common":

> It seems that wherever the rule in *Brown* v. *Higgs* (5) is applied, the objects will take the property among them as tenants in common, and not as joint tenants. This is certainly the case if the power be to divide the property "amongst" or "between" the objects (*Casterton* v. *Sutherland* (6)): and in *Re White's Trusts* (7) a gift to "such other of my children or their issue." as A. should appoint, was held, in default of appointment, to create a tenancy in common between all the children and issue. In fact any power which enables the donee either to select objects, or to fix proportions, seems to contain that reference to plurality of interest among the objects which is sufficient to create a tenancy in common.

A number of cases were, in the course of the argument, referred to on this point, but I do not think that multiplication of reference to authority in this judgment will advance the matter. In my view, that last sentence is a correct statement of the law as at present administered by this court and I propose to proceed on that basis.

In the result, therefore, I propose to declare in answer to the question in the summons that on the true construction of the declaration of trust the trust funds subject thereto became on the death of Grace Arnold divisible between all the children and remoter issue of Grace Arnold the daughter born in her lifetime, whether or not living at her death and whether or not they had attained or attain the age of 21 years or being female had married or marry, in equal shares *per capita*.

Solicitors: *Snow, Fox & Co.* (for the plaintiffs and all defendants except the fourth child and the administrator of the deceased children); *G. Edmund Hodgkinson* (for the fourth child and the administrator of the deceased children).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

MALEY *v.* FEARN.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 23, 1946.]

Landlord and Tenant—Rent restriction—Sub-tenancy—Sub-tenant deemed to become tenant—" Lawfully sub-let "—Covenant by tenant not to sub-let without landlord's consent—Dwelling-house sub-let without consent—Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 15 (3).

One of the terms of the tenancy of a dwelling-house was that " the tenant must not sub-let . . . without the written consent of the owner." The tenant sub-let a room in the house to the defendant without the consent of the owner. Subsequently, the tenant died. In an action by the owner of the dwelling-house against the defendant for possession,

HELD : in view of the tenant's breach of the term of tenancy, the defendant was not a " sub-tenant to whom the premises or any part thereof have been lawfully sub-let " within s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, but was a mere trespasser, and the owner was entitled to an order for possession.

Norman v. *Simpson* (1) *discussed.*

[**EDITORIAL NOTE.** This case is of importance because it establishes that a class of sub-tenants, which cannot be numerically small, are not " lawful sub-tenants " within s. 15 (3) of the Rent Act, 1920. Apart from the decision itself, MORTON, L.J. (speaking, as he says, *obiter*, for here the stipulation against sub-letting was regarded as a condition the breach of which would give rise to a right of re-entry), makes an important extension of the language he used in *Norman* v. *Simpson* (1). If, his view now is, a sub-letting is contrary to the terms of the tenancy, it may well be that it is an unlawful sub-letting even though it does not give rise to a right of re-entry. In *Norman* v. *Simpson* (1) he restricted the description of premises as being " unlawfully sub-let " to cases where the head lessor had a subsisting right of re-entry.

AS TO RIGHT OF RE-ENTRY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 246-253, paras. 278-285 ; and FOR CASES, see DIGEST, Vol. 31, pp. 462-471, Nos. 6093-6183.]

Case referred to :

(1) *Norman* v. *Simpson* (1945), 62 T.L.R. 113, Digest Supp.

APPEAL by defendant from an order of His Honour JUDGE CROSTHWAITE, made at St. Helen's and Widnes County Court, and dated Apr. 5, 1946. The facts appear in the judgment of MORTON, L.J.

John Foster for the defendant.

E. M. L. Mallison for the plaintiff.

MORTON, L.J. : In this case the landlord (the plaintiff) claimed possession of a dwelling-house, No. 20, Wood Street, Widnes, in the County of Lancaster, as he alleged that the defendant was a trespasser on the premises. He also claimed a sum of £2 15*s.* 4*d.* for use and occupation of the dwelling-house. The defendant put in no defence.

The judge was not asked to take a note, and, as a result, all we have in the way of a note of the evidence is what the judge himself described as " scraps." The evidence given for the plaintiff was that a Mrs. Bedggood was tenant and a rent book was produced, which is before the court. The judge gave the plaintiff possession and his judgment is in the following terms :

> Though the defendant had instructed solicitors and was represented by counsel at the hearing, no defence had been delivered (County Court Rules, Ord. 9, r. 4), and I was not asked to take a note, so I only took the scraps reproduced above. The plaintiff regards the defendant as a trespasser. The defendant did not satisfy me that he was a ' lawful sub-tenant ' ; on the contrary, I inferred from such evidence as there was that it was a term of the original tenancy that there should be no sub-letting without consent.

The reference to a " lawful sub-tenant " is, I think, a reference to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3). That subsection is in the following terms :

> Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

My brethren agreed with these views. It seems to me that that is a decision of this court that two persons can together constitute a " landlord " within the meaning of para. (*h*). The point was not argued in that case, because, on production of the documents to which I have referred, counsel for the defendants conceded that he could not contend that the plaintiffs were not " landlords," but I would add that, on further considering the matter, I feel no doubt that two persons can be the " landlord " within para. (*h*). One starts with the Interpretation Act, 1889, s. 1 :

> In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears . . . words in the singular shall include the plural.

It seems to me that when two people jointly entitled legally and beneficially are seeking possession of premises there is no reason why they should be excluded from coming within the meaning of the word " landlord " in para. (*h*). They may be seeking possession of the premises for occupation as a residence for themselves, and I do not think that in the paragraph which we are now considering a " contrary intention appears." However, I think that this point is really concluded against the present defendant by the decision of this court in *Owen* v. *Overy* (2).

That being so, these two persons, who are the " landlord " within para. (*h*), require this property as a residence for themselves. Counsel for the defendant relied on the fact that the plaintiffs proposed to bring with them to occupy this house other persons who did not come within the precise words of para. (*h*), and he suggested that these persons could not be taken into consideration when the learned judge was arriving at his conclusion. It is true that the plaintiffs could not, for example, come within para. (*h*) if they " required " the dwelling-house for occupation as a residence for, for instance, a nephew or niece, but I think that, if they require the house as a residence for themselves, the judge, in deciding the other points which arise in the case, ought to take into consideration the fact (if it be a fact) that there are other persons residing with them in their present premises whom they do not wish to turn into the street.

The second point which was put forward by counsel for the defendant was that the words in para. (*h*) " not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939] " excluded the plaintiffs in the present case because they became landlords " by purchasing " on the death of the previous owner within the meaning of these words. He said that the word " purchasing " should be given a technical meaning. I am well aware that the word " purchaser " and the words " by purchase " have in certain contexts a technical meaning which is well-known to all lawyers, but I am not aware of any case in which the words " by purchasing a dwelling-house " have been given any technical meaning. For my part I feel no doubt that they simply refer to a transaction of purchase or buying. If I had felt any doubt on that point I should have been assisted by the decision in *Inland Revenue Commissioners* v. *Gribble* (3), to which counsel for the defendant referred.

There is one more matter to which I should refer. Counsel for the plaintiffs rightly called my attention to a passage in my judgment in *Sharpe* v. *Nicholls* (1) at [1945] 2 All E.R., at p. 60, and he suggested that that passage may have influenced the county court judge in arriving at the conclusion that only one person could be the " landlord " within sub-para. (*h*). In that passage I said :

> In those circumstance, one must consider whether it can be said that the " dwelling-house is reasonably required by the landlord for occupation as a residence for himself or herself " when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house. In my opinion, such a case is not within the terms of para. (*h*) of sched. I at all. Strange results would follow if that were not so. For instance, you might have four legal personal representatives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself or herself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (*h*). It is also to be observed that the words " himself; or any son or daughter of his . . . ; or his father or mother " seem to refer to a person who is the landlord not in the sense that he or she is one of several personal representatives but in the sense that he or she is the sole owner of the property subject to the tenancy.

Taken apart from its context, that passage might seem to indicate that I may have thought only one individual could be a "landlord" within para. (*h*), but I desire to say that, as appears from the context, my attention was concentrated on the contrast between those who could only come forward as personal representatives and those who could come forward as persons having the beneficial interest in the property, and I did not intend to suggest that two persons could not possibly be a "landlord" within the meaning of para. (*h*) if those two persons were the sole beneficial owners of the property. For these reasons I think that, unless the parties agree on a date on which possession is to be given, the matter must go back to the county court judge for a decision on that point.

SOMERVELL, L.J.: I agree with the judgment which has been delivered and with the reasons which have been given for it. I only wish to add a few words on one point. In the present case, as in *Owen* v. *Overy* (2), the position was simple in that the joint owners were both suing for possession for themselves and were both intending to occupy themselves. In *Owen* v. *Overy* (2) it was husband and wife; in the present case it is two sisters. All I want to say is that I am not in any way implying or suggesting that para. (*h*) is only applicable in the case of joint owners where they are both desiring the dwelling-house for occupation as a residence for all of their number. I myself am inclined to take the view that it has a wider application and that it would cover the case where A, B and C, being joint owners, put forward a claim for possession, alleging that the residence is required for occupation as a residence by A.

ASQUITH, L.J.: I agree. This court has decided in *Owen* v. *Overy* (2) that "landlord" in para. (*h*) of sched. I to the Act of 1933 covers two or more joint beneficial owners, and in *Sharpe* v. *Nicholls* (1) that it does not cover two or more bare personal representatives. Where there are two or more joint beneficial owners, (i), (ii) and (iii) of (*h*) should, I think, be read as follows: in (i) for "himself" read "themselves," in (ii) for "any son or daughter of his" read "any son or daughter of theirs," and in (iii) read "their father or mother." Where, read in this way, neither (i), (ii) nor (iii) has any application, such beneficial owners would fail, for instance, if they proceed under (ii) and are not a married couple with a child, or if they proceed under (iii) and have not got a parent in common; but they would fail in that case not because there are several of them or because they are not a "landlord" within the opening words of the section, but because they could not bring themselves within the language of (i), (ii) or (iii), construed in the way I suggest.

Appeal allowed.

Solicitors: *Willis & Willis*, agents for *Freeborough & Co.* (for the appellants); *E. Arthur Edmonds & Pinhorn* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

lied. LLEWELLYN *v.* HINSON.
8] 2 All E.R. 95.

KENYON *v.* WALKER; STEVENSON *v.* KENYON.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), October 30, 1946.]

Landlord and Tenant—Rent restriction—Letting into possession of exclusive use of certain rooms with use in common of box-room, bathroom and w.c., but with use of kitchen for cooking purposes only—Whether "part of a house let as a separate dwelling" or a "sharing agreement"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *ss.* 4, 16.

The statutory tenant of a dwelling-house allowed W. to have the exclusive use of certain rooms in the house, together with the use in common with himself of a boxroom, bathroom and w.c., and also the right to use the kitchen for cooking purposes only. The landlord sought to recover possession of the house under s. 4 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the tenant was charging the subtenant an excessive rent, and the tenant sought possession against W. on the ground that there was no subletting of the rooms occupied by W. and that the Rent Restrictions Acts did not apply to them since it was an arrangement to share the house and did not amount to the letting of a separate dwelling.

DUFFIELD *v.* GREAT WESTERN RAILWAY CO.

[KING'S BENCH DIVISION (Wrottesley, J.) October 21, 23, 1946.]

Emergency Legislation—Essential work—Railway fireman—Transfer to lower grade in accordance with contract of employment—Claim to wages at original rate—Essential Work (General Provisions) (No. 2) *Order,* 1942 (*S.R. & O.,* 1942, *No.* 1594), *art.* 4 (1).

The plaintiff was employed by the defendant company as a fireman from 1922 to 1943. It was a term of his contract of employment that a fireman, before being promoted to the grade of engine-driver, should pass an examination, and that, if he failed three times to pass it, he should be transferred to a different grade of employment. The plaintiff, having failed in the examination three times, was transferred to the grade of shed-labourer, being promoted later to that of steam raiser. He brought this action, claiming the balance of wages at the higher rate applicable to a fireman, and in support of his claim he relied on the Essential Work (General Provisions) Order (No. 2), 1942.

By art. 4 (1) of that Order a person carrying on a scheduled undertaking [the railway company were such an undertaking] "shall . . . pay to every specified person" [the plaintiff was such a person] ". . . not less than the normal wage . . . if that person is during the normal working hours (i) capable of and available for work; and (ii) willing to perform any services outside his usual occupation which . . . he can reasonably be asked to perform . . . when work is not available for him in his usual occupation in the undertaking."

HELD: the change in the plaintiff's occupation having taken place in accordance with the terms of his contract of employment, the Order of 1942 was not applicable, and the claim failed.

[**EDITORIAL NOTE.** Article 4 (1) (ii) of the Essential Work (General Provisions) (No. 2) Order, 1942, provides for an eventuality which must not be allowed to occur in a time of national emergency—a man standing idle because work of the kind which he usually does is not available whereas other work is. The employee is safeguarded by the provision that he shall not lose from the point of view of wages if he engages in work of a lower grade than that of his normal employment or is not employed full time. This case, however, decides that, if the reduction of grade is provided for in the contract of employment to take effect in circumstances which have happened, the Order has no application, and so the employee cannot avail himself of art. 4 (1) (ii).

FOR THE ESSENTIAL WORK (GENERAL PROVISIONS) (NO. 2) ORDER, 1942, art. 4 (1), see BUTTERWORTH'S EMERGENCY LEGISLATION, [14], 130.]

Cases referred to:

(1) *Adrema, Ltd.* v. *Jenkinson,* [1945] 2 All E.R. 29; [1945] K.B. 446; Digest Supp.; 114 L.J.K.B. 313; 173 L.T. 318; 109 J.P. 138.

(2) *George* v. *Mitchell and King,* [1943] 1 All E.R. 233; Digest Supp.

ACTION to recover balance of wages. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *M. R. Nicholas* for the plaintiff.

Sir Valentine Holmes, K.C., and *J. P. Ashworth* for the defendants.

Oct. 23. WROTTESLEY, J., read the following judgment: The plaintiff, after a few years in the service of the Taff Vale Ry. Co., as a cleaner or fireman of locomotives, was taken over as a fireman by the Great Western Ry. Co., on the amalgamation of 1921, and he accepted the conditions of service of that company. It was the practice of the Great Western Ry. Co., and of all other main line companies to treat the footplate of the locomotive as a training ground where firemen could qualify to act as engine drivers. Accordingly, there was an understanding incorporated into the terms of employment of men engaged on this side of the undertaking under which firemen were entitled, in order of seniority, to be promoted engine drivers provided they could pass the necessary examination, but, if a fireman, after three trials, should fail to pass the examination, he not only missed his chance of promotion, but he was also removed from the footplate and sent to other less well paid employment. This was well known to the plaintiff and accepted by him. When his turn for promotion came he went up for examination and failed each time. For some reason he was given four chances, and after the fourth failure he was removed from the footplate and given work in the engine shed.

As to the plaintiff's legal position on removal there is not complete agreement between the parties. The railway company's view is that the plaintiff remained in their employment and must be found work elsewhere. On behalf of the plaintiff it was suggested that while he was entitled to be found work he could leave if he liked. The point is not of much practical importance because either side could give seven days' notice to determine the employment. On the whole, I prefer the company's view. Incidentally, it is clear that this practice was most salutory. If a man is unwilling or unable to qualify as an engine driver he should not be permitted to block promotion by occupying the only possible training ground. The practice was most strongly approved by the Associated Society of Locomotive Engineers and Firemen which was not, as it happens, the union to which this plaintiff belonged.

Apart therefore, from the Order relied on by the plaintiff, he has nothing to complain of. He was employed from his failure to pass the examination until these proceedings as a locomotive shed labourer, except that, as opportunity offered, he was promoted to the more responsible and higher paid work of steam raiser. When all this happened there had come into force the Essential Work (General Provisions) (No. 2) Order, 1942, and it is claimed by the plaintiff that, by reason of the provisions of this Order, the plaintiff is entitled to receive the higher rate of pay due to a fireman from the date of his removal from the footplate to the date of these proceedings, even though his work was in a lower grade and normally with a lower rate of pay.

It is common ground that the railway company's undertaking is a "scheduled undertaking" and the plaintiff a "specified person." I can, therefore, read the relevant provisions in art. 4 of the Order:

> (1) Subject as hereafter in this Order provided, where a person carries on a scheduled undertaking the following provisions shall apply: (*a*) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person or without terminating such employment cause him to give his services in some other undertaking (except in case of emergency for a period not exceeding fourteen days), except with the permission in writing of a national service officer; (*b*) a specified person shall not leave his employment except with such permission as aforesaid; (*c*) not less than one week's notice of the termination of the employment of a specified person shall be given by that person or by the person carrying on the undertaking as the case may be, so, however, that this provision shall not apply where the specified person is dismissed for serious misconduct; (*d*) without prejudice to any terms and conditions of employment more favourable to persons employed in the undertaking that may be provided for by the Conditions of Employment and National Arbitration Order, 1940, or by that Order as amended by any subsequent Order, the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person (except as otherwise provided in this Order) a sum which is not less than the normal wage for the prescribed period if that person is during the normal working hours—(i) capable of and available for work; and (ii) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.

The relevant words are those which I have read in para. (*d*).

The normal wage of a fireman for the prescribed period was greater than what was paid to the plaintiff by the amount claimed in the action. The question, therefore, arises whether para. (*d*) applies to this case. In the course of the argument counsel for the plaintiff agreed that literally sub-para. (ii) of this paragraph did not apply to the plaintiff. The paragraph only applies if two hypotheses are fulfilled: first, that the man was capable of and available for work, and, secondly, that he was willing to perform any services outside his usual occupation which in the circumstances he could reasonably be asked to perform during any period when work was not available for him in his usual occupation in the undertaking.

The fact is that this paragraph and the whole Order is directed to providing for matters set out in the Defence Regulations, 1939, reg. 58A (4A). Regulation 58A is headed "Control of Employment," and provides, among other things, by para. (4A), that:

> The Minister may by Order make provision for securing that enough workers are available in undertakings engaged in essential work and may in particular provide by any such Order—(*a*) for securing that, except in circumstances and to the extent provided by the Order, persons employed in any such undertaking shall continue to

> be employed in that undertaking, and shall not be caused to give their services in any other undertaking ; (*b*) for prohibiting persons so employed from absenting themselves from work without reasonable excuse, or being persistently late in presenting themselves for work, or refusing to work reasonable overtime or to work at the times when they are required to work or to obey lawful orders in relation to their work, or impeding the work of the undertaking ; (*c*) for requiring payment to persons so employed of wages for periods during which, though work is not available for them in their usual occupation, they are capable of and available for work, and willing to perform services which they can reasonably be asked to perform.

In other words, the national interest might require that persons should be kept in their employment, even though for part or all of the time they could not be employed at their usual employment. In such a case they must obviously be paid, and obviously, too, they should not be idle if there were work to be done which they might reasonably be asked to do. For all such cases this paragraph is apt.

Under para. (*a*) of art. 4 of the Order they may not be dismissed, except by leave, but no breach of this paragraph is or can be set up here, nor under (*b*) could they leave. Under (*c*) the notice has to be not less than one week. Under (*d*) we find dealt with the remuneration to be paid to persons who, though kept on, cannot be employed in their usual occupation. They must be fit and present and willing to do other reasonable work, and if all this is established they are to be paid as though they had worked full time and in their usual occupation, even though they had, in fact, done no such work, or only worked part time.

As it appears to me, the fallacy in the case put forward by the plaintiff lies in attempting to apply these provisions to the case of a man, the nature of whose job was changed in accordance with the terms of his contract of employment. The Order is not concerned with such a case. Of course, if the change of job were not in accordance with the terms of his contract, or was such a change as to be a colourable transaction, and, therefore, in effect a termination of the employment, the courts could doubtless intervene as was suggested by HUMPHREYS, J., in *Adrema, Ltd.* v. *Jenkinson* (1) ([1945] K.B. 446, at p. 450) :

> I am far from saying that there may not be circumstances which may arise in some case in which so great an alteration is made in the position of the employee by an order of his employers that it may be said that his position is impossible, that the effect of what is done by his employers is in effect to terminate his employment altogether . . .

But there was nothing colourable in what happened here. On the other hand, there never was a period right down to the date of these proceedings when work in the plaintiff's real occupation in the locomotive shed was not available for him. Since art. 4 (1) (*d*) of the Order, read literally, has a context to which it applies, and ample scope quite apart from facts such as are found in this case, I see no reason for doing violence to the words of the paragraph and reading it in the manner suggested by counsel for the plaintiff, *i.e.*, suppressing the second hypothesis contained in sub-para. (ii), or by reading other words into it. This part of the Order does not deal with the rates of pay due to persons who perform an ordinary week's work, but only to persons for whom such work cannot be found. In that context it is clear and sensible and gives effect to what is to be provided for under the Defence Regulations.

The only other authority, *George* v. *Mitchell and King* (2), is not directly in point, but the reasoning to be found in the judgments lays considerable stress on the fact that this Order proceeds from, and is superimposed on, the contract, and only tears that contract up when the contract would otherwise contradict the Order. This contract does nothing of the kind, and hence, therefore, there must be judgment for the defendants, with costs.

Judgment for defendants with costs.

Solicitors : *Pattinson & Brewer* (for the plaintiff) : *M. H. B. Gilmour* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

ROBINSON *v.* ROBINSON AND PILBOROUGH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 22, 1946.]

Divorce—Costs—Decree of judicial separation—Subsequent decree of divorce—Co-respondent the same in both petitions—Payment by co-respondent of costs of both petitions.

R. was married to his wife in June, 1943. In Apr., 1945, R. successfully petitioned for a judicial separation on the ground of his wife's adultery with P., the co-respondent, who was ordered to pay costs. At that time R. was not able to petition for a divorce, by reason of the Matrimonial Causes Act, 1937, s. 1 (1), which prohibits the presentation of a petition until three years after marriage. As soon as the Act permitted, R. successfully petitioned for a divorce on the ground of his wife's adultery with P. who was cited as co-respondent.

HELD : the co-respondent must pay the costs of both proceedings because they arose out of his own adultery and because the petitioner, when he presented his petition for judicial separation, was unable to present a petition for divorce.

Menon v. *Menon and Warth* (1) distinguished.

[**EDITORIAL NOTE.** This case raises a question which it is fairly safe to assume that Parliament did not visualise when it passed the Matrimonial Causes Act, 1937. Dealing with the matter free from statutory or other authority, BARNARD, J., makes an order which may seem hard to the co-respondent, but he can scarcely complain if he has to accept the results of his own actions.

Case referred to :

(1) *Menon* v. *Menon and Warth*, [1936] 1 All E.R. 900 ; [1936] P. 200 ; 105 L.J.P. 83 ; 154 L.T. 725 ; 52 T.L.R. 483 ; 80 Sol. Jo. 348 ; Digest Supp.

PETITION of husband for dissolution of marriage on the ground of his wife's adultery with the co-respondent. The facts are set out in the judgment.

Victor Russell for the petitioner.

David Karmel for the co-respondent.

BARNARD, J. : In this case the only question at issue is a question of costs. The husband, Percy Bunster Corin Robinson, was married to his wife in June, 1943, and apparently before three years had elapsed she had transferred her affection to another man, the co-respondent, and started to live in adultery with him.

Under the Matrimonial Causes Act, 1937, s. 1 (1) : " No petition for divorce shall be presented to the High Court unless at the date of the presentation of the petition three years have passed since the date of the marriage." So, under the statute, the husband was at that time precluded from asking for a divorce. What he did was, on Apr. 30, 1945, to present a petition for judicial separation, in which he alleged adultery with the same man as he names now in his petition for divorce. The case was undefended and the husband obtained a decree of judicial separation on Sept. 11, 1945, in which the co-respondent was ordered to pay the costs. Counsel for the co-respondent now submits that the co-respondent ought not to have to pay costs twice over. He has also submitted that the only reason for the judicial separation and the present application for costs was either to put the evidence on record or to punish the co-respondent. I do not agree with that submission. I think that the submission of counsel for the husband was the more likely one, and that is that the husband, in taking proceedings for judicial separation, which were the only proceedings he could take at that time, was anxious to regularise his position. He could not petition for divorce. His wife was living in adultery, and I think he took a very proper course in asking the court for a judicial separation on the ground of adultery and the very moment that the three years elapsed presenting another petition for a divorce, relief for which he could not have asked before. It seems to me that both sets of costs really arise out of the co-respondent's adultery. It is a little unfortunate that there were two sets, but there would not have been any but for the co-respondent's adultery, and I think the co-respondent ought to pay the costs.

I have been referred to *Menon* v. *Menon and Warth* (1), but there the facts were so different that I do not think I need enumerate them again. There was a claim for damages against the co-respondent after the petitioner had already accepted a sum for damages in an enticement action in the King's Bench Division. I cannot see any similarity between that case and the case I have to deal with now, and I make an order that the co-respondent pay the costs.

Order accordingly.

Solicitors: *Stephenson, Harwood & Tatham* (for the petitioner); *Lipton & Jefferies* (for the co-respondent). A

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

LENG *v.* LENG.

B

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Byrne, J.), October 18, 1946.]

Divorce—Desertion—Constructive desertion—Neurosis—Whether sufficient ground for leaving and refusing to live with spouse.

The neurotic condition of a husband, and nothing more, is not, in law, sufficient ground for a wife's refusal to live with him. Consequently, where a wife, on this ground alone, leaves her husband and refuses to return to him, this does not constitute desertion on the part of the husband. C

[**EDITORIAL NOTE.** Since the decision in *Sickert* v. *Sickert*, [1899] P. 278, it has been established that the principle of what is known as "constructive desertion" is that the respondent has compelled the petitioner to separate from him. Here the justices appear to have thought that the neurotic condition of the husband, resulting, no doubt, in irritation and unhappiness in the home, with, possibly, some ill-health on the part of the wife and child, satisfied this somewhat strict test. The Divisional Court, however, D point to the ultimate result of the justices' order, which would, in effect, be a divorce on the ground of neurosis, and compare such a state of things with what a petitioner must prove when seeking a divorce on the ground of insanity—incurability, definite unsoundness of mind, and care and treatment as defined by the statute for at least five years: see Matrimonial Causes Act, 1937, s. 2 (*d*) and s. 3. It would be strange if divorce were obtainable more easily for a less serious reason than on graver grounds.

As to Constructive Desertion, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and for Cases, see DIGEST, Vol. 27, pp. 315, 316. Nos. 2930-2939.] E

Appeal by the husband from a refusal of Hull justices to discharge a separation order made in the wife's favour on the ground of desertion. The facts appear in the judgment of Lord Merriman, P.

E. A. Greenwood for the husband.

R. W. Payne for the wife.

Lord Merriman, P.: This is a husband's appeal from the refusal by the F justices of the city of Hull on May 27, 1946, to discharge a separation order made in the wife's favour on Apr. 25, 1946, on the ground of desertion.

I regard this case as of some little importance, though I think the principles on which it should be decided are quite clear and well established. The husband is evidently a man whose health is not good. He said in his evidence that he had had four operations, and that he had a hole in his stomach, which was G only barely covered with skin, large enough to put his fist in. I daresay that, in that state of health and trying to keep the home together, he has been very tiresome and irritable from time to time. Things came to a head in this marriage sometime early in 1946, when it was necessary for the probation officer to see both spouses, but I need not go into what is said to have happened then because everything came to a climax by the wife leaving the home and taking the child with her on Mar. 26. She promptly issued a summons, and H the case came on before the stipendiary magistrate at Hull on Apr. 25. Evidence was given by the wife of the husband's neurotic condition and of a good deal of personal unkindness on some occasions, but there was little evidence of any violence, although one act was mentioned. The substance of the case was that it was a case of nagging and the like, including oft-repeated orders to the wife to clear out. When the wife came before the magistrate, the question was whether there was evidence on which he could find, though she physically had left the matrimonial home, that she was justified in doing so by her husband's misconduct. We have not to sit in appeal on that judgment. There was no appeal. Finding as he did that the wife had had to put up with conduct which sufficiently justified her in leaving home, the magistrate went on to suggest that he hoped that the separation order which he made would be torn up in a few days by the husband and wife effecting a reconciliation for the benefit of the child. In those circumstances it would have been absurd for the husband to appeal. If he was minded to effect a reconciliation, that would be the worst way of doing it. The proper thing to do was to take the magistrate's hint, and promise to behave better to his wife in future. If the magistrate had taken the other view, and said: "This conduct has been so bad that no wife can be expected to live with her husband again"—*a fortiori* if he had said: "This wife's health is in great danger"—then, indeed, the husband would have been obliged to appeal, but he himself gave the right reason when he was cross-examined about this very point, for he said he had acted on his solicitor's advice in seeking to have the order discharged because he wanted his wife back.

In my opinion, it is extremely important to remember that the starting point in this case is a separation of a kind which the stipendiary magistrate did not consider as breaking up the marriage. He thought that, given repentance on the part of the husband, there was no reason why the marriage should not be reconstituted. I propose to approach the case from that point of view, because it is vital to arrive at a just decision. The husband took the magistrate's hint, and wrote his wife a letter of a most affectionate and repentant kind. The justices who heard this case have held that it was a genuine expression of his readiness and willingness to resume married life. From that it follows that the only remaining question is whether the circumstances were such as to justify the wife in refusing to do so, as she unquestionably has done. She refused when the husband went alone to see her. She refused when he went with a friend, and, according to the evidence, she made it clear to the friend that she would be a fool if she accepted the offer because she was living on a payment under the order of £2 10*s.* 0*d.* a week, with her board and lodging and nothing expected of her, instead of going back to her husband to receive an allowance of £3 10*s.* 0*d.* a week and have to look after the home. When she gave evidence in court, there are no two opinions about it, she made it perfectly clear over and over again that nothing in the world would induce her to go back. I ought to add that the solicitor for the wife, in what I think are distinctly unwise terms, also refused.

That was the issue presented to the justices, who held that, owing to the husband's neurotic condition, the parties could not live happily together; that the husband would have difficulty in making serious decisions of any kind; that, should the parties live together, the neurotic state of the husband would have injurious effects on the health of the wife and indirectly of the child; and, in view of her previous experience of the husband, that the wife was justified in her refusal to accept his offer to resume cohabitation. It is important that the implications of that judgment should be plainly understood. If the wife, by reason of her previous experience of her husband's neurotic condition, is justified now in refusing to take him back, and we are to uphold this judgment for the reasons given, I cannot see what change of circumstances there could be in the future—to be more precise, in the course of the next 2½ years—which would impel any court to come to any other conclusion, a Divisional Court of this Division having held that this was a valid judgment. That would mean that as soon as 3 years had run from Mar. 26, 1946, the wife, unless some change which I cannot envisage came into the picture, would be entitled to say: "I am not obliged to go back to my husband; the Divisional Court of the Divorce Division have said so; 3 years have now elapsed since I have been deserted: now give me a divorce!" In plain English that would mean nothing less than that by a judgment of a court of justice neurosis was made a ground for divorce.

I decline to be a party to any such judgment. Let it be considered for one moment with what restrictions divorce for insanity is hedged around, and then let it be considered whether any court has the right to say that the neurotic condition of the husband and nothing else is ground for refusal by a wife to live with her husband so that he is to be held a deserter. The thing has only to be stated to be seen to be nonsense. Justices really must apply their minds to the law as laid down in the Act of Parliament and by decisions of this court and not invent reasons of this sort for disrupting married life, bearing always in mind that the marriage vow is expressed to prevail "in sickness and in health." This appeal, in my opinion, must be allowed.

BYRNE, J.: I agree. The reasons given by the justices for the decision that they came to are reasons which are quite contrary to law. As my Lord has pointed out, if this matter stood, it would mean that dissolution of marriage could be obtained on such grounds as those stated by the justices, which, of course, everybody must know perfectly well would be quite contrary to the law of this country. *Appeal allowed. Order discharged.*

Solicitors: *Amery-Parkes & Co.* agents for *A. V. Dickinson,* Hull (for the husband); *Smith & Hudson,* agents for *Payne & Payne,* Hull (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Dicta of ASQUITH, L.J., *applied.* MCINTYRE *v.* HARDCASTLE. [1948] 1 All E.R. 696.

Distinguished. LITTLECHILD *v.* HOLT. [1949] 1 All E.R. 933.

BAKER *v.* LEWIS.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 29, 1946.]

Landlord and Tenant—Rent restriction—Possession—Joint owners—"Landlord"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1); *sched. I, para.* (*h*)—*Interpretation Act,* 1889 (*c.* 63), *s.* 1.

The plaintiffs, two sisters, sought possession from the defendant of a house which was subject to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The house had come into the ownership of the plaintiffs under a will, probate of which had been granted to one of them as sole executrix on Aug. 12, 1942, and she had, by a vesting deed, vested the house in herself and her sister jointly. The plaintiffs sought possession under s. 3 (1) and sched I, para. (*h*), of the Act and brought their claim as joint owners beneficially and legally entitled.

Section 3 (1) of and sched. I (*h*) to the Act give the county court power to make an order for the recovery of possession of a dwelling-house if "the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939]) for occupation as a residence for—(i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother . . ."

HELD: (i) having regard to the wording of para. (*h*) and to the Interpretation Act, 1889, s. 1, joint owners can be a landlord within para. (*h*) of sched. I if they are legally and beneficially entitled.

(ii) if an owner wishes to obtain possession and to take with him into the house persons who are residing with him, but do not come within para. (*h*), the judge, in deciding the other points which arise in the case, ought to take into consideration the fact that there are other people living with the owner in his present premises whom he does not wish to turn into the street.

(iii) in para. (*h*) the words "by purchasing the dwelling-house" has no technical meaning so as to catch an owner, legally and beneficially entitled, who takes under a will, but it refers to the everyday transaction of purchase or buying, and, therefore, the plaintiffs had not "purchased the dwelling-house" within the meaning of the words in para. (*h*) on the death of the previous owner of the property and were not prevented by those words from being granted possession.

Sharpe v. *Nicholls* (1) explained.

[**EDITORIAL NOTE.** It is important to note the *obiter* remarks of SOMERVELL and ASQUITH, L.JJ., that a claim by joint owners would fall within para. (*h*) if the house is required for occupation by one, not all, of them; that sub-para. (ii) must be read as "any son or daughter of theirs"; and that sub-para. (iii) must be read as "their father and mother," constructions which exclude children or parents who are not common to the owners.

AS TO ORDERS FOR POSSESSION WHEN PREMISES REQUIRED BY LANDLORD FOR OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Cases referred to:

(1) *Sharpe* v. *Nicholls* [1945] 2 All E.R. 55; [1945] K.B. 382; Digest Supp; 114 L.J.K.B. 409; 172 L.T. 363.

(2) *Owen* v. *Overy*, unreported.

(3) *Inland Revenue Comrs.* v. *Gribble* [1913] 3 K.B. 212; 42 Digest 735, *1582*; 82 L.J.K.B. 900; 108 L.T. 489.

APPEAL by plaintiffs from West London County Court. The facts are set out in the judgment of MORTON, L.J.

Gratton-Doyle for the plaintiffs.

Mannington-Buller, K.C., and *Roger Willis* for the defendant.

MORTON, L.J.: The plaintiffs, Mrs. Baker and Mrs. Joubert, who are sisters, sought possession of No. 7, Bowfell Road, Fulham, which had been let to the defendant, Joseph Lewis, at a rental of 25*s.* 0*d.* a week. There is no dispute that the tenancy was duly determined by a notice to quit, and, accordingly, Mr. Lewis can only rely on the Rent Restrictions Acts as justifying him in remaining in possession. The property formerly belonged to someone other than the plaintiffs, who made a will leaving this house to the plaintiffs. Probate of that will was granted to the plaintiff, Mrs. Baker, on Aug. 12, 1942, as sole executrix. Before the hearing she had executed a vesting deed vesting it in herself and her sister jointly.

The hearing took place on May 15, 1946. Evidence was given by Mrs. Baker and by the defendant, Mr. Lewis. Certain submissions of law were made, and also certain submissions as to the matter of hardship. The county court judge was in favour of the plaintiffs on the question of greater hardship, but he refused possession on the ground which I shall shortly state. I must first refer to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1):

> No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment and . . . the court has power so to do under the provisions set out in sched. I to this Act.

The plaintiffs relied on para. (*h*) of that schedule, which provides:

> the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for—(i) himself . . .

The county court judge thought that in that section the word "landlord" only referred to one person and had no application where two joint owners were claiming possession. For this reason he refused the plaintiffs possession.

In the present case no question arises in regard to the matter which was discussed by this court in *Sharpe* v. *Nicholls* (1), namely, whether legal personal representatives, not being beneficially entitled, can obtain possession as "landlords," because in the present case the plaintiffs have the legal estate and they are also the sole beneficial owners. As regards the question whether two persons together can constitute the "landlord" within para. (*h*), the matter is not free from authority, although it is not dealt with, so far as I know, in any reported case. On Friday, Oct. 25, 1946, this court decided *Owen* v. *Overy* (2). In that case the parties seeking possession were husband and wife and they had acquired the property in the following manner. The previous owner was a son of theirs who died on July 28, 1937, intestate and a widower without issue. Letters of administration of his estate had been granted to the plaintiffs and the plaintiffs had executed a vesting deed vesting the property in themselves. In the course of my judgment I said:

> The result of that is that the plaintiffs were not only administrators; they, and they alone, as parents of the intestate, were beneficially entitled to the proceeds of sale under the statutory trust for sale which arose on the death of the intestate. The result is that they have not only the legal estate, but the whole beneficial interest in the property. For that reason, in my view, they would be "landlords" within para. (*h*) of the schedule. Further, it is admitted by the defendants, very frankly, that there is a vesting assent, vesting the property in the plaintiffs, which could have been produced at the hearing in the county court.

My brethren agreed with these views. It seems to me that that is a decision of this court that two persons can together constitute a " landlord " within the meaning of para. (*h*). The point was not argued in that case, because, on production of the documents to which I have referred, counsel for the defendants conceded that he could not contend that the plaintiffs were not " landlords," but I would add that, on further considering the matter, I feel no doubt that two persons can be the " landlord " within para. (*h*). One starts with the Interpretation Act, 1889, s. 1 :

> In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears . . . words in the singular shall include the plural.

It seems to me that when two people jointly entitled legally and beneficially are seeking possession of premises there is no reason why they should be excluded from coming within the meaning of the word " landlord " in para. (*h*). They may be seeking possession of the premises for occupation as a residence for themselves, and I do not think that in the paragraph which we are now considering a " contrary intention appears." However, I think that this point is really concluded against the present defendant by the decision of this court in *Owen* v. *Overy* (2).

That being so, these two persons, who are the " landlord " within para. (*h*), require this property as a residence for themselves. Counsel for the defendant relied on the fact that the plaintiffs proposed to bring with them to occupy this house other persons who did not come within the precise words of para. (*h*), and he suggested that these persons could not be taken into consideration when the learned judge was arriving at his conclusion. It is true that the plaintiffs could not, for example, come within para. (*h*) if they " required " the dwelling-house for occupation as a residence for, for instance, a nephew or niece, but I think that, if they require the house as a residence for themselves, the judge, in deciding the other points which arise in the case, ought to take into consideration the fact (if it be a fact) that there are other persons residing with them in their present premises whom they do not wish to turn into the street.

The second point which was put forward by counsel for the defendant was that the words in para. (*h*) " not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939] " excluded the plaintiffs in the present case because they became landlords " by purchasing " on the death of the previous owner within the meaning of these words. He said that the word " purchasing " should be given a technical meaning. I am well aware that the word " purchaser " and the words " by purchase " have in certain contexts a technical meaning which is well-known to all lawyers, but I am not aware of any case in which the words " by purchasing a dwelling-house " have been given any technical meaning. For my part I feel no doubt that they simply refer to a transaction of purchase or buying. If I had felt any doubt on that point I should have been assisted by the decision in *Inland Revenue Commissioners* v. *Gribble* (3), to which counsel for the defendant referred.

There is one more matter to which I should refer. Counsel for the plaintiffs rightly called my attention to a passage in my judgment in *Sharpe* v. *Nicholls* (1) at [1945] 2 All E.R., at p. 60, and he suggested that that passage may have influenced the county court judge in arriving at the conclusion that only one person could be the " landlord " within sub-para. (*h*). In that passage I said :

> In those circumstance, one must consider whether it can be said that the " dwelling-house is reasonably required by the landlord for occupation as a residence for himself or herself " when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house. In my opinion, such a case is not within the terms of para. (*h*) of sched. I at all. Strange results would follow if that were not so. For instance, you might have four legal personal representatives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself or herself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (*h*). It is also to be observed that the words " himself ; or any son or daughter of his . . . ; or his father or mother " seem to refer to a person who is the landlord not in the sense that he or she is one of several personal representatives but in the sense that he or she is the sole owner of the property subject to the tenancy.

Taken apart from its context, that passage might seem to indicate that I may have thought only one individual could be a "landlord" within para. (*h*), but I desire to say that, as appears from the context, my attention was concentrated on the contrast between those who could only come forward as personal representatives and those who could come forward as persons having the beneficial interest in the property, and I did not intend to suggest that two persons could not possibly be a "landlord" within the meaning of para. (*h*) if those two persons were the sole beneficial owners of the property. For these reasons I think that, unless the parties agree on a date on which possession is to be given, the matter must go back to the county court judge for a decision on that point.

SOMERVELL, L.J.: I agree with the judgment which has been delivered and with the reasons which have been given for it. I only wish to add a few words on one point. In the present case, as in *Owen* v. *Overy* (2), the position was simple in that the joint owners were both suing for possession for themselves and were both intending to occupy themselves. In *Owen* v. *Overy* (2) it was husband and wife; in the present case it is two sisters. All I want to say is that I am not in any way implying or suggesting that para. (*h*) is only applicable in the case of joint owners where they are both desiring the dwelling-house for occupation as a residence for all of their number. I myself am inclined to take the view that it has a wider application and that it would cover the case where A, B and C, being joint owners, put forward a claim for possession, alleging that the residence is required for occupation as a residence by A.

ASQUITH, L.J.: I agree. This court has decided in *Owen* v. *Overy* (2) that "landlord" in para. (*h*) of sched. I to the Act of 1933 covers two or more joint beneficial owners, and in *Sharpe* v. *Nicholls* (1) that it does not cover two or more bare personal representatives. Where there are two or more joint beneficial owners, (i), (ii) and (iii) of (*h*) should, I think, be read as follows: in (i) for "himself" read "themselves," in (ii) for "any son or daughter of his" read "any son or daughter of theirs," and in (iii) read "their father or mother." Where, read in this way, neither (i), (ii) nor (iii) has any application, such beneficial owners would fail, for instance, if they proceed under (ii) and are not a married couple with a child, or if they proceed under (iii) and have not got a parent in common; but they would fail in that case not because there are several of them or because they are not a "landlord" within the opening words of the section, but because they could not bring themselves within the language of (i), (ii) or (iii), construed in the way I suggest.

Appeal allowed.

Solicitors: *Willis & Willis*, agents for *Freeborough & Co.* (for the appellants); *E. Arthur Edmonds & Pinhorn* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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lied. LLEWELLYN *v.* HINSON.
8] 2 All E.R. 95.

KENYON *v.* WALKER; STEVENSON *v.* KENYON.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), October 30, 1946.]

Landlord and Tenant—Rent restriction—Letting into possession of exclusive use of certain rooms with use in common of box-room, bathroom and w.c., but with use of kitchen for cooking purposes only—Whether "part of a house let as a separate dwelling" or a "sharing agreement"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), *ss.* 4, 16.

The statutory tenant of a dwelling-house allowed W. to have the exclusive use of certain rooms in the house, together with the use in common with himself of a boxroom, bathroom and w.c., and also the right to use the kitchen for cooking purposes only. The landlord sought to recover possession of the house under s. 4 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the tenant was charging the subtenant an excessive rent, and the tenant sought possession against W. on the ground that there was no subletting of the rooms occupied by W. and that the Rent Restrictions Acts did not apply to them since it was an arrangement to share the house and did not amount to the letting of a separate dwelling.

HELD: that there was a sharing of the kitchen at all times, and therefore a sharing of the house and not a tenancy, so that the tenant could recover possession against the subtenant, but the landlord's action failed.

[**EDITORIAL NOTE.** In *Cole* v. *Harris* (3) the test to be applied to the issue whether there is a demise of part of a house or a sharing of the whole house was stated to be that, if there was a sharing of essential living rooms (which would include the kitchen), there would be a sharing of the whole and not a demise of the part. In *Neale* v. *Del Soto* (1) the arrangement between the parties was held to be a sharing. The present case the Court of Appeal holds to fall on the *Neale* v. *Del Soto* (1) side of the line. A

AS TO SEPARATE DWELLING WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 369-373; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7064.

FOR RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933 (*c.* 32), see HALSBURY'S STATUTES, Vol. 26, p. 265 *et seq.*]

Cases referred to: B

(1) *Neale* v. *Del Soto*, [1945] 1 All E.R. 191; Digest Supp., [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65.

(2) *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55; Digest Supp.; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363.

(3) *Cole* v. *Harris*, [1945] 2 All E.R. 146; Digest Supp.; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50.

APPEALS by the subtenant and the lessor from orders of His Honour JUDGE HURST, K.C. made at East Grinstead County Court and dated May 14, 1946. The facts are set out in the judgment of MORTON, L.J. C

G. G. Baker for W. and the lessor.
F. K. Glazebrook for the lessee.

MORTON, L.J.: In my opinion, this appeal fails. I propose to treat the two cases of *Kenyon* v. *Walker* and *Stevenson* v. *Kenyon* together, as they were so treated in the county court. D

On Feb. 27, 1946, when the proceedings began Stevenson was the owner of a house known as "Orchardfield," Baxters Lane, Chelwood Common, Sussex. He had recently purchased that house. Kenyon had been the tenant of the house. His tenancy had been granted originally by Stevenson's predecessor in title for a period of one year from Oct. 6, 1940, expiring on Oct. 5, 1941. Kenyon continued in possession as tenant after that date, but it is common ground that the tenancy was duly determined by a notice to quit, which expired on Oct. 6, 1944. Accordingly, Kenyon can only claim the right to remain in the premises as a statutory tenant under the Rent Restrictions Acts. Kenyon had let into occupation of part of "Orchardfield," first, Mrs. Walker and another lady, and later Mrs. Walker only. Her mother, Mrs. Springer, lived with her. Stevenson claims possession of "Orchardfield," against Kenyon on the ground that the letting into occupation by Kenyon of Mrs. Walker was a sub-letting of a part of "Orchardfield" (which part was also a dwelling-house to which the Rent Restrictions Acts applied) at a rent which was in excess of the recoverable rent of that part. That claim is based on s. 4 of the Act of 1933 which, so far as is material, is as follows: E F

> . . . an order or judgment for the recovery of possession of a dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom may be made or given where the court considers it reasonable so to do, if the court is satisfied that the rent charged after the passing of this Act by the tenant for any sublet part of the dwelling-house which is also a dwelling-house to which the principal Acts apply was in excess of the recoverable rent of that part. G

In the action of *Kenyon* v. *Walker*, Kenyon was claiming possession against Mrs. Walker and Mrs. Springer, on the ground that the Rent Restrictions Acts did not apply to the arrangement between him and Mrs. Walker. He relied on the fact that (as he alleged) the letting in that case amounted to a sharing of the house, and was not a letting of part of the house as a separate dwelling. At this point I must refer to the definition of dwelling-house in s. 16 of the Act of 1933: H

> "Dwelling house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

It will at once be apparent that the principal question in these two appeals is: Was the letting into occupation of part of the house by Kenyon to Mrs. Walker a letting of that part as a separate dwelling or was it a "sharing" of the hous, to use the phrase which was used in this court in *Neale* v. *Del Soto* (1).

The three issues in the county court were: First, was the rent which Kenyon charged for the portion of the house let to Mrs. Walker in excess of the recoverable rent of that part and, if so, was it reasonable for the county court judge to make an order for possession under s. 4 of the Act of 1933? The county court judge was prepared to answer both of those questions in the affirmative. Secondly, was the letting by Kenyon to Mrs. Walker a letting in which a substantial portion of the rent was attributable to the use of furniture? The judge indicated that he was prepared to find that it was not such a letting. Thirdly, was the letting by Kenyon to Mrs. Walker a letting of a part of the house as a separate dwelling, or was it a "sharing agreement"? The judge held that it was a sharing agreement and that the sub-let portion was not let as a separate dwelling, and, if that finding is upheld by this court, there is an end to both appeals. The judge said:

> I give judgment in both cases. Apart from question: "Is sub-let part a separate dwelling-house?", I would hold plaintiff [*i.e.*, Stevenson] is entitled to judgment. His action is reasonable and rent for sub-let is equivalent to rent for the let and is "excessive." This does not arise if it is a sharing agreement. I have concluded it is a sharing. Very little importance attaches to bathroom and boxroom.

I should say at that point that there was undoubtedly up to a certain time a sharing of the bathroom, but apparently Kenyon objected to Mrs. Walker and Mrs. Springer using it at one stage and they ceased to use it. However, as the judge has said, very little importance attaches to that, because on the authorities, even if they had shared the bathroom, that would not have constituted a "sharing of the house." Then the judgment continues:

> Kitchen sharing brings case within the *Neale* v. *Del Soto* (1) line of cases. They were not given the use of kitchen for all purposes. They never made it a complete living room but they had the right to use at all times for the purpose of cooking, which is the main use of a kitchen. Not like use of bathroom and W.C. Nothing in the agreement debarred them from using the kitchen on any occasions during the day. A year ago parties got so on each other's nerves that it was made plain to sub-tenants they were unwelcome in kitchen, so much so that Mrs. Springer did cooking on an open fire.

What Mrs. Springer did when this unpleasantness arose was, first, to cook on the open fire in the sitting-room of Mrs. Walker and herself. Later, Stevenson supplied a cooker, which was put in a small room opening off their living room. The judge proceeds:

> It wasn't an abandonment of right to share. If sub-tenants had taken matter to court, court would have granted an injunction. There is, therefore, a sharing and it is an unprotected sub-tenancy.

Thus, the judge held plainly that at all material times Mrs. Walker and Mrs. Springer had the right to use this kitchen for the purpose of cooking, and he says: "Nothing in the agreement debarred them from using the kitchen on any occasions during the day." He qualifies that by saying: "They were not given the use of kitchen for all purposes." There is certainly some evidence that Mrs. Walker and Mrs. Springer could use the kitchen for all purposes, but I think the judge was justified in arriving at the conclusion that that was not part of the agreement and I am prepared to decide this appeal on the footing that he held correctly that Mrs. Walker and Mrs. Springer had the right to use the kitchen at all times for the purposes of cooking but not for other purposes.

In those circumstances, there being a letting of the exclusive right to use certain rooms to Mrs. Walker with the right to the joint use, together with Kenyon, of the bathroom, the boxroom and (for cooking purposes) the kitchen, is that a sharing of the house or is it the letting of part of the house as a separate dwelling? For the purpose of answering that question it is necessary to refer to three cases. The first is *Neale* v. *Del Soto* (1) in which the landlord had sub-let to the tenant two unfurnished rooms in a house containing seven rooms and the agreement provided for the use by the tenant jointly with the landlord of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. In delivering judgment in that case, with which my two brethren agreed, I said ([1945] K.B. 144, at p. 147 ; [1945] 1 All E.R. 191, at p. 193) :

> Were the two rooms in question in the present case a part of a house let as a separate dwelling ? In my view, they were not. What was let was the two rooms together with the use, in common with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house and conservatory, and it would be a misuse of language, to my mind, to say that the two rooms, and nothing more, were let as a separate dwelling. The real substance of the matter was that there was a sharing of the house.

In *Sharpe* v. *Nicholls* (2) the county court judge had made the following order :

> And it is ordered that the defendant do give the plaintiff possession of the said land on Apr. 6, 1945, subject to plaintiff allowing defendant a Rent Act protected tenancy of the two front rooms, together with joint use of kitchen and out-offices.

It was held by all the members of this court that that was an impossible order because there could not be a Rent Act protected tenancy of the three rooms together with joint use of the kitchen and outer offices. Any such tenancy would be a sharing of the house and would not be within the Acts.

Lastly, in *Cole* v. *Harris* (3) what had been let was the exclusive use of three rooms on the first floor, together with the right to use, in common with the landlord and the occupant of the three rooms on the top floor, a bathroom containing a W.C. The three rooms of which the tenant had the exclusive use were a sitting room, a bedroom, and a combined kitchen and scullery. So that in that case the court was faced with this problem : Does the sharing of a bathroom containing a W.C. take the case out of the operation of the Rent Restrictions Acts ? Lawrence, L.J., thought that it did, but the majority of the court thought that it did not. I may, perhaps, be forgiven for referring first to my own judgment, because MacKinnon, L.J., expressed his agreement with the test which I laid down. ([1945] 2 All E.R. 146, at p. 152) :

> I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows : There is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as " living rooms " or " dwelling rooms." To my mind a kitchen is fairly described as a " living room ", and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason. On the other hand, both the bathroom and the W.C. are rooms which are only visited on occasions for a specific purpose, and I think they may fairly be classed with such a room as a box-room, though no doubt it is not visited so often. I think that this test gives a reasonable construction to the Acts, and one which is in accordance with their general scheme and intention.

MacKinnon, L.J., said this (*ibid.* at p. 148) :

> It is, I think, difficult to formulate any principle of law which separates what I have called the contrasted conceptions of (*a*) a demise of part of a house as a separate dwelling, and (*b*) an agreement to share the use and occupation of a house. But I think Morton, L.J., provides the best formula by saying that to create (*a*) there must be an agreement by which the occupier has the exclusive use of the essential living rooms of a separate dwelling-house. After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A W.C. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is.

Counsel for the " subtenant " and the lessor asks us to draw a distinction between the present case and the cases to which I have referred on the ground that the sub-tenant, Mrs. Walker, and her mother were given the right not to share the use of the kitchen generally but only to use the kitchen for the purpose of cooking. To my mind, ingenious though the argument is, we should be introducing an unwarrantable extra refinement into the test which has been already laid down by this court if we accepted that argument. After all, the primary purpose of a kitchen is for cooking, and in this case there is no doubt that the use of the kitchen, at any rate for that primary purpose, was shared by the parties. It seems to me that the present case comes both within the wording of the test as I expressed it and as it was expressed by MacKinnon, L.J. I said : " nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling." I think the parties did share the kitchen in any reasonable meaning of that phrase. Again, MACKINNON, L.J., said: "there must be an agreement by which the occupier has the exclusive use of the essential living rooms of a separate dwelling-house," and he says then: "A kitchen, I think, is a living room."

For these reasons I think the judge was right in this case in finding that there was a sharing of the house within the test laid down in the cases to which I have referred.

The result is that, in my view, there was at all material times a sharing of this house between Kenyon, on the one hand, and Mrs. Walker and her mother, who lived with her, on the other. If that is the right view, no other point arises on either of these appeals. Stevenson cannot recover possession against Kenyon because the case does not come within s. 4 of the Act of 1933, and Kenyon can recover possession as against Mrs. Walker and Mrs. Springer because the arrangement they came to is not protected by the Rent Restrictions Act. Thus, the judge was right in refusing possession to Stevenson and granting it to Kenyon, and this appeal fails.

TUCKER, L.J.. I agree. To succeed in this case counsel for Mrs. Walker and the lessor has got to show that the county court judge erred in law. He had to apply to the facts of these cases the law as laid down by this court in *Neale* v. *Del Soto* (1) and *Cole* v. *Harris* (3). In my view, he applied the right test and on the facts to which he applied that test he came to the correct conclusion.

ASQUITH, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Markby, Stewart & Wadesons*, agents for *George Coleman & Son*, Haywards Heath, Sussex (for the sub-tenant and lessor); *Langhams & Letts*, agents for *Dawson & Hart*, Uckfield (for the lessee).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law*].

SUTCLIFFE *v.* HOLMES AND ANOTHER.

[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 18, 21, 22 and November 7, 1946.]

Animals—Trespass—Defences—Duty to fence—Enclosure of common land—Wrongful act of third party.

The defendants' sheep strayed from L. moor, on which the defendants had the right to pasture them, over land belonging to the M. corporation and thence along a road from which they gained access to the plaintiff's land situate about a mile distant from L. moor. In an action by the plaintiff in respect of the damage done by the trespassing sheep,

HELD: (i) the defence that the plaintiff was under a duty to fence against L. moor would not avail the defendants because there was no evidence that the plaintiff's land was inclosed from, or was originally adjacent to, the moor.

(ii) assuming that the M. corporation were in breach of a duty to fence against L. moor, the defendants could not avail themselves of the defence that the damage was caused by the wrongful act of a third party because they were aware of the breach and could reasonably have guarded against its consequences.

(iii) even if the defendants had a right of recovery over against M. corporation, it did not follow that the corporation was directly liable to the plaintiff.

(iv) it was, therefore, the defendants' duty to see that the sheep did not escape, and they were liable to the plaintiff.

[**EDITORIAL NOTE.** The first authorities relating to cattle trespass were among the earliest of our recorded decisions. They date from a case referred to in the judgment—Anon., reported Y.B., 20 Ed. 4, fo. 10, pl. 10—which was decided as long ago as 1480. "It behoves [the owner of cattle] to use his common so that he shall do no hurt to any man," says BRIAN, C.J., in that case, "and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common and out of the land of any other." In the present case two defences which are open to the owner of straying cattle are held not to be available to the defendants by reason of the facts. An attractive argument, based on the desirability of avoiding circuity of action, that the plaintiff should be able to sue a third party who owes him no direct duty is rejected as being, in the circumstances, against authority.

As to Liability for Trespass of Domestic Animals, see HALSBURY, 2nd Edn., Vol. 1, pp. 544-46; and for Cases see Digest, Vol. 2, p. 223 *et seq.*, Nos. 154-157, 163, 172, 174-178.]

Cases referred to:

(1) *Barber* v. *Whiteley* (1865), 34 L.J.Q.B. 212; 29 J.P. 678; 7 Digest 291, *179*.

(2) *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; 4 H. & C. 263; 35 L.J. Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd. sub nom. Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 2 Digest 228, *195*.

(3) *Read* v. *Edwards* (1864), 17 C.B.N.S. 245; 5 New Rep. 48; 34 L.J.C.P. 31; 11 L.T. 311; 2 Digest 227, *187*.

(4) *Anon.* (1496), Keil. 30; 72 E.R. 186; 2 Digest 205, *17*.

(5) *King* v. *Rose* (1673), Freem. K.B. 347; 89 E.R. 258; 2 Digest 225, *177*.

(6) *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527; 126 E.R. 684; 7 Digest 283, *137*.

(7) *Smith* v. *Stone* (1647), Sty. 65; 82 E.R. 533; 2 Digest 225, *172*.

(8) *Topladye* v. *Stalye* (1649), Sty. 165; 82 E.R. 615; 2 Digest 223, *153*.

(9) *Smith* v. *Great Western Ry. Co.* (1926), 135 L.T. 112; 42 T.L.R. 391; 36 Digest 199, *384*.

(10) *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest 28, *143*.

(11) *Sharp* v. *Harvey* (1935), L.J.N.C.C.R. Vol. II, 261.

Appeal by the plaintiff from an order of His Honour Judge Batt, made at Todmorden County Court dated March 26, 1946. The facts appear in the judgment of Somervell, L.J.

W. K. Carter for the plaintiff.
E. Milner Holland for the defendants. *Cur. adv. vult.*

Nov. 7. Morton, L.J.: I have read the judgment that is about to be delivered by Somervell, L.J., and I agree with it. Asquith, L.J., has asked me to say he also agrees with it.

Somervell, L.J. read the following judgment: This was a claim by the plaintiff for damage done to his land by sheep belonging to the defendants trespassing on his land. The county court judge held that damage to the extent of £25 had been done by sheep belonging to the two defendants which were trespassing on the plaintiff's land. He dismissed the claim on the ground that the properties owned or occupied by the plaintiff were formerly part of the "commons of Erringdon and district," and that "it would be a term of the enclosure awards that those to whom the enclosures were granted should fence against the common or commons surrounding the enclosures." He based this latter conclusion not, I think, on any express evidence of the terms of the enclosures, but as an implication he was entitled or bound to draw in law by reason of the decision in *Barber* v. *Whiteley* (1).

The case as argued before us raises difficult questions of fact and of law. I will deal first with the facts. No enclosure award was produced or traced dealing with the plaintiff's lands. It is clear on the evidence and common ground before us that the defendants' sheep came from Langfield Moor on which both defendants had a right, in common with others, to pasture sheep. Langfield Moor is about a mile from the plaintiff's property. In between, starting from Langfield Moor, is a considerable area of land belonging to the Morley Corporation. There was access to this land from the moor and across it. The land was said to be derelict and the walls had not been attended to since 1894. From where the Morley Corporation land ended the sheep proceeded along a road and from the road direct to the plaintiff's land or through lands of an adjoining occupier.

Counsel for the defendants submitted that there was evidence to support the finding that the plaintiff's land was formerly part of the commons of Erringdon and district and that, if there was any evidence, this court would not interfere. He relied on an abstract of feoffment of 1628, an extract from the Erringdon Valuation Book of 1828, a conveyance of 1845, extracts from the Sowerby and Soyland Enclosure Award of 1849, and a conveyance of 1858. These must, he submitted, be read in the light of the fact, as shown by the ordnance map, that the lands today inclosed, including the plaintiff's land, are surrounded by moors from which it might reasonably be presumed they had been inclosed. It is unnecessary to go through the documents in detail. Admittedly, there are no statements clearly referable to the plaintiff's lands. The documents show that there had been inclosures from these moors from early times. There are references to "old inclosures" as descriptive of land near (and possibly including) the plaintiff's lands. Counsel for the defendants also relied on some passages in the judge's note of the oral evidence which again were of a very general character. Counsel for the plaintiff raised no objection to our regarding any statements in these documents as evidence. He submitted that to show there had been a number of inclosures from moors was not in itself any evidence that the plaintiff's lands had been inclosed from moors. He further submitted that there was no evidence that the plaintiff's land had been inclosed from Langfield Moor. I take the view that there was some, though very slight, evidence that the plaintiff's land had been inclosed from some moor on which at the time there were probably grazing rights. In my view, there was no evidence on which a court could find, and the judge did not purport so to find, that the plaintiff's lands were inclosed from Langfield Moor, and the general lie of the land, as shown by the ordnance map, makes it more probable that, if inclosed from a moor, it would be from Bellhouse Moor.

Before considering the law, it is convenient to indicate the defendants' main alternative point, which may be stated as follows: Whatever the origin of the inclosure of the plaintiff's land, the Morley Corporation land clearly was inclosed from Langfield Moor. In law the corporation was under an obligation to fence against Langfield Moor, and its failure to fence was a wrongful act or default causing the trespass and affording a good defence to the plaintiff's claim.

The owner of livestock is, according to English law, under a duty to keep it from straying on to the land of others. The duty is not absolute, but it is more than a duty not to be negligent: see *Fletcher* v. *Rylands* (2) (L.R. 1 Ex. 265, at pp. 280-282). The party damaged had from early times an action of "cattle-trespass." That this duty falls on those who pasture sheep on a common was laid down in a case reported in the Year Book, 20 Ed. 4, Michaelmas Term, Folio 10, and referred to by BLACKBURN, J., in the above passage in *Fletcher* v. *Rylands* (2) and by WILLES, J., in *Read* v. *Edwards* (3) (34 L.J.C.P. 30, at p. 32), where a translation of the report is set out in a note. The defence was that the defendant's sheep were on a common, that the plaintiff's close adjourned the common, that the sheep entered without the defendant's knowledge, and that immediately the defendant knew what had happened he drove the sheep out. BRIAN, C.J., with whom LITTLETON, J., agreed, held (34 L.J.C.P. 30, at p. 32) that this plea was bad as, the common being uninclosed, the defendant "ought to keep his beasts in the common and out of the land of another."

It is, however, a defence available to a defendant that the plaintiff was under a duty to fence. I will consider, first, the case where the plaintiff's land adjoins the defendant's land from which the cattle escaped. The principle is illustrated in *Barber* v. *Whiteley* (1), to which the judge referred and relied on as stated above. The plaintiff's sheep had strayed on to the defendant's land and the defendant had taken the sheep, claiming to be entitled to do so under the right of distress damage feasant. If the defendant was under a duty to fence as against the plaintiff, this defeated his right of distress, as it would have defeated a claim for cattle-trespass against the plaintiff. The defendant's farm was land inclosed from the waste of a manor under an ancient grant from the lord of the manor. Animals were at that time grazed on the waste. The plaintiff's land was an adjacent part of the original waste inclosed under a later inclosure award. There was evidence that the owners and occupiers of the defendant's farm had repaired the fence prior to and after the inclosure of the plaintiff's farm and down to two years before the events in issue. The court did not regard this last evidence as in itself decisive, though they attached great weight to it. They relied also on the probability of the lord attaching a duty to fence to the original grant allowing the inclosure of the defendant's farm. COCKBURN, C.J., said (34 L.J.Q.B. 212, at p. 216):

> Now the very purpose of inclosing lands by the lord must have been that the land should be used as cultivated land, and since such a use, beneficial to the owner alone, makes it necessary that the land should be protected from grazing animals, it is more

likely that the lord would enforce the obligation of keeping up a fence and so preventing a trespass on the person whom he had allowed to inclose than on the other tenants of the manor, who had rights of common over the waste which they could have exercised before the inclosure without being subject to the risk of having their cattle distrained for trespassing, and who would be, moreover, a varying and fluctuating body.

The first defence put forward must be on the basis that the plaintiff was under a duty to fence as against Langfield Moor, and it is sufficient to say that, in my opinion, there is no evidence that the plaintiff's farm was inclosed from Langfield Moor. If it had been so inclosed and originally adjacent to the moor, a difficult question would have arisen whether this duty survived as against the owners of sheep on Langfield Moor, the plaintiff's land no longer being adjacent to the moor. There is authority for the proposition that the duty to fence can only be raised and exist as between adjacent lands: see Brian, C.J., in *Anon.* (4); *King* v. *Rose* (5). Though the facts were somewhat different, this principle is affirmed by Heath, J., in *Dovaston* v. *Payne* (6). It seems to me to follow from these and other authorities that the situation of the plaintiff's lands in relation to Langfield Moor would, on any view, be an answer to this defence.

It is necessary now to consider the alternative argument of counsel for the defendants, already set out, which is independent of whether the plaintiff's land was originally inclosed from a common. The first question is whether there is evidence that the Morley Corporation were under a duty to fence as against Langfield Moor. I am prepared to assume on the evidence that the Morley Corporation land was inclosed from Langfield Moor. If one contrasts the facts of the present case with the facts in *Barber* v. *Whiteley* (1), the evidence here as to actual maintenance is very weak. The walls had not been maintained since 1894. This is relevant on a later point, but I am prepared to assume that the duty to fence can be implied on the grounds set out by Cockburn, C.J., in the case cited. Is the wrongful act of a third party a defence to an action of cattle-trespass? The old authorities and *dicta* are conflicting whether the wrongful act of a third party is a defence. In *Smith* v. *Stone* (7) Roll, C.J., said (Style 65, at p. 65):

> He that drives my cattle into another man's land is the trespasser against him, and not I who am the owner of the cattle.

On the other hand, the same judge said (Style 165, at p. 166) in *Topladye* v. *Stalye* (8):

> If cattle be stolen and put into my ground, I may take them damage feasant or bring an action of trespass against the owner.

Counsel for the defendants referred to *Smith and Others* v. *Great Western Ry. Co. and Others* (9) as a case where a defendant successfully pleaded the act of a third party as a defence to a claim based on the *Fletcher* v. *Rylands* (2) principle. The judgment of the Court of Exchequer Chamber in the latter case, which was affirmed and approved in the House of Lords, as appears from the passage already referred to in this judgment, applied the general principles of cattle trespass to a reservoir from which water had escaped and caused damage. In *Smith* v. *Great Western Ry. Co.* (9) oil escaped from a tank sent in a defective condition by the defendant oil company to the defendant railway company for carriage. Avory, J., held the oil company liable and the railway company not liable, adopting what was said by Lord Moulton in a Privy Council appeal, *Rickards* v. *Lothian* (10). In the latter case, Lord Moulton was dealing with the malicious act of a third person which the defendant could not reasonably have foreseen or provided against. Avory, J., found that the railway company were ignorant of the defect in the tank entrusted to them, and, as soon as they discovered it, took immediate steps to remedy it. The reasoning in both cases seems to me to be based on findings that the defendant was unaware of the act or default at the time, was guilty of no negligence in being unaware of it, and could not reasonably have foreseen and guarded against it or its consequences. If this is right, it cannot avail the defendants in the present case. The defendants were well aware of the alleged default by the Morley Corporation in not fencing against the moor, as this state of affairs had existed for years. Steps could have been taken in the matter. It was not suggested that any steps had been taken by the defendants or other commoners to enforce the rights which it is claimed the commoners have against the Morley Corporation. It is unnecessary to consider the form in which these rights could be enforced, but I can think of more than one method by which, assuming they exist, they could be effectively exercised. Having acquiesced in the failure to fence, it seems to me it was their duty to see that the sheep did not escape as laid down in the above cited case in the Year Book, 20 Edw. 4.

Counsel for the defendants put the same point in a somewhat different way. One may simplify the facts of this case by considering three holdings—A's adjoining B's, and B's adjoining C's. B is under a duty to fence against A, but C is under no duty to fence against B. Through B's default, A's cattle come from his land through B's on to C's. Counsel submitted that C should be entitled to sue B in negligence, A being freed from liability. He adopted as part of his argument the reasoning on this issue set out in Mr. Glanville Williams's book on Liability for Animals, at p. 223. He admitted that such authority and *dicta* as existed were against him. The argument is mainly based on the suggestion that to allow C to sue B avoids circuity of action. There are, however, many cases in which a defendant sued and liable may have a right of recourse over against a third party. This is in itself no reason for holding that the third party is directly liable. So to hold, on the facts as set out above, would be to treat the duty to fence as against A as a duty owed to C. This is inconsistent with the authorities already cited and I see no grounds in principle in favour of it. It is, therefore, unnecessary to consider whether, having regard to the fact that the plaintiff's land did not directly abut on the corporation's land, he could, on any view, have invoked this principle.

Our attention was drawn to *Sharp* v. *Harvey* (11), a decision of JUDGE WETHERED. In that case the judge found that some of the defendant's sheep had escaped from a common through defective fences into A's field, which abutted on the common, and thence on to the plaintiff's farm causing damage. He held that A's failure to keep up his fences was the breach of a duty to maintain fair fences against the common. In the course of a careful judgment, with most of which I agree, he laid down as a general principle that, if the defendant's animals enter the plaintiff's land owing to the wrongful act of a third party, the defendant is not liable. For the reasons I have given, I think this is too broadly stated. The judge should, I think, have considered the question whether the defendant knew or ought to have known of the defect and ought to have taken steps to have it remedied or seen that the sheep did not escape as a result of it.

For these reasons, I think the appeal must be allowed and judgment should be entered for the plaintiff for £25 damages with costs here and below. I think the county court judge was wrong in not realising, on the basis on which he decided in the defendants' favour, that there must be evidence that the plaintiff's land was inclosed from Langfield Moor. The alternative points on which the defendants sought to support the judgment have been dealt with.

Appeal allowed with costs.

Solicitors: *Williamson, Hill & Co.*, agents for *Eastwoods, Sutcliffes, Sager & Gledhill*, Hebden Bridge (for the plaintiff); *Preston, Lane-Claypon & O'Kelly*, agents for *Waddington & Son*, Burnley (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* ST. EDMUNDSBURY AND IPSWICH DIOCESE (CHANCELLOR) : *Ex parte* WHITE AND ANOTHER.

[King's Bench Division (Lord Goddard, C.J., Lewis and Oliver, JJ.), November 6, 7, 1946.]

Crown Practice—Certiorari—Consistory court.

A writ of *certiorari* does not lie to a consistory court. There is no precedent for the issue of such a writ, and, as the spiritual courts are not inferior courts to the King's Bench Division of the High Court, it does not follow that because prohibition would lie, *certiorari* must lie.

[**EDITORIAL NOTE.** The principle that a writ of *certiorari* will only lie to an inferior court would seem to have been first laid down in 1656 : see *Re Cassock* (1 Lilly's Register 253, 353 ; Style's Practical Register, 4th ed., 154)—a proposition also expressed by Holt, C.J., in *Grenville* v. *College of Physicians* (1700) (12 Mod. Rep. 386 ; 88 E.R. 1398), and in *Smith* v. *Cross* (1703) (7 Mod. Rep. 138 ; 87 E.R. 1148), and acted on in many more modern cases. It is the principle underlying the refusal of the court to direct the issue of *certiorari* to the Central Criminal Court : *R.* v. *Boaler* (1892) 67 L.T. 354 ; 56 J.P. 792 (a case, it should be noted, before the institution of a Court of Criminal Appeal), on the one hand, and, on the other, the issue of the writ to the Cinque Ports Court (*Tyndal's Case* (1632) (Cro. Car. 252, 264, 291 ; 79 E.R. 820, 831, 855)), local courts, and licensing justices. In some instances modern statutes giving rights of appeal from inferior courts have rendered recourse to the writ unnecessary. As an illustration of the application of the general principle mentioned above, *certiorari* will not lie to a county court in a matter where the county court judge has the same powers as the High Court, *e.g.* in bankruptcy : see *Skinner* v. *Northallerton County Court Judge* ([1899] A.C. 439).

As to what Courts Certiorari may issue to, see HALSBURY, Hailsham Edn., Vol. 9, pp. 851-873, paras. 1442-1475 ; and for Cases, see DIGEST, Vol. 16, pp. 400-402, Nos. 2438-2466.]

Cases referred to :—

(1) *Isherwood* v. *Oldknow* (1815) 3 M. & S. 382 ; 105 E.R. 654 ; 31 Digest 422, *5681*.

(2) *Ricketts* v. *Bodenham* (1836), 4 Ad. & El. 433 ; 5 L.J.K.B. 102 ; 111 E.R. 850 ; 19 Digest 308, *1069* ; *sub. nom. Bodenham* v. *Ricketts*, 1 Har. & W. 753 ; 6 Nev. & M.K.B. 170, 537.

(3) *Mackonochie* v. *Penzance* (*Lord*) (1881) 6 App. Cas. 424 ; 50 L.J.K.B. 611 ; 44 L.T. 479 ; 45 J.P. 584 ; 19 Digest 224, *16*.

(4) *Caudrey's Case* (1591), 5 Co. Rep. 1a ; 77 E.R. 1 ; 19 Digest 224, *12* ; *sub. nom. Caudrey* v. *Atton*, Poph. 59.

(5) *Morris* (*B.O.*) *Ltd.* v. *Perrot and Bolton*, [1945] 1 All E.R. 567 ; 172 L.T. 234 ; Digest Supp.

Motion for an order of *certiorari* to remove into the High Court to be quashed an order made by a consistory court. The order was a decree of the Chancellor of the diocese authorising a faculty to issue with regard to a grave. A preliminary point was taken that the court had no jurisdiction to proceed with the matter because *certiorari* did not lie to a consistory court.

Ralph Sutton, K.C., and *Michael Stranders* for the applicants.

J. Neville Gray, K.C., and *Humphrey King* for the respondent.

Lord Goddard, C.J. : This case has given rise to an interesting discussion of a somewhat historical nature. Counsel for the applicants obtained leave from a divisional court to move for an order in the nature of a *certiorari* to bring up and quash an order made by the consistory court of the diocese of St. Edmundsbury and Ipswich. I hope I have given the court its proper title. I am not sure whether I should not say the consistory court of the bishop of the diocese.

We need not go into the question of merits, nor need we go into the question of what the nature of the order was, except to say that it was a decree of the chancellor authorising a faculty to issue with regard to the grave of a child.

Counsel for the respondent took the preliminary point that we could not proceed with this matter because *certiorari* does not lie to a consistory court. It would be sufficient for this court to say, when they find that from the earliest days of the King's courts no writ of *certiorari* has ever been shown to have been issued by this court to an ecclesiastical court, that it is far too late now to come and ask this court to make a precedent and order a *certiorari* to issue. True, as I shall show later, prohibition has lain to the ecclesiastical courts since the 12th century, and probably earlier, but no trace can be found of a *certiorari* ever having been granted or even moved. As I said in the course of the argument, Lord Ellenborough in *Isherwood* v. *Oldknow* (1) (3 M. & S. 382 at pp. 396, 397), said that *communis opinio* is evidence of what the law is, and it seems abundantly clear that there has been a *communis opinio* among lawyers that *certiorari* does not lie, because in the hundreds of cases which have come before the King's courts in the old days and afterwards in this court in which an excess of jurisdiction has been alleged against a spiritual court, there is no trace that counsel has ever attempted to obtain more than a prohibition or suggested that *certiorari* has been granted.

Prohibition prohibits a court from entertaining an action, or from, in proper cases, proceeding on the judgment or other matter in the court. *Certiorari* is a writ by which the record of the court is brought up to be examined in this court, and it may be an attractive argument to say that, if prohibition lies, *certiorari* must lie, because the result of the two things is exactly the same—the court issues the writ if satisfied there is an excess of jurisdiction, and, therefore, if they can issue a writ to a spiritual court prohibiting them from entertaining a case on the ground that it is outside the jurisdiction, it must necessarily follow that the court is able to issue a writ of *certiorari* so as to be able to examine the record to see whether a matter is beyond the jurisdiction, and, if so, to quash it.

As I say, it would be enough in this case to say that the court is not prepared in the 20th century to make a precedent which, if it had been open to the applicants in this case, must have been open before. An unbroken and universal practice is shown, that it has never been considered that *certiorari* lay to a spiritual court, but, although I do not pretend that in the interval which has elapsed since this case was opened I have been able to pursue any deep historical researches, I think it is useful to see if we can find the principle which underlies the reason for saying that, although prohibition may lie, *certiorari* will not. I think it is to be found very largely in the fact that *certiorari* will only lie to an inferior court, and so the question arises whether the courts christian or spiritual courts are inferior courts in the true sense of the word "inferior," that is, to this court.

It is, no doubt, a very attractive argument to say that they must be inferior to this court or else this court would not grant a prohibition, but there are certainly *dicta* by very learned persons to be found which seem to show that spiritual courts are not inferior courts in the sense that this court can treat them as such for the purpose of examining their records. Littledale, J., a lawyer of very great learning and eminence, in *Ricketts* v. *Bodenham and others* (2) distinctly said, having been referred to some cases with regard to courts of inferior jurisdiction (4 Ad. & El. 433 at p. 446):

> Those are cases of common law courts, which are inferior to the courts of Westminster Hall; but ecclesiastical courts are not so.

Sir Frederick Pollock, who was arguing the case, admitted that in some sense they may be termed superior courts, and during the argument Sir John Campbell, who at that time was Attorney-General—this case was argued in 1836, at which time the spiritual courts were much more active and vigorous than they are at the present day when their jurisdiction has been taken away so far as the laity is concerned—said (*ibid.* at p. 440):

> The authorities cited as to inferior courts do not apply to the spiritual courts, which are courts christian and superior, though liable to prohibition if they exceed their jurisdiction.

I think that the reason is to be found in this. There has always been in England more than one system of law. I will not say that the canon and civil law is as old as the common law, but it is, at any rate, of antiquity approaching the common law, and was very vigorous and had great effect in the days of the Plantagenets. The common law existed side by side with the civil law, and there were the two sets of courts, the courts spiritual and the common law courts. The common law courts were generally called the King's courts, but there is no doubt, and there is the authority of Coke, C.J., for saying it, that the ecclesiastical law was the King's ecclesiastical law. In the age-long conflict there has always been in England between the church and state, the church courts at one time seeking to extend their jurisdiction and the common law courts seeking to control them and extend their own jurisdiction, someone had to decide where the boundary line was to be placed because of these two different systems. The civil law and the canon law were wholly different systems from the common law, and with these two bodies of law, each of them administered in vigorous courts presided over by great men, existing side by side, conflict was inevitable. It is worth remembering what LORD BLACKBURN said on this subject in *Mackonochie* v. *Lord Penzance* (3) (6 App. Cas. 424, at p. 446):

> The ecclesiastical law of England is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the courts of Queen's Bench, Common Pleas and Exchequer, to which the term common law is sometimes in a narrower sense confined, but also that law administered in chancery and commonly called equity, and also that law administered in the courts ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm,—and form, as is laid down in *Caudrey's* case (4), the King's ecclesiastical law.

LORD BLACKBURN is saying that there are three systems of jurisprudence in England. There is the common law in its narrower sense, the law as administered in this court; there is equity administered by the Chancellor; and the ecclesiasical law administered in the King's ecclesiastical courts; and they are all three separate systems of law and all three existing side by side. There was another court, which was presided over by civilians and in which civilians practised, which again had its own separate body of law, and that was the High Court of Admiralty. There you had what, I think, one may say was a fourth system, because the law administered in the High Court of Admiralty, largely borrowed from the continental law, the ancient law of Brittany and the law and practice of merchants in the Mediterranean, was being administered as a separate branch of jurisprudence and constantly found itself in conflict with the common law courts.

With this position of separate systems of law, someone had to control the respective jurisdictions so that they did not constantly clash. A perusal of HOLSWORTH'S HISTORY OF ENGLISH LAW will show the never-ending dispute between the courts, not only between the ecclesiastical and the common law courts, but between the Court of Chancery and the common law courts, and more especially, coming down to much more recent times, the great conflict which prevailed between the Court of Admiralty and the High Court of common law. It seems to me from such little research as I have been able to give to this matter, that from a very early stage the King took on himself the duty or the power or right of deciding the boundaries between the common law courts and the ecclesiastical courts, and he did it by his writ of prohibition. That was a writ which, I think it will be found, in the early days—I speak on this with some hesitation—was a prerogative writ issued by the King himself by virtue of his prerogative. When you come to 1285, which was the reign of Edward I, sometimes called the English Justinian, the statute of *Circumspecte Agatis* was passed, in which the King limited the jurisdiction of the common law courts as against the ecclesiastical courts, because the statute—I believe there is some dispute among learned persons whether it is properly called a statute, but it is always quoted as a statute and is to be found in the Statutes at Large—is directed by the King to his judges saying: "Use yourselves circumspectly in all matters concerning the . . . clergy," and then setting out the things the judges of the land were not to interfere with. Briefly, it comes to this, that by that statute, and by the statute passed in the reign of Edward II, called *Articuli Cleri*, you find again set out in great detail those things over which the ecclesiastical courts were to have exclusive jurisdiction. Briefly, it was simply that in matters of purely temporal concern the common law courts were supreme; in matters which appertained to the church, the church courts were supreme, and the *Circumspecte Agatis* finishes in this way:

> In all cases afore rehearsed the spiritual judge shall have power to take knowledge notwithstanding the King's prohibition.

It was inevitable that there should be some control exercised by some one if one of these courts exceeded its jurisdiction, and, as the common law courts were the courts from which the prerogative writs came to be issued, it seems to me it was not unnatural that the King's Bench should assume the right of issuing the prohibition to the spiritual court and saying: "You are not going to entertain that case because it is outside the statute of *Circumspecte Agatis* and outside the *Articuli Cleri*, and is a matter which is temporal, and, therefore, within our jurisdiction." Someone had to issue the writ. The King had issued it in the first instance; then his courts became the proper medium of issuing the prerogative writs; and thereby to that extent were controlled the activities of the spiritual court, but the King's courts never claimed, once the case was in the spiritual court, to call on the spiritual court to return the record into this court that they might examine it, although there is no doubt that they had the power to issue a prohibition even if the case had been heard to prevent the court apparitors or proper officers from imposing penances or other spiritual sanctions on the person whom they alleged had offended. LORD DENMAN, in *Ricketts* v. *Bodenham* (2) points this out (4 Ad. & El. 433, at p. 441):

> And there is no doubt that in the case of prohibitions to be granted *for the sake of trial* [by which I understand he means to prohibit the trial] as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, *unless the defect appears on the face of the pleadings.*

So, the court would not interfere after trial except in a clear case where, on the face of the proceedings of the court, it was shown that the court was acting without jurisdiction.

It seems to me, therefore, that it does not follow that because prohibition would lie, *certiorari* must lie, and it does not follow for the reason that the spiritual courts were not inferior courts to this court. If they had been inferior courts, the judgments of this court would have been binding on the inferior courts. I do not think it has ever been supposed, although I have no doubt the great ecclesiastical judges in the past paid attention to decisions of the King's Bench or of the other common law courts on a matter which was material to the case they were deciding, that the civilians at Doctors Commons were bound by the decisions of the courts of common law in the same way that judges sitting at *nisi prius* are bound by the decisions of the whole court or as we are bound by the decisions of the Court of Appeal and the House of Lords, because they were two separate jurisdictions, as separate for many purposes as can well be imagined. They were administering different systems of law, they were administered by different judges, and the advocates who appeared before them were not barristers but were doctors of civil law admitted by a separate body and performing entirely different functions from common law courts.

In those circumstances, one can see how this matter grew up, why it was that prohibition would lie, although there has never been any attempt to issue a writ of *certiorari*. I cannot help thinking that it is somewhat analogous—I do not say wholly analogous—to the position that existed between the courts of common law and the court of the Chancellor before the Judicature Act. One of the reasons for what is called the fusion of law and equity into one system was that the Chancellor from very early times right down to the time of the Judicature Act always asserted a right to restrain persons by injunction from either taking proceedings or pursuing their remedies after they had got a judgment in the common law courts. There was a case in the Court of Appeal in 1945 [*Morris (B.O.), Ltd.* v. *Perrott & Bolton* (5)] which dealt with the question where a person recovered damages in respect of the same cause of action against two people. It was pointed out in that case, I remember, how a plaintiff was never allowed, although he had got two separate judgments against two people, to satisfy his judgment more than once, if it was the same cause of action. The means which existed for preventing his doing so, although he had got two perfectly good judgments, was that the Chancellor would restrain him because it would be against conscience that he should recover twice over. The Chancellor restrained the plaintiff from executing more than once. When once he had got complete satisfaction, there was an end of it. That is not unlike the present position, because the Chancellor, although he did not issue prohibitions, could issue injunctions. Prohibition was a prerogative writ, and the King had confided the exercise of his prerogative to the King's Bench, but the

Chancellor acted by means of injunction which had the same effect of preventing the subject pursuing his remedy in a common law court. Yet the Chancellor never claimed the right to enquire into the validity of a common law judgment either by means of a writ of *certiorari* or any other means.

So, too, with regard to the High Court of Admiralty. The books are full of cases where the Court of King's Bench issued prohibitions to the Admiralty Court before the beginning of the 19th century, when the genius of LORD STOWELL had laid the foundations of the high regard in which the Court of Admiralty has been held in this country, and there were many cases in which the Court of Admiralty tried various devices to arrogate to itself the business which the common law courts considered to be their exclusive jurisdiction. Again—this will all be found set out in HOLDSWORTH'S HISTORY OF ENGLISH LAW—you will find from a very early stage, and during the Stuart period particularly, when great civilians like SIR LEOLINE JENKINS presided in the Court of Admiralty, there were constant conflicts between this court and the court of Admiralty with regard to jurisdiction. The common law courts often issued prohibitions against the Admiralty for proceeding with a case, but in no single case did they ever bring up by *certiorari* the proceedings in the court to be examined. That seems to me to be because it was recognised that the Court of Admiralty was a High Court of Admiralty, just in the same way as the ecclesiastical courts were High Courts in their own particular sphere.

I summarise the matter thus—ecclesiastical courts are not inferior courts. They are as unfettered in spiritual causes as is the Supreme Court in temporal causes. If the former encroach or trespass on the temporal field, the King, who is "supreme governor in these his realms for all persons in all causes as well ecclesiastical as temporal," interferes by means of his prerogative writ of prohibition the issue of which is entrusted to his High Court. Moreover, the writ of *certiorari* issues not only for the absence or excess of jurisdiction, but also for correcting and quashing judgments or orders of those courts from which error did not lie. If the writ could issue in the one case, I can see no reason why it should not issue in all. In theory the judges of the common law courts have no knowledge of, or, at least, are not expert, in the system of law administered, by the ecclesiastical courts, and could not, therefore, presume to examine their records for the purpose of correcting their judgments.

I entirely agree with one of the arguments which junior counsel for the applicant addressed to us that, though an appeal lies from the Consistory Court to the Court of Arches and now to the Judicial Committee, that does not affect the matter one way or the other. There always has been an appeal, so the subject who complained that the court had exercised its jurisdiction over him when it had no jurisdiction so to do was not without remedy. Even from the Provincial Court he could go in the early days to the steps of the Throne and ask for the prerogative to be exercised and the case taken before His Majesty in Council. Later, that was put on a statutory basis and the Court of Delegates was set up. By the Judicial Committee Act, 1833, the matter comes before the Judicial Committee of the Privy Council.

For these reasons which I have endeavoured with some hesitation and some diffidence to express because, as I say, it is enough for us to say that we are not prepared to make a precedent after 600 years, the application is refused. The preliminary objection succeeds, and we are bound to dismiss the motion with costs.

LEWIS, J.: In the course of the extremely attractive and able argument which has been presented to us on behalf of the applicant, I confess I had some doubt whether the preliminary point taken by counsel for the respondent was a good one, but on consideration I am quite satisfied, for the reasons given in the judgment just delivered by my Lord, that the preliminary point is a good one, with the result my Lord has pronounced. I agree entirely with his judgment.

OLIVER, J.: I agree.

Motion dismissed with costs.

Solicitors: *Evill & Coleman* (for the applicant); *Tamplin, Joseph & Flux*, agents for *Gudgeons, Peecock & Prentice*, Stowmarket (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ, *Barrister-at-Law.*]

Approved. TOOTAL BROADHURST LEE CO., LTD. *v.* I.R.C. [1949] 1 All E.R. 261.

INLAND REVENUE COMMISSIONERS *v.* BROADWAY CAR CO. (WIMBLEDON) LTD.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), November 5, 6, 1946.]

Revenue—Excess profits tax—Motor agent and repairing company sub-letting part of premises—" Income received from investments "—Finance (No. 2) Act, 1939 (*c.* 109), *sched. VII, pt. I, para.* 6 (2).

A company carried on the business of motor car agents and repairers on land held on a lease from 1935 to 1956 at an annual rent of £750. By 1940 the company's business had dwindled under war conditions to such an extent that no more than one-third of the land was required. In those circumstances the remainder was sub-let for 14 years at an annual rent of £1,150. The general commissioners of income tax decided that the difference of £400 between the outgoing of £750 for the land retained and the incoming of £1,150 for the land disposed of was " income received from an investment," and, the business not being one within the special categories mentioned in the Finance (No. 2) Act, 1939, sechd. VII, pt. I, para. 6 (2), that that £400 was not taxable : –

HELD : applying the test, laid down in *Inland Revenue Comrs.* v. *Desoutter Brothers Ltd.* (1), that the word " investment " must be construed in the ordinary, popular sense of the word as used by business men and not as a term of art having a defined or technical meaning, that it was impossible to say that the commissioners had erred in law in coming to the conclusion that the transaction resulted in an investment.

Decision of MACNAGHTEN, J., *reversed.*

[**EDITORIAL NOTE.** In *Inland Revenue Commissioners* v. *Desoutter Bros., Ltd.* (1) the Court of Appeal expressed, and acted on, the view that " investments " in para. 6 (2) of pt. I of sched. VII to the Finance (No. 2) Act, 1939, must be given a wide and popular meaning, rejecting as being too narrow the opinion expressed by MACNAGHTEN, J., in *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.* ([1944] 2 All E.R. 340), that before a transaction could be described as an investment there must be " the placing of money into it in order to acquire it or bring it into existence." The court find that the commissioners had applied the test which was, later, in the *Desoutter* case, held to be the right test. Although it is nowhere specifically stated in the judgments, the court, in deciding that the company did not fall within para. 6 (2), no doubt applied the principle of construction that where a provision in a statute is expressed to apply to a number of specified things, other things which are not so specified are impliedly excluded.

FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, pt. I, para. 6 (2), see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

Case referred to :

(1) *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58 ; 174 L.T. 162.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated July 24, 1946. The facts are set out in the judgment.

Terence Donovan, K.C., and *H. B. Magnus* for the appellant.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the respondents.

SCOTT, L.J. : This is an appeal relating to the excess profits tax provisions of the Finance (No. 2) Act, 1939. The appellant company was assessed in the sum of £2,500 on the profits of their business. They appealed to the general commissioners, and the latter held that a part of their income amounting to £400 net was income from an investment within the meaning of para. 6 (2) of pt. I of sched. VII to that Act, and that, the company not being a company of one of the special kinds made liable for investment income in that sub-paragraph, the income in question ought to be excluded from the assessment. MACNAGHTEN, J., reversed the commissioners' decision, and the company appeal to this court.

The company carried on the business of motor car agents and repairers at Russell Road, Wimbledon, under a lease at £750 per annum from Dec. 1, 1935, to Dec. 25, 1956, with a right to the lessees to demand another lease of 21 years by notice 6 months before the expiration of the first term. It also contained a proviso that the landlord could not sell the freehold reversion without first offering it to the lessees. By August, 1940, the company's business had dwindled so much under war conditions, that they did not want more than one-third of their land, and they decided to sub-let the rest. They did so by a 14 years' sub-lease in return for a covenant by the sub-lessees to pay £1,150 yearly rent with a right of re-entry on non-payment. They partitioned the part sub-let off from the rest of their land, and also installed heating apparatus for the sub-lessee. The difference between their outgoing of £750 for all the land and their incoming of £1,150 for the land disposed of, namely, £400, is the income which they contended, and the general commissioners decided, was "income from an investment." Their business not being one within the special categories mentioned in sub-para. (2), to which I have referred, their contention was that that income was not taxable.

On those facts, I think, the decision of the commissioners is unassailable. War conditions had reduced the company's business to very small proportions, and they cut their loss by going out of business in respect of the major part of their land and put it out of their power for 14 years to resume business there. On the other hand, they tempered the wind to their shorn undertaking by making a prudent use of a good income-yielding investment, namely, their spare land. So used, it brought them the right to enforce the covenants to pay the rent and to perform the other terms of the sub-lease, coupled with the right of entry on default. Whatever name be given to it, they thus had a valuable asset producing £1,150 a year and providing them with money out of which they could pay the head rent, with a cash income of £400 to spare. Why was not that an investment for the war years which were proving so lean to motor car agents? Applying the definition of "investment" in the excess profits tax statute which was applied by this court in *Commissioners of Inland Revenue* v. *Desoutter Brothers, Ltd.* (1) of the "popular" or "vernacular" use of the word, it seems to me impossible to say that the commissioners who "found in fact" and "held in law"—so far as this question partook of one or the other aspect—have gone wrong in so finding and holding. There was ample evidence to justify the finding of fact. Indeed, it appears to me to represent the common sense view of the facts. Of error of law, I can see no trace.

The argument of the Crown is that the wording of the commissioners' finding in the Case Stated shows error. According to that finding (1) the income "did not arise in the ordinary course of the company's business," and (2) "was income from an investment." I cannot see how that was wrong. The commissioners rejected the contention of the Crown, so far as it was fact, that the rent "arose in the ordinary course of the business," if, by that, was meant as an ordinary transaction or operation of a motor car agent's business, and rightly rejected it because there was no evidence to support it. They rejected the Crown's legal contention that that proposition led logically, or at all, to the Crown's second contention, namely, that "therefore" the income should be included in the computation of excess profits tax. By the word "therefore," I think the Crown meant "because it was an ordinary trade receipt." To test the company's proposition that the source of this income is rightly regarded as an "investment," it is useful to compare its source with sources which would have produced an identical state of affairs economically, so far as income is concerned, but eliminating the one feature on which the Crown relies, namely, that the land handed over to the sub-lessees was a part of the parcel covered by the main lease. Suppose that all the land had been freehold and the company had granted a 14 years' lease of the portion now let off on terms identical with those of the sub-lease. The difficulty felt by counsel for the Crown in asserting that in that case the lease would not exhibit the character of an investment shows that, in the common understanding of that word ("in the vernacular," as MacKinnon, L.J., called it), it would obviously be an investment. It was also practically conceded by counsel for the Crown that, had there been two leases to the company, one of the plot retained, and the other of the plot sub-let, and the latter had been assigned, the Crown's argument would have been almost equally difficult, and these easily imaginable variations from the facts in evidence before the commissioners involve distinctions without a difference.

The question for the commissioners was one of mixed fact and law, the law being as to the meaning of the word "investment." In my opinion, as I have said, there was evidence to support the finding of fact and no error of law.

It follows that I disagree with the judge whose view was the opposite of mine. I should like to add that there is not the faintest hint in this case of "tax-dodging" by the taxpayer. The revenue sought to put on the company a burden which plainly was not the company's burden. The appeal must be allowed with costs here and below, and the assessment reduced accordingly.

Tucker, L.J.: I agree that this appeal succeeds because I think that the judge was wrong in coming to the conclusion that the commissioners had erred in law.

When the commissioners arrived at their decision in this case, *Comrs. of Inland Revenue* v. *Desoutter Brothers* (1) had not been decided, so that they had not that case before them. It is said that in that situation they applied the wrong test, and that, if they had had that case before them, they would have come to some different conclusion. For myself, I think there is very little assistance to be derived from *Comrs. of Inland Revenue* v. *Desoutter Brothers* (1), which dealt with patent royalties, and was, on its facts, completely different from the present one. All that was said which was relevant for present purposes was that the court deprecated analogies in these cases, and that the word "investment" was not a term of art, but had to be interpreted according to its popular conception. Apart from that, personally I cannot find much assistance from the *Desoutter* case (1) in arriving at a proper decision on the facts of the present case. I have, however, no reason to think that the commissioners did apply any other test than that laid down in *Desoutter's* case (1), namely, that the word "investment" must be construed in the ordinary, popular sense of the word as used by business men, and not as a term of art having a defined or technical meaning.

In this case we are dealing with a part of the property of a company which had become redundant and was sublet purely to produce income, a transaction quite apart from the ordinary business activities of the company. It seems to me impossible to say that the commissioners have erred in law in coming to the conclusion that that transaction resulted in an investment. For these reasons, I agree that the appeal succeeds.

Cohen, L.J.: I agree. Counsel for the Crown invited us to reach the conclusion that the commissioners had gone wrong in law, by referring us to a paragraph of the Case, the last sentence of which reads as follows:

> The question at issue was whether rent received by the respondent company under an underlease was income from an investment or income from a trade or business.

Counsel said that was a wrong contrast because income might be income from an investment and still be income from a trade or business. I think counsel for the company gave the right answer to that argument when he said that the commissioners had merely adopted an elliptical way of stating the question, and that what they really meant was that the question was whether the rent was income from an investment or income from a trade or business, not being income from an investment. I think it is clear that counsel for the company is right if one looks at the language in which the commissioners summarised the arguments addressed to them.

I agree with Tucker, L.J., that only limited assistance can be got from *Comrs. of Inland Revenue* v. *Desoutter Brothers* (1), but I think it does help to the extent that it makes it quite clear that the term "investment" in the Finance (No. 2) Act, 1939, must not be construed in a narrow sense, for the instances Lord Greene, M.R., gave in that case of income from royalties arising out of patents which, in his view, could properly be termed investment income are inconsistent with a narrow construction. The expression is, therefore, not limited to investments which you would buy on the advice of a stockbroker—Stock Exchange investments. If you once go beyond that field, it seems to me reasonably clear that rents from leases or underleases can properly in suitable circumstances be comprised within the phrase "income from investments" in the Finance (No. 2) Act, 1939. I think the true view of the *Desoutter* case (1) is, as Lord Greene, M.R., indicated and as I think counsel for the Crown agreed, that the question whether a particular source of income was an investment or not must be decided as it would be by business men according to ordinary common sense principles.

To sum up, it seems to me clear from the Case that the commissioners properly appreciated the principles of law which they should apply, and that there was evidence on which they could reach the conclusion to which they came, and I can see no ground on which the court ought to interfere with their finding.

Appeal allowed with costs.

Solicitors: *E. M. Lazarus & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LANCASTER *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Henn Collins, J.), November 6, 1946.]

Master and Servant—Common employment—Linesman and trolley bus driver.

While on the tower wagon and engaged in repairing the overhead gear which was used by the defendants' trolley buses, the plaintiff, who was employed by the defendants as a linesman, met with an accident caused by the culpable misjudgment of the driver of one of the defendants' trolley buses:—

Held: both servants were engaged on their master's business and employed directly or indirectly in getting the trolley bus along its route, which necessarily and naturally or in the usual course involved juxtaposition and exposure to the risk of negligence by one which would injure the other, and, therefore, the doctrine of common employment applied and the defendants were not liable.

Dictum of Lord Wright *in Radcliffe* v. *Ribble Motor Services, Ltd.* (1) *applied.*

[**EDITORIAL NOTE.** There are few unpopular doctrines today than that which is known as "common employment." It is generally applied by the courts with the greatest regret, and there would seem to be a likelihood that at some not distant date legislation will be introduced to remove it from the pages of our law. Meanwhile, it is the duty of the reporter to place on record decisions which restrict, extend, or illustrate the application of the doctrine.

As to Common Employment, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and for Cases, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.]

Cases referred to:

(1) *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.

(2) *Morgan* v. *Vale of Neath Ry. Co.* (1864), 5 B. & S. 570; *on appeal* (1865) L.R. 1 Q.B. 149; 35 L.J.Q.B. 23; 13 L.T. 564; 30 J.P. 36; 34 Digest 212, *1750*.

Action by a servant against his master for damages for injuries caused by the negligence of a fellow servant. The facts are set out in the judgment.

G. Russell Vick, K.C., and *Alban Gordon* for the plaintiff.
R. O. L. Armstrong-Jones for the defendants.

Henn Collins, J.: On Sept. 10, 1945, the plaintiff met with a serious accident in respect of which he sues the defendants. He was employed as a linesman by the defendants, and at the time of the accident was on a tower wagon engaged in repairing the line on which the power wires are supported, the accident being caused by the culpable misjudgment of the driver of a trolley bus, a servant of the defendants.

Two questions arise for my decision. First, the extent of the injuries which the plaintiff has suffered and is suffering; and, secondly, whether the defendants are liable to compensate the plaintiff in respect of those injuries, the latter depending on whether in law he, the plaintiff, and the driver of the bus were in common employment. Logically, of course, the question of compensation only arises if I am of the opinion that the defendants are liable, but as, no doubt, whichever way my decision goes on the question of liability, one or other of the parties may desire to appeal, I think it my duty to make the best assessment that I can of the damages suffered by the plaintiff. [His Lordship reviewed the evidence and assessed the damages at £1,600, including £432 special damage, and continued :—] That brings me to the mixed question of fact and law, whether the driver of the trolley bus and the plaintiff were in common employment. That they were both servants of the same employer, of course, carries one a very short way. I do not think one can do better than found oneself on the decision in *Radcliffe* v. *Ribble Motor Services, Ltd.* (1), and on the passage in LORD WRIGHT'S opinion, which appears at [1939] 1 All E.R. 658, because it seems to me that that passage crystallises the earlier pronouncement of BLACKBURN, J., in *Morgan* v. *Vale of Neath Railway* (2), a passage which LORD WRIGHT cites with approval. Speaking of two persons said to be in common employment, LORD WRIGHT, said :

> They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other.

What was the position of these two men, the plaintiff, a linesman engaged on the overhead gear which the trolley bus used and the driver of the trolley bus? In the broad sense, both were engaged on their master's business. That is not enough. It must be much narrower. They were employed also, both of them, directly or indirectly, in getting the trolley bus to move along its route, but that, again, I do not consider to be enough. There must be something in their work which necessarily, naturally, or in the usual course, involves their juxtaposition and exposure to the risk of negligence by one which will injure the other.

Let us for the sake of clarity for the moment suppose that the whole road is confined to the use of these trolley buses. It is obvious that a man on a tower wagon in the middle of the road runs a risk of being knocked off the tower by a trolley bus, not necessarily by the top of the bus, which happened in this case, through some misconduct, misadventure, or misjudgment on the part of the driver. That is the very thing one would contemplate might happen if trolley buses were the only vehicles on the road, and I cannot doubt in my own mind that the driver and the plaintiff injured man would be in common employment and an employment in juxtaposition, because, by the orders of the employer, they were together in the same place in the performance of their respective duties and for the common purpose of keeping the trolley buses running. Does it make any difference that other vehicles use the road, and that some few of these other vehicles might be high enough to touch the platform or be rash enough to charge into some part of the tower wagon ? I think not. I think this has got to be judged, not on the question which arose in some of the other cases, whether it was a mere fortuitous event that the vehicles were in the same place at the same time, but whether the callings of the bus driver and the linesman brought them to that juxtaposition.

In those circumstances, having regard to the view I have formed in this case on common employment, I am bound to give judgment for the defendants with costs. One is reluctant to apply that doctrine and more reluctant to extend it, but I do not think I am extending it.

Judgment for the defendants with costs.

Solicitors : *William Gorringe & Co.* (for the plaintiff) ; *Arthur Herbert Grainger* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

MANKIN AND ANOTHER *v.* SCALA THEADROME CO., LTD.

[King's Bench Division (Stable, J.), November 4, 5, 1946.]

Master and Servant—Loss of service—Injury to servant through negligence of third person—Injury caused by defect in stage floor—Right of master to sue—Measure of damages.

M., a music hall artist, was employed by C., another music hall artist, to assist him in a music hall turn. While performing his turn at a theatre belonging to the defendants, M. met with an accident owing to a loose floor board in the footlight area of the stage, and the defendants were held liable to M. for negligence. C. claimed that, as the employer of M., he was entitled to damages from the defendants in that he had lost the services of M. owing to the defendants' negligence :—

Held : although the injury sustained by M. was caused by an omission and not a positive act, C. was entitled to damages.

[**EDITORIAL NOTE.** The action by an employer for the deprivation of the services of his servant through the act or default of another is of considerable antiquity. The earliest cases appear to have arisen where the defendant had assaulted and injured the plaintiff's servant : see *Anon* (1516) Keil 180 ; 72 E.R. 357 ; *Anon* (1611), 1 Bulst. 173 ; *Mary's Case* (1612), 9 Co. Rep. 111 *b* ; *Seaman* v. *Cuppledick* (1615), Owen. 150. But in *Everard* v. *Hopkins* (1), also decided in 1615, Croke, J., expressed the opinion that a master had an action where his servant, whom he had sent on a message, fell, through the negligence of the defendant, into a hole in the highway and was injured. A case where the facts were somewhat similar to the present—*Taylor* v. *Neri* (1795), 1 Esp. 385—was not cited in the present matter. There the manager of a place of public entertainment sued the defendant for beating one of the performers who was thereby prevented from appearing, and it was held that the action would not lie.

As to Master's Right of Action for Loss of Service, see HALSBURY, Hailsham Edn., Vol. 22, pp. 251-253, paras. 437-439 ; and for Cases, see DIGEST, Vol. 34, pp. 180, 181, Nos. 1451-1470.]

Cases referred to :

(1) *Everard* v. *Hopkins* (1615), 2 Bulst. 332 ; 1 Roll Rep. 124 ; 80 E.R. 1164 ; 34 Digest 180, *1455*.

(2) *Meux* v. *Great Eastern Ry. Co.*, [1895] 2 Q.B. 387 ; 64 L.J.Q.B. 657 ; 73 L.T. 247 ; 59 J.P. 662 ; 42 Digest 970, *20*.

(3) *Hayn* v. *Culliford* (1879), 4 C.P.D. 182 ; 48 L.J.Q.B. 372 ; 40 L.T. 536 ; 41 Digest 430, *2699*.

Action for damages for negligence. The action was brought by Reginald Mankin and Jock Cochrane as joint plaintiffs. Mankin's claim was for damages for personal injuries sustained by him. Cochrane's claim was for damages for the loss of the services of Mankin who was in his employment. The facts appear in the judgment.

A. E. Beecroft for the plaintiffs.

P. R. J. Barry, K.C., and *R. O. L. Armstrong-Jones* for the defendants.

Stable, J. : This action is brought by Reginald Mankin and Jock Cochrane against Scala Theadrome Co., Ltd., the two plaintiffs claiming damages from the defendants for the consequences of an accident that Mankin suffered on Sept. 23, 1944, when he was acting at the Bury Hippodrome, for which the defendant company was responsible. I say an action is brought by the two plaintiffs. It would be much more accurate to say that two actions are brought, one by Mankin and one by Cochrane, for, although the facts connected with the two claims are identical, the causes of action are wholly separate and distinct.

It is as well, before discussing the law and the conclusions at which I have arrived, to deal with the facts which are as follows. Cochrane and Mankin were two music hall artists. Cochrane had run a turn with a partner for a great number of years, and this turn had achieved a considerable measure of success and fame under the title of " The Two Pirates." Cochrane's " opposite number " was Mankin who was paid a salary by Cochrane. They were not partners in a legal sense. Cochrane was the employer and Mankin was the employee. On Sept. 23, 1944, both plaintiffs were on the Hippodrome stage, and Mankin, while doing a sort of shuffle dance, put down his foot with a bang on a part of the stage to which I will allude in a moment, with the result that a loose board flew up, his foot went through the hole, and he gave his knee a nasty wrench.

[His Lordship reviewed the evidence, found that the defendants were negligent, and assessed the damages recoverable by Mankin at £70, and continued :—] As regards Cochrane, the cause of action is entirely different. He says that, by reason of the negligence of the defendants, he lost the services of Mankin and sustained damage.

This gives rise to two interesting questions. First, there is the submission that this peculiar cause of action (which seems to have started from the natural desire of courts to inflict some sort of penalty on persons who seduce young people) has gradually developed. The earliest cases seem to be cases of seduction, and by an obvious and logical stage the next class of case we come to is where a wrong done to a servant, whereby the master loses his services, was something in the nature of a trespass to the person such as assault. Although from the very ancient case of *Everard* v. *Hopkins* (1) it appears that not every tort (at all events in those days) which resulted in a master losing the services of his servant gave rise to a cause of action, I find it extremely difficult to see where the line is to be drawn. In *Meux* v. *Great Eastern Ry. Co.* (2), where the Court of Appeal decided that the defendants were liable to compensate the claimant, each of the lords justices laid emphasis on the fact that the tort or the wrongful act was not a mere omission but of commission. LORD ESHER, M.R., said ([1895] 2 Q.B. 387, at p. 390) :

> If they authorise their servants to take luggage up and carry it, the servants must do so with reasonable care, and for any active wrongful act on their part the company are liable.

Later, in discussing the decision of BRAMWELL, B., in *Hayn* v. *Culliford* (3), LORD ESHER, M.R., said (*ibid.*, at p. 391) :

> He [*i.e.*, BRAMWELL, B.], was dealing, not with an omission to do something, or with mere non-feasance, but with misfeasance, and he pronounces such a misfeasance to be an act wrongful in itself.

KAY, L.J., said (*ibid.*, at p. 392) :

> It is quite plain that there was an act, not of omission but of commission, which was negligent and improper and which caused the destruction of these things.

A. L. SMITH, L.J., said (*ibid.*, at p. 394) :

> She [the plaintiff] has incurred loss by reason of her property having been destroyed by the active negligence of the servants of the company, whilst it was lawfully on the premises of the company ; she has, therefore, a right of action in tort wholly irrespective of contract. Her goods were lawfully on the defendants' premises, and by their active negligence those goods have been damaged.

I lay stress on the word " active." It certainly seems remarkable that when an assistant is injured by an omission of someone else, and the person injured happens to be in the relation of servant to master, that omission, whatever it may be, provided it deprives the master of the services of the servant and would give an action to the servant, gives the master also a right of action. One is surprised if that is the law, that the courts have not been inundated with cases of this kind during the years that have elapsed. On the other hand, on what conceivable principle can one draw the line between those wrongs resulting in loss of service which give a right of action to the master and those which do not ? I find myself quite unable to ascertain with any certainty any principle which provides a satisfactory answer to that question. My view is that the right a master has to the services of the servant is regarded by the law as a species of "property," and I have no doubt that, in the days when law began, the servant was almost a species of "property," hardly distinguishable from a chattel), and where that right is interfered with by any act or omission done to or suffered by the servant, which, if resulting in injury to him, would give him a right of action against the wrongdoer, it also confers a right of action on the master. I exclude, of course, those cases where the servant's rights are derived from a contract and not from a purely tortious act. In this case, there was no active or intentional wrong inflicted on Mankin by the defendants. Nobody struck him, either accidentally or on purpose, but his injuries arose from a defect in the stage which reasonable care and skill would have brought to the knowledge of the defendants. Essentially, the wrong of the defendants in this case was an omission and not a positive or intentional act.

In my view, Cochrane is entitled to recover. The question is how much ? In my judgment, Cochrane cannot carry his damages beyond Dec. 11, when Mankin had fully recovered. Counsel for the defendants argued that, having regard to the peculiar sort of action this is, the measure of damages is limited to valuing the actual services that the master lost and to any expense to which the master was subjected as a result of the mischief. I have come to the conclusion that one has to look at each case and say : " What was the direct consequence to the employer ? " In the present case, as regards the six weeks when Cochrane and Mankin put on what I may call a reduced turn, the management, or the other contracting party, cut down the payment to Cochrane from £40 a week to £30 a week. Under the £40 arrangement, Mankin received £10 and Cochrane had £30. When it was cut down to £30, Cochrane passed £2 10*s*. of the cut on to Mankin and shouldered the other £7 10*s*. himself. In my judgment, he is entitled to recover that. There were four weeks when Mankin was not able to work, and during that time Cochrane did not do any work either. Cochrane said that he did not look out for a job by himself, because, his name being so associated with the title " The Two Pirates," had he taken a more or less casual job on his own, although he would have earned a little, it would have done him more harm than good in his profession. I assent to that.

In my judgment, the direct result of Mankin being put out of action was that his employer was unable to use Mankin's services as he would have used them had Mankin been all right. Had Mankin been all right, I think during those four weeks Cochrane would have earned the £30 a week, less some deduction for the cost of living and lodging, fares and so on, but in substance that loss is the direct loss of Mankin's injury, so far as it has affected his employer, Cochrane. It should be observed that the figure is £30 and not £40, because while Mankin was not working he was not paid. That being so, it seems to me that the proper figure to award Cochrane is £145.

Judgment for the plaintiffs.

Solicitors : *Randolph & Dean* (for the plaintiffs) ; *Hair & Co.* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

WRIGHT AND BOWERS *v.* ARNOLD.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), November 1, 1946.]

Landlord and Tenant—Rent restriction—Sub-letting—" Lawfully sub-let "—Sub-letting in breach of covenant—Continued acceptance by landlord of rent from headlease after knowledge of breach—" Deemed to be dwelling-house to which Rent Acts apply "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 15 (3)—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (*c.* 26), *s.* 7 (1).

In 1931 W., the lessor, demised the premises to J.W. (Jeweller), Ltd., for 14 years from Dec. 25, 1930. The lease described the premises as a " messuage shop and premises " and contained a covenant by J.W. (Jeweller), Ltd., that they would not assign or sub-let the premises or any part thereof without the consent of the lessor. The lease contained no prohibition against the use of the premises or any part of them as a dwelling-house. In 1939, without the consent of the lessor, J.W. (Jeweller), Ltd., sub-let the upper part of the premises to A. as a dwelling-house. In 1941 and again in 1944, the lessor came to know that the upper part of the premises were sub-let to A., and, with this knowledge, he continued to receive rent from J.W. (Jeweller), Ltd. The lease of J.W. (Jeweller), Ltd., expired on Dec. 25, 1944, and B. took a lease of the premises. On a claim by W. and B. for possession of the upper part of the premises, A. relied on the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3) : " Where the interest of a tenant of a dwelling-house to which this Act applies is determined . . . any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall . . . be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

HELD: (i) Section 15 (3) of the Act of 1920 is limited to a case where the tenant of a dwelling-house to which the Act applies sub-lets part of that dwelling-house, and does not apply to a case where a tenant of premises which are not within the Act sub-lets part of those premises;

(ii) Section 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which provides: "If any question arises in any proceedings whether the [Rent Restriction] Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown," only applies where it has first been established that the premises regarding which the question arises are a "dwelling-house" within the definition of that term in the Rent Restrictions Acts, but, in all the circumstances of the present case and in the view of the provisions of s. 12 (2) (ii) of the Act of 1920, the premises as a whole constituted a "dwelling-house" within the meaning of the Acts, and W. and B. had failed to discharge the burden placed on them by s. 7 (1) of the Act of 1938 of proving that the Rent Restrictions Acts did not apply to the premises;

(iii) as W. had continued to accept rent after he knew that the premises had been sub-let to A. he must be taken to have waived his rights under the lease in the event of sub-letting without his consent;

Norman v. *Simpson* (1) *applied.*

(iv) therefore, A. was a "sub-tenant to whom" the upper part of the premises "had been lawfully sub-let," and so was entitled to the protection afforded by s. 15 (3) of the Act of 1920 with the result that the claim of W. and B. failed.

[**EDITORIAL NOTE.** The tenant is brought within the protection of s. 15 (3) of the Act of 1920 by the fact that the head lessor waived his rights under the lease by accepting rent from his tenant with knowledge of the sub-letting. By his conduct premises which were "unlawfully" sub-let became "lawfully" let. That is the result of the application of *Norman* v. *Simpson* (1) in which the opinion was expressed by MORTON, L.J., that the question whether or not a sub-letting was unlawful depended on the existence of the head lessor's right of re-entry, the head lessor in that case having lost that right by accepting rent from his tenant after knowledge of the sub-letting without his consent. It must be remembered that in the recent case of *Maley* v. *Fearn* (p. 583 *ante*) MORTON, L.J., referring to what he had said in *Norman* v. *Simpson* (1), said that he was now disposed to think that, if a sub-letting is contrary to the terms of the tenancy, it may well be that it is an unlawful sub-letting, even although under the terms of the tenancy the sub-letting does not give rise to a right of re-entry.

AS TO POSITION OF SUB-TENANTS UNDER RENT RESTRICTION ACTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 333, para. 399; and FOR CASES, see DIGEST, Vol. 31, pp. 581, 582, Nos. 7303-7310.]

Cases referred to:

(1) *Norman* v. *Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B.; 174 L.T. 279.

(2) *Barrett* v. *Hardy Brothers* (*Alnwick*), *Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 31 Digest 561, *7090*.

(3) *Morrison* v. *Jacobs*, [1945] 2 All E.R. 430; [1945] K.B. 577; 173 L.T. 170.

APPEAL from Wandsworth County Court. The facts are set out in the judgment of MORTON, L.J.

D. F. Brundrit (*W. G. Wingate* with him) for the appellant.

J. Comyn (*Malcolm Wright* with him) for the respondent.

MORTON, L.J.: By their writ in this action the plaintiffs, Mr. Wright and Mr. Bowers, claim that Mr. Wright is the freeholder of certain premises, No. 89, High Road, Streatham, in the county of London, and that Mr. Bowers is the leaseholder of the same premises. It is alleged that the defendant, Miss Arnold, is in occupation of the upper part of the premises and "is a trespasser and wrongfully retains possession of the said premises." There is a claim for possession and mesne profits from Dec. 31, 1944.

The whole case turns upon s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which reads:

Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

On Feb. 6, 1931, the plaintiff, Mr. Wright, demised the premises, 89, High Road, Streatham, to a company called James Walker (Jewellers), Ltd., The precise terms of that lease are of some importance. The operative part begins :

> Witnesseth that in consideration of the rent hereinafter reserved and of the lessee's covenants hereinafter contained the lessor hereby demises unto the lessee all that messuage shop and premises situate at the corner of Streatham High Road and Sunnyhill Road in the county of Surrey and numbered 89, Streatham High Road aforesaid.

Then the term is stated, *viz.*, 14 years from Dec. 25, 1930, and the rent is £550 per annum. There is this covenant by the lessee :

> And also will not at any time during the said term carry on or permit to be carried on upon the said premises or any part thereof any other trade or business than that of a goldsmith silversmith jeweller watch and clock maker cutler and dealer in such fancy goods as are usually dealt in by jewellers without the consent in writing of the lessor first had and obtained such consent not to be unreasonably withheld in respect of any trade not then being carried on by any of the other tenants of the lessor in the adjoining or adjacent or neighbouring premises Nos. 75A, 75, 77, 79, 81, 83A, 85 and 87, Streatham High Road aforesaid or the premises in Sunnyhill Road occupied by Hunt and Dowsett and Jenkins Ltd. but this qualification as to trade or business shall not be held to authorise the premises or any part thereof being used at any time for the trade or business of a butcher fishmonger poulterer or greengrocer or any of them.

There is a further covenant as follows :

> And also will not (except by will) assign or underlet the said demised premises or any part thereof without the consent in writing of the lessor first had and obtained but such consent shall not be unreasonably withheld provided the proposed assignee or underlessee is a respectable and responsible person.

There was a proviso for re-entry on breach of covenant. So far as the lease goes, the description of the premises is " messuage shop and premises." Clearly the property included something which is described as a shop and the parties contemplated that some business would or might be carried on in that shop, but no obligation is put on the lessee to carry on any business and there is no prohibition against the user of the premises or any part thereof as a dwelling-house.

In 1937 the ground floor and basement of No. 89 was sub-let by the head lessee, with the licence of the head lessor, to a company called Delta Radio, Ltd., at a rental of £450 a year. That company had been formed by Mr. Bowers, the second plaintiff. On Mar. 25, 1939, the head lessee, James Walker (Jewellers), Ltd., sub-let to the defendant, Miss Arnold, the upper part of 89, together with the landlord's fixtures therein, for a term of three years from Mar. 25, 1939, with an option to continue for a further year and thereafter from month to month, at the yearly rent of £90. The county court judge found as a fact that that letting was without the licence of the head lessor.

Certain letters passed to which I must refer. On Mar. 18, 1941, the head lessee, James Walker (Jewellers), Ltd., wrote to Sherrard & Sons, the solicitors for the head lessor :

> Re 89, High Road, Streatham. These premises are let to us on lease at a rental of £550 per annum. As doubtless you are aware, they were some few years ago divided, the shop being let to Delta Radio, Ltd., at a rental of £450 per annum. Unfortunately, owing to war conditions, the proprietor, Mr. Bowers, is unable to pay rental at the present time and is almost a year in arrears.

Then they ask for a concession in regard to the rent which will enable them " to tide over the present period." The last paragraph says :

> The upper part is let at a very nominal rental to an elderly lady who conducted a dressmaking business, but whose business has almost disappeared.

In reply to that the solicitors for Mr. Wright begin :

> We have now heard from Mr. Wright respecting your letter to us of the 18th instant which we forwarded to him for consideration.

They then state that Mr. Wright agreed to a reduction in the rent. It is plain that at that time Mr. Wright knew of the sub-letting of the upper portion to the "elderly lady" and, notwithstanding that, he continued to receive the rent due under the head lease for a considerable period. The matter does not end there, because on March 13, 1944, James Walker (Jewellers), Ltd., wrote to Mr. Wright himself saying:

> Dear Sir, Re 89, Streatham High Road. Further to our letter of Jan. 1, the lease of the above premises expires on Dec. 25 next. We have already communicated with you regarding Mr. E. V. Bowers, who occupies the shop premises.

Again there was, apparently, a distinction drawn between the shop premises and the rest of the building. James Walker (Jewellers), Ltd., continued:

> We also have a tenant, Miss Arnold, in the upper part at a rental of £5 per month. Perhaps you may like to take over this tenancy.

There again Mr. Wright is informed of this tenancy of the upper part and of the rent which was paid, and, notwithstanding that, he continued to accept rent under the head lease. On the expiry of the lease to James Walker (Jewellers), Ltd., Mr. Bowers took a fresh lease of the property, and he wanted vacant possession of the upper portion, but Miss Arnold claims to be entitled to remain there.

Before the county court judge there was evidence that when the upper portion was let to Miss Arnold as a dwelling-house in 1939 no licence was asked for or given. It was admitted that Mr. Wright accepted rent with knowledge of the sub-letting to Miss Arnold. No evidence was called for the defendant and her counsel submitted that there had been a waiver of the breach of covenant because Mr. Wright had accepted rent from James Walker (Jewellers), Ltd., with knowledge of the sub-letting. Therefore, he said, Miss Arnold was a sub-tenant to whom the upper part of the premises had been "lawfully sub-let." The judge, however, did not accept that argument. According to his note he said:

> Satisfied no licence. Onus on defendant to show lawfully sub-let. Section 15 (3). This letting was not lawful originally. Waiver of right of forfeiture does not render legal that which has at all times been illegal. Landlord may not wish to forfeit the head lease, and if he does not so wish he does not recognise the legality but only waives one specific remedy. Possession in one month.

There was judgment for £25 and costs and for payment out to the plaintiffs of a sum of £25 already in court.

That decision of the county court judge foreshadows the judgment which was shortly afterwards delivered by du Parcq, L.J. (as he then was) in *Norman* v. *Simpson* (1). In that case the court held by a majority, du Parcq, L.J., dissenting, that the words "have been lawfully sub-let" refer to the time just before the head tenancy determines, and that, where a tenant, in breach of the terms of his tenancy, has sub-let premises to which the Act applies without first obtaining the consent of the landlord and the landlord continues to accept rent with knowledge of the breach, the sub-tenant is, within the terms of s. 15 (3), a person to whom part of the premises has been "lawfully sub-let." The defendant appeals, and it would appear at first sight that *Norman* v. *Simpson* (1) governs this case and that this appeal should be allowed, but counsel for the plaintiffs has argued five points before us. First, he raised a question of costs, about which I need say nothing. Secondly, he argued that s. 15 (3) does not apply to a case where the tenant who sub-lets is not the tenant of a dwelling-house to which the Act applies, and he submitted that s. 15 (3) is limited to a case where a tenant of a dwelling-house to which the Act applies sub-lets part of that dwelling-house and does not apply to a case where a tenant of premises which are not within the Act sub-lets part of those premises. I think that argument is well-founded. It seems to me that that is the natural meaning of the words used in the sub-section and that the subsection only applies "where the interest of a tenant of a dwelling-house to which this Act applies is determined," in certain circumstances. True that in *Barrett* v. *Hardy* (2) Bankes and Scrutton L.JJ., felt compelled to put what, in my opinion, they felt was a somewhat strained construction on s. 12 (3) of the Act of 1920, which deals with apportionment, but for my part I do not feel constrained, for that or any other reason, to put on the language of s. 15 (3) a meaning which, to my mind, the words do not properly bear. It seems to me that, unless the interest of James Walker (Jewellers) Ltd., was an interest in a dwelling-house to which the Act applies, the section would have no operation in the present case.

However, the matter does not end there. Counsel for the plaintiffs submitted that it was for the sub-tenant to produce evidence that 89, High Road, Streatham, came within the wording of the section. That might well be so, but for the language of s. 7 (1) of the Act of 1938, which I must now read :

> If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown.

Counsel for the defendant at first argued that that was a complete answer to the submission of counsel for the plaintiffs, and that, as the landlords had failed to discharge the onus which was cast on them, he must succeed. However, I do not think the sub-section can apply save where it is first established that the premises regarding which the question arises are " a dwelling-house." That, I think, means a dwelling-house within the definition contained in the Act. The intention of the sub-section is, in my view, that when the court is satisfied that the building about which the question arises is " a dwelling-house," then it shall be deemed to be a dwelling-house to which the Act applies unless the contrary is shown. It is, therefore, I think, necessary for this court to consider, on the somewhat scanty evidence before it, whether or not this building, No. 89, High Road, Streatham, is a dwelling-house in the sense in which that word is used in the Act.

Section 12 (2) of the 1920 Act provides :

> This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed [then follow certain figures] and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies.

Section 12 (2) (ii) proceeds by way of qualification :

> The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes.

That is followed in the 1939 Act by s. 3 (3) which, so far as material, is as follows :

> . . . the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes.

What are the facts in regard to No. 89, High Road ? There is the description, which I have already read, in the lease. There is the fact that there is no provision in the lease that the premises shall be used for business or that they shall be used for residential purposes. There is no prohibition against user as a dwelling-house and there is a limited prohibition against the user of the premises or any part thereof for certain trades. So far the lease does not throw a very strong light on the matter one way or the other. The other fact which I think one is entitled to take into account is that Miss Arnold went and lived in the premises. The upper part was let to her as a dwelling-house, and there is nothing in the evidence or correspondence to indicate that there was any structural alteration in the premises to render that possible. I think the fair conclusion to draw from the evidence is that this is the sort of building, with which one is so familiar, in which there are dwelling rooms above and a shop below. It seems to me, on the whole, therefore, that it is a fair conclusion to draw from the evidence that these premises as a whole are a " dwelling-house." Thus, the burden is on the plaintiffs to show that it does not come within the Act. They failed to do this, as there was no evidence as to the rateable value. It follows that so far the defendant has brought her case within the provisions of s. 15 (3) of the Act. There has been a sub-letting to her of a dwelling-house to which the Rent Restriction Acts apply.

The third point taken by counsel for the plaintiffs is that the upper part was not " lawfully " sub-let. He argued that *Norman* v. *Simpson* (1) does not cover the present case because the head lessor here had not such a full knowledge of the facts of the sub-letting as the head lessor had in that case. I cannot accede to that argument. The head lessor here knew that the premises had been sub-let to Miss Arnold and he continued to accept rent after that. He also knew (if it is material) the rent which she paid. Fourthly, counsel submitted that we should in some way extend the principle of *Morrison* v. *Jacobs* (3) to this case, and regard the landlord as having accepted the rent unwillingly and under some form of compulsion. Again, I cannot accede to that argument. When the breach of covenant came to the landlord's notice he had his option either to take proceedings to recover possession or to accept the rent and waive the breach. He chose the latter course. Finally, counsel submitted, without arguing the point, that *Norman* v. *Simpson* (1) was wrongly decided. He did that to keep the point open if this case should go further.

I have come to the conclusion that the tenant has succeeded in bringing herself
A within s. 15 (3), having regard to the construction which was put on that sub-section by the majority of the court in *Norman* v. *Simpson* (1). That being so, the appeal succeeds.

TUCKER, L.J.: I agree. I do not desire to add anything with regard to some of what I may call the subsidiary points relied on to distinguish this case from *Norman* v. *Simpson* (1). I desire only to add a word or two with regard to
B what I regard as the principal point put forward by counsel for the plaintiffs, and one which, I think, requires careful consideration. He said that *Norman* v. *Simpson* (1) was a case where, on the admitted facts, the whole premises which comprised the part that had been sub-let were at all times premises within the Rent Restrictions Act, whereas in the present case there was no evidence to show that the premises in their entirety were a dwelling-house to which the Act applies. That appeared to be on the face of it a formidable point when I heard it, because
C I agree that, on the true construction of s. 15 (3) of the Act of 1920, to bring that sub-section into operation it is necessary that the premises, the tenancy of which has determined, should be a "dwelling-house" to which this Act applies, but the difficulty of counsel for the plaintiffs is that s. 7 (1) of the Act of 1938 provides:

> If any question arises in any proceedings whether the principal Acts apply to a
> D dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown.

That seems to me to be a complete answer to his point, provided always that the premises with which we are dealing appear to the county court judge on the evidence before him to be a "dwelling-house" within the meaning of that phrase when used in the Increase of Rent Acts, whether by the express provisions of those Acts or by judicial interpretation. I think the only question here is whether there
E was evidence before the county court judge that the premises in respect of which the question had arisen were *prima facie* a dwelling-house so that the presumption in this section would take effect. I think there was material before the county court judge from which, in the absence of any evidence to the contrary, he would be bound to assume he was dealing with a dwelling-house. The factors were that there was a neutral provision in the lease which indicated that the premises included other rooms beyond a shop, that there was no pro-
F hibition in the lease against using any part of the premises as a dwelling-house, and that there was evidence that some part of that house was, in fact, being, or had been, so used, although that user had been brought about by a sub-letting which was contrary to the provisions of the lease.

For these reasons, I think that s. 7 applies and, therefore, it is impossible to distinguish this case from the decision of this court in *Norman* v. *Simpson* (1).

G ASQUITH, L.J.: I agree with both the reasoning and the result of the judgments delivered by my Lords.

Appeal allowed.

Solicitors: *Warren & Co.* (for the appellant); *Sherrard & Sons* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HOUSEHOLD MACHINES LTD *v.* COSMOS EXPORTERS LTD.

[KING'S BENCH DIVISION (Lewis, J.), Oct. 28, 29, 30, 31, Nov. 1, 1946.]

Sale of Goods—Failure to deliver—Repudiation—No market—Damages for breach of contract—Measure—Resale—Claims by third party against buyer—Declaration of indemnity.

(i) Repudiation of a contract for the sale of goods, to be of any avail, must be accepted by the other party, and whether or not there has, in fact, been repudiation depends on the facts of each particular case.

(ii) where there is no market a buyer, who to the knowledge of the seller has bought goods with a view to re-sale, is, in the event of non-delivery, entitled to recover his loss of profit, such loss being in practice a certain percentage, fixed by the court, of the price agreed to be paid by the buyer to the seller. In the present case the percentage fixed by the court was 10 per cent.

(iii) a buyer who, to the knowledge of the seller, has bought goods with a view to re-sale, and who has contracted to re-sell the goods to a third party, but, owing to non-delivery, is unable to do so, may be granted a declaration that the seller is bound to indemnify him for anything which can be adjudged by a court of law to be due from him to the third party and can be handed on to the seller.

[**EDITORIAL NOTE**. Where the sellers are in breach of a contract for the sale of goods the measure of damages to which the buyers are entitled is, as a general rule, the difference between the contract price and the market price at the time of the breach. Where there is no market in which the goods can be obtained, this rule is not applicable. The present being a case where the buyer had bought the goods for resale, the amount of the damages recoverable is held to be his loss of profit, a figure which the court fixes by a percentage over and above the purchase price. The granting of a declaration of indemnity is an interesting feature of the judgment.

AS TO ACTIONS FOR NON-DELIVERY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 193-199, paras. 258-267 ; and FOR CASES, see DIGEST, Vol. 39, pp. 662-677, Nos. 2523-2632.]

Cases referred to :

(1) *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 ; 53 L.J.Q.B. 497 ; 51 L.T. 637 ; 12 Digest 339, *2835*.

(2) *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208 ; 43 L.J.C.P. 91 ; 29 L.T. 773 ; 12 Digest 340, *2838*.

(3) *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337 ; [1942] A.C. 356 ; 111 L.J.K.B. 241 ; 166 L.T. 306 ; Digest Supp.

(4) *Maple Flock Co., Ltd.* v. *Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148 ; 103 L.J.K.B. 513 ; 150 L.T. 69 ; Digest Supp.

ACTION for the price of goods sold and delivered. COUNTERCLAIM for damages for non-delivery of part. The facts are set out in the judgment.

B. L. A. O'Malley and *C. W. Sabine* for the plaintiffs.

F. Hallis for the defendants.

LEWIS, J., reviewed the evidence with regard to the counterclaim and found that there were three firm contracts between the parties of which the plaintiffs were in breach. He continued : The plaintiffs, in answer to the counterclaim, have raised the question whether or not the defendants repudiated the contracts, and, therefore, are unable to recover any damages on the ground that the plaintiffs broke their contracts. I have considered the evidence and the letters which are relied on as being a repudiation, and I appreciate that repudiation, before it is of any avail, has to be accepted by the other side. Authorities have been cited to me. I hope that I am not in any way suggesting that those authorities were not extremely helpful, and I agree they are authorities which bind me, but I appreciate that the question in each case whether there has been repudiation depended on the facts of that particular case. That, I think, has been laid down and said in terms in *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1) where LORD SELBORNE said (9 App. Cas. 434, at p. 439) :

> I am content to take the rule as stated by LORD COLERIDGE in *Freeth* v. *Burr* (2), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform

the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.

Other cases were cited to me, of which *Heyman* v. *Darwins, Ltd.* (3) and *Maple Flock Co., Ltd.* v. *Universal Furniture Products* (*Wembley*), *Ltd.* (4) are examples. In my view, they lay down no new principle, but only the principle which was enunciated by LORD COLERIDGE and approved by LORD SELBORNE in the House of Lords in the *Mersey Steel & Iron Co.* case (1).

The letters which are relied on as repudiation are two letters written by the defendants on August 17 and 30, 1945. In the letter of August 17, the defendant says :

> We are greatly surprised to receive notice to the effect that you will be unable to fulfil delivery of the table spoons and forks to our orders Nos. 741, 770 . . . In view of the fact that you failed to notify us when accepting the orders that part thereof could not be delivered, we must hold you responsible for complete delivery under these contracts . . . We look forward to hearing from you that you are able to fulfil your obligations as accepted.

At that time the defendants owed the plaintiffs £339, the terms of the contract being cash within seven days. Rightly or wrongly, when they found that they could not get deliveries under these contracts and there seemed to be a lot of delay, they said : " We are not going to pay you until you deliver. You need not be afraid. We have got the cash, and we propose to deposit the amount which we owe you, £339 12*s.* 0*d.* in the bank." That may have been a breach of the contract to pay cash by a certain date. On Aug. 30 the defendants wrote the other letter which is alleged to be a repudiation of the contract. It is as follows :

> We confirm receipt of your registered letter dated Aug. 28, and should like to inform you that we have deposited the amount of £339 12*s.* 0*d.* on a special account with Westminster Bank Ltd. for deliveries effected up to date and as invoiced by you. You can dispose of this amount as soon as the matter under consideration has been settled. In any case, the reason for our non-payment of your invoices up till now lies in the fact that we have a claim against you. We can assure you that the non-payment on our part does not constitute a breach of agreement, and we certainly cannot agree that, owing to our non-payment, you are entitled to stop further deliveries. We should like to have your comments on the above outlined position and also on all orders still outstanding so that the matter can be settled. We should like to emphasise the fact that we reserve our rights to damages resulting from the non-delivery on your part.

Whatever may be said about the propriety or otherwise—and I emphasise the " otherwise "—of the defendants saying : " You have not delivered, and we are, therefore, not going to pay on the nail," I am entirely unable, bearing in mind the authorities as I understand them, to say that those letters constitute any repudiation by the defendants of the contracts. In my view, they do not, but the defendants are saying the very opposite and trying to keep the contracts alive.

The next matter with which I have to deal is what the defendants are entitled to recover in view of the breaches of contracts to which I have already referred. It is clear beyond doubt that the plaintiffs knew that the defendants were buying these goods with a view to re-sale and, as has been said by the courts before, that assumes or should assume that it means re-sale at profit. The question has been argued before me and, if I may venture to say so, a great deal of useful authority has been cited to me which would seem to show that in cases where there is no market, as in this case, the purchaser who has been disappointed and has not received delivery is entitled to recover, as it is put, his loss of profit on the re-sale. It is argued by counsel for the plaintiffs that " loss of profit" is not quite the right expression, although one of the tests in ascertaining what the amount of damages is may be the loss of profit of the purchaser when he is re-selling them to somebody else. Counsel points out, and I venture to think there is authority for his proposition, that the disappointed buyer is really entitled to recover from the seller the value of the goods at the time when the breach occurs, that is to say where there is failure to deliver. In this case goods of this description were extremely scarce and there were no other goods of that same quality to be obtained in the market. The value of the goods is stated by counsel for the defendants to be the amount at which the defendants were able to sell them to one Shasha. The amount which they asked Shasha was some 12 per cent. net above the price they paid the plaintiffs. In my opinion, the proper figure to name as the loss of profit is a certain percentage of the price agreed to be paid by the defendants to the plaintiffs. The percentage claimed by the defendants is, I think, too high, although it has to be borne in mind that evidence was given that there was such a scarcity of these goods that they could practically have asked anything. I think the proper figure should be a figure of 10 per cent. over the price paid or agreed to be paid in each case for these goods by the defendants to the plaintiffs.

Further, the defendants ask in their counterclaim for a declaration of indemnity. They say that the plaintiffs knew perfectly well that this was a purchase for re-sale to exporters, and they ask for a declaration that the plaintiffs are bound to indemnify the defendants for anything they may have to pay to Shasha which may properly be passed on by the defendants to the plaintiffs in this case. Counsel for the plaintiff has argued that such a declaration is unheard of. I venture to think that there is power in the court to grant such a declaration in a proper case. Indeed, the Rules of the Supreme Court seem to indicate that it is right for a court in a proper case to make such a declaration and for very obvious reasons. If a declaration of that kind cannot be made in a case of this sort, it means that there would have to be two bites at a cherry. In other words, it is encouraging multiplicity of actions. If I once give judgment in this action for a sum by way of damages to the defendants without taking into consideration the fact that there may be other damages which may be due to the defendants from the plaintiffs which arise because of what I may call the chain contracts, it seems to me (and I think counsel agree with this) that the defendants' claim is finished. They cannot bring another action, because they can only come once to court in respect of the same breach of contract, and they must once and for all recover or fail to recover. Judgment is given one way or the other for the whole amount to which they are entitled. That would seem to be an argument for saying that Shasha has made a claim against the defendants and has said : " Here is my claim, but I do not know yet whether it will not be larger still when I am sued by my buyers." I cannot try that case. The material is not here. If I for once and all reject the prayer for a declaration, I may be doing a very serious injustice, because it may be that Shasha's buyers will claim from him in circumstances which entitle Shasha to hand on that claim or part of it to the defendants, and the defendants, then having had to pay, may be in law and on the facts of the case entitled to go against the plaintiffs. Therefore, I propose to do what may be an unusual thing and order a declaration. The terms of the declaration will have to be very carefully considered. No declaration that I grant is to be considered to be a declaration of an indemnity to pay anything except what can be adjudged by a court of law to be due from the defendants to Shasha and can be handed on to the plaintiffs.

Judgment for the plaintiffs on the claim and for the defendants on the counterclaim.

Solicitors : *Tarlo, Lyons & Co.* (for the plaintiffs) ; *G. Edmund Hodgkinson* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

LUTTRELL *v.* ADDICOTT.

[COURT OF APPEAL (Morton, Tucker and Asquith, L.JJ.), October 31, 1946.]

Landlord and Tenant—Rent restriction—Alternative accommodation—Premises let as dwelling-house with cafe and used as boarding house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1) (*b*) ; *s.* 3 (3) (*a*) *—Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *s.* 3 (3).

Practice—Appeal—Notice—Misdirection in law—Matters to be included in notice of appeal.

The defendant was tenant of a dwelling-house, A., consisting of five bedrooms, a dining room, a lounge and kitchen, which she took together with a cafe attached, and at all material times she carried on the business of cafe and guest or boarding house on the two premises. She was also tenant of another house, B., which had similar accommodation and she used to accommodate guests when A. was full. For some years and for particular reasons the tenant used to sleep at A. and have her meals there, and rarely went to B. except for business purposes and to see how her guests were getting on. In an action for recovery of possession of B. the county court judge held that A. was a dwelling-house within the Rent Restrictions Acts, that suitable alternative accommodation existed in it, and that it would be reasonable to make an order for possession of B. The tenant appealed on the ground that the judge was not entitled to regard as alternative accommodation business premises occupied by the tenant :—

HELD : A. was not business premises, but was a dwelling-house to which the Acts applied, and there was evidence on which the county court judge could find that it was suitable alternative accommodation reasonably suitable to the tenant's means.

Per TUCKER, L.J. : It is an easy refuge, as a peg for a question of law, to allege that there was no evidence to support a judge's finding of fact, and by relying on that point an appellant virtually obtains a rehearing of the whole case. That the Court of Appeal may know in what respects it is alleged that the judge in the court below misdirected himself in law, it is incumbent on an appellant to include, in his notice of appeal, the matters on which he intends to rely and also that the points should have been taken in the court below.

[**EDITORIAL NOTE.** This case supplies an instance of what is " alternative accommodation " within s. 3 (1) (*b*) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and is unusual because of the business use to which the alternative premises had been put and the consequent invocation of s. 3 (3) of the Act of 1939 to constitute them a " dwelling-house " within s. 3 (3) (*a*) of the Act of 1933. The remarks of TUCKER, L.J., as to the need to particularise alleged misdirections in the notice of appeal should be noted.

AS TO ALTERNATIVE ACCOMMODATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para, 398 ; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. 7311-7330.]

Case referred to :

(1) *Macmillan* v. *Rees*, [1946] 1 All E.R. 675 ; 175 L.T. 86.

APPEAL by the tenant from an order of His Honour JUDGE WETHERED, made at Minehead County Court, and dated May 21, 1946. The facts are set out in the judgment of MORTON, L.J.

Neil Lawson for the tenant.
H. Montgomery Hyde for the landlord.

MORTON, L.J. : By the particulars of claim in this case the landlord claimed possession of a dwelling-house known as " Fernside," The Holloway, Minehead, Somerset. That house had been let to the tenant on a yearly tenancy, and it is common ground that that tenancy had been determined by a notice to quit expiring on Sept. 29, 1945. Thus, the tenant can only claim to remain in occupation under the Rent Restrictions Acts.

The relevant statutory provisions are contained in s. 3 of the Act of 1933, which provides :

> (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give

> such a judgment, and . . . (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment dation is available for the tenant or will be available for him when the order or judgment takes effect.

" Suitable alternative accommodation " is defined in sub-s. (3) :

> . . . . accommodation shall be deemed to be suitable if it consists either (*a*) of a dwelling-house to which the principal Acts apply, or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work and . . . otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.

The alternative accommodation put forward in the present case was a house with a cafe attached to it known as No. 11, Park Lane and the " Sprig of Heather." The tenant had for some years carried on the business of a restaurant in the " Sprig of Heather " portion and of a guest house in the 11, Park Lane portion. She had a 7 years lease of the house and cafe at £100 a year, which expired in June, 1946—the hearing of the case before the county court judge took place on May 21, 1946—but she had arranged for a fresh 7 years lease beginning in June, 1946, at a rent of £125 a year. Having regard to the fact that there was user of the " Sprig of Heather " as a restaurant and of 11, Park Lane for taking in guests, I ought to refer to s. 3 (3) of the Act of 1939, which provides :

> Subject to the provisions of para. (*a*) of the last preceding subsection, the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . .

That section is relevant because 11, Park Lane was only brought within the operation of the Act by the 1939 Act. The sub-section is similar in terms to s. 12 (2) (ii) of the Act of 1920.

When the matter came before the county court judge evidence was given as to the accommodation at " Fernside " and 11, Park Lane respectively. It appears that " Fernside " was a house containing two living rooms and five bedrooms. The tenant used to take in paying guests there as well as at 11, Park Lane. The latter consisted of five bedrooms, a dining room, a lounge and a kitchen and, no doubt, the " usual offices," because reference is made to a bathroom. The county court judge arrived at the following findings. 11, Park Lane was let to the tenant and she took it together with the cafe with the intention of carrying on at both premises the business of a cafe and guest house or boarding house, and at all material times she had carried on those businesses on the two premises. She had also used " Fernside " to accommodate guests when 11, Park Lane was full. For some years during the war, and for particular reasons which were explained in the evidence, the tenant used to sleep at 11, Park Lane and have her meals there. She occupied a bathroom which she had converted into a bedroom for herself, and, apparently, during that time she did not go very often to " Fernside " except for business purposes and to see how the guests there were getting on. The county court judge said in regard to 11, Park Lane :

> I was of opinion that suitable alternative accommodation for the defendant as a dwelling-house existed at 11, Park Lane. The house was let as a dwelling-house and was a dwelling-house to which the principal Acts applied. The tenant had been living there for the past 5 years and the fact that primarily she used the house in connection with her business of a boarding house keeper did not prevent the house from being a dwelling to which the Acts applied. The tenant required accommodation only for herself and the house was suitable both as to extent and character.

He held that the rent was one which was suitable to the means of the tenant and that the landlord had shown that suitable alternative accommodation, within the statutory definition, was available for the tenant at 11, Park Lane. He then came to the conclusion, after weighing up the facts, that it was reasonable to make an order for possession as at Sept. 14, 1946.

That judgment is attacked by counsel for the tenant, who says, first, that there was no evidence on which the judge could find that 11, Park Lane provided suitable alternative accommodation within s. 3 (3) of the Act of 1933. In my view, that argument must fail. The lease of 11, Park Lane was not put in evidence, so far as the note shows, and we do not know whether it was expressly let as a dwelling-house or, indeed, whether the lease contained any reference to its being a dwelling-house, but, in my view, on the evidence before us, 11, Park Lane with its annexe, the " Sprig of Heather " restaurant, was a " dwelling-house to which the principal Acts apply." It was conceded at the trial that the rateable value was within the limit laid down by the Act of 1939, and it is clear that the tenant for a considerable period during the first 7 years of her lease (which was the lease running when the county court judge heard the case) had slept at 11, Park Lane, and had had her meals there. In effect, she had lived there when she wanted to, or when circumstances rendered it desirable for her so to do from time to time. The fact that a very substantial part of the premises was used for business purposes does not prevent the Acts from applying. I might add that it seems to me that it would be a very queer result if such accommodation as this was not " suitable alternative accommodation." This spinster lady had got available a house with five bedrooms, a dining room, a lounge, a kitchen and a bath room.

We were referred to *Macmillan* v. *Rees* (1), where there was a covenant in the lease in regard to using the premises for business purposes. The covenant in question was :

> . . . not to use the said suite for any other purpose than as offices for the tenant's business of Travel and Buying Service . . . The tenant and Mrs. Mittler may, however, sleep upon the premises should they so require.

This court held that the proviso giving permission to the tenant to sleep and eat on the premises did not contemplate the use of them as a dwelling-house and that the premises did not come within the Act. That was a very different case from the one now before us.

It was next suggested that the premises were not " reasonably suitable to the means of the tenant " and that the county court judge had only taken into account the fact that the tenant had already entered into a lease to take these premises. It was a matter for the county court judge to decide whether, in his opinion, the premises were " otherwise reasonably suitable to the means of the tenant." He came to the conclusion that they were, and there was, in my opinion, ample evidence on which he could come to that conclusion, and I am not going to infer that he neglected and shut out of his mind any part of that evidence. Even if he had relied on the circumstances I have mentioned, I do not think this court could properly disturb his decision. Finally, it was suggested (though rather faintly) that the judge had not considered the position of the tenant and her " family " because the guests who frequented this guest house from time to time must be regarded as being the defendant's " family " within the meaning of the Act. I do not propose to say any more about that argument than that I do not agree with it. For these reasons, I think that the county court judge arrived at a correct decision and that this appeal should be dismissed.

Tucker, L.J. : I agree and I desire to add only a word or two with regard to the notice of appeal in this case. The grounds of appeal are as follows :

> (*a*) That the judge had no power to make the said order in the absence of proof of alternative accommodation.

If that were so, he had no power, but clearly there was evidence of some alternative accommodation. Whether it was " suitable " within the meaning of the Rent Restrictions Acts is another matter. Then the second ground is :

> That the judge was not entitled to regard as alternative accommodation business premises occupied by the tenant elsewhere, there being no evidence that the tenant could reside on such business premises.

The third ground is :

> That the said business premises were not " alternative accommodation " within the meaning of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

I read this notice of appeal as in effect raising one question only, that the alternative accommodation suggested was business premises and not a dwelling-house. That is partly a question of fact and may in certain circumstances involve considerations of law. I agree that on the evidence 11, Park Lane was not business premises but was a " dwelling-house " within the meaning of the decisions which have been passed upon this Act. That, in my view, is the end of this appeal.

Other matters have been argued but, speaking for myself, I think if they were to be relied on they should have been included in the notice of appeal. I attach some importance to that for this reason. Appeals to this court naturally lie on questions of law, and it is a very easy refuge, as a peg for a question of law, to say there was no evidence to support the judge's finding of some fact. Before that can be decided you have to consider the whole of the case before the county court judge and what the evidence was, and by relying on that point an appellant can always get the case more or less re-heard. I think it is incumbent on him, if he is going to say that the county court judge misdirected himself, to include in the notice of appeal matters of the kind which have been relied on in this appeal, and I am also of opinion that the points should have been taken before the county court judge so that one would know the precise respect in which the county court judge is alleged to have misdirected himself in law. In my view, there was here no evidence that the county court judge misdirected himself. I have no doubt that it was very proper for him to consider, that, by giving up " Fernside " and going to live in 11, Park Lane, the tenant might suffer some consequential financial loss, and that he took that possibility into consideration. I agree that the appeal fails.

Asquith, L.J.: I agree with both the judgments which have been delivered.

Appeal dismissed with costs.

Solicitors: *Edwin Coe & Calder Woods*, agents for *Cuthbert B. Pardoe*, Bridgewater (for the tenant); *Gregory, Rowcliffe & Co.*, agents for *Risdon, Hosegood & Weston*, Williton (for the landlord).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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istinguished. Lee *v.* K. Carter,
TD. [1948] 2 All E.R. 690.

Re SWANSON'S AGREEMENT, HILL *v.* SWANSON.

[Chancery Division (Evershed, J.), October 30, 31, 1946.]

Landlord and Tenant—Lease—Assignment subject to landlord's consent—Withholding of consent—Reasonableness—No grounds for objection to proposed assignee—Landlord wishing to obtain vacant possession.

Landlord and Tenant—Rent restriction—Contractual tenancy—Notice increasing rent to standard rent—Notice invalid, as out of time—Standard rent paid by tenant—Whether contractual tenancy ended—Estoppel.

By a tenancy agreement, dated June 1, 1942, the tenant agreed not to assign the premises without the landlord's consent, " such consent not to be unreasonably withheld in the case of a respectable and responsible assignee." The term was for 2 years from June 1, 1942, and quarterly thereafter, subject to 3 calendar months' notice in writing, "such notice expiring on May 31, 1944, or some subsequent quarter day." The rent was £108 a year. On Feb. 22, 1944, the landlord gave the tenant notice that as from Apr. 1, 1944, the rent would be £115, which was the standard rent. On Feb. 28, the tenant replied that the tenancy agreement terminated on May 31, 1944. On Mar. 7, 1944, the landlord wrote again, asking the tenant to regard the letter of Feb. 22 as a notice of increase in rent as from June 1, 1944. The tenant did not reply to that letter, but from June 1, 1944, she paid the increased rent of £115 a year. In June, 1946, the tenant asked the landlord's consent to assign the tenancy, whereupon, on June 20, 1946, the landlord gave the tenant a notice to determine the tenancy. In this notice it was stated that the tenant held the premises under the agreement of June 1, 1942. There were no grounds of objection to the proposed assignee, but the landlord wished to prevent a statutory tenancy arising and to get possession of the premises for herself or for a tenant of her own choice. The questions to be determined were (i) whether it was unreasonable for the landlord to refuse consent to the proposed assignment; (ii) whether the contractual tenancy had ended on May 31, 1944. With regard to (ii) it was contended by the tenant that the contractual tenancy still subsisted because there had been no valid notice to determine it, and the tenant further relied on the notice to quit of June 20, 1946, which assumed that the contractual tenancy still subsisted :—

HELD : (i) since the ground for refusal was unconnected with the person of the assignee or the user or occupation of the premises, the landlord's refusal to consent to the proposed assignment was unreasonable.

Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease (1) followed.

(ii) although the landlord's letter of Mar. 7 was not a valid notice, it not having been given three months before May 31, the tenant was estopped from asserting its invalidity by her failure to dispute its validity at the time and by her subsequent payment of the increased rent ; the letter of Mar. 7 operated as a notice to put an end to the contractual tenancy on May 31 so that after that date the tenant was a statutory tenant ; the inference to be drawn from the notice to quit of June 20, 1946, did not outweigh the conclusion to be drawn from the earlier correspondence ; and, therefore, from June 1, 1944, the tenant was a statutory tenant and not entitled to assign her interest.

[**EDITORIAL NOTE.** The correctness of the decision of the Court of Appeal in *Re Gibbs & Houlder Bros. & Co., Ltd's Lease* (1) was doubted by LORD DUNEDIN and LORD PHILLIMORE in their opinions in *Tredegar* (*Viscount*) v. *Harwood* (3), but EVERSHED, J., as a judge of first instance, declines to give effect to those *dicta* and leaves it to the Court of Appeal to consider whether or not its previous decision should be modified.

AS TO RIGHT TO ASSIGN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 344-354, paras. 415-426 ; and FOR CASES, see DIGEST, Vol. 31, pp. 379-384, Nos. 5259-5291.

AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401 ; and 1946 Supplement ; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplement.]

Cases referred to :

(1) *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd.* v. *Gibbs*, [1925] Ch. 198, 575 ; 94 L.J.Ch. 312 ; 133 L.T. 322 ; 31 Digest 383, *5286*.

(2) *Bates* v. *Donaldson*, [1896] 2 Q.B. 241 ; 65 L.J.Q.B. 578 ; 74 L.T. 751 ; 60 J.P. 596 ; 31 Digest 383, *5284*.

(3) *Tredegar* v. *Harwood*, [1929] A.C. 72 ; 97 L.J.Ch. 392 ; 139 L.T. 642 ; Digest Supp.

(4) *Keeves* v. *Dean, Nunn* v. *Pellegrini*, [1924] 1 K.B. 685 ; 93 L.J.K.B. 203 ; 130 L.T. 593 ; 31 Digest 576, *7254*.

(5) *Morrison* v. *Jacobs*, [1945] 2 All E.R. 430 ; [1945], K.B. 577 ; 173 L.T. 170 ; Digest Supp.

(6) *Farrow* v. *Orttewell*, [1933] 1 Ch. 480 ; 102 L.J.Ch. 133 ; 149 L.T. 101 ; Digest Supp.

(7) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469 ; 2 Nev. & P.K.B. 488 ; Will. Woll. & Dav. 678 ; 112 E.R. 179 ; 21 Digest 290, *1032*.

(8) *Freeman* v. *Cooke* (1848), 2 Exch. 654 ; 6 Dow. & L. 187 ; 18 L.J. Ex. 114 ; 12 L.T.O.S. 66 ; 21 Digest 287, *1019*.

(9) *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328 ; 1 Horn & H. 79 ; 7 L.J.Ex. 57 ; 150 E.R. 1170 ; 31 Digest, 459, *6073*.

ADJOURNED SUMMONS to determine certain questions arising under a tenancy agreement dated June 1, 1942. The questions raised by the originating summons were : (i) Whether according to the true construction of the said agreement and in the events which had happened the refusal of the defendant to grant a licence to the plaintiff to assign the premises was unreasonable ; (ii) whether, notwithstanding such refusal, the plaintiff was at liberty to assign the premises without any such licence. The facts appear in the judgment.

C. L. Fawell for the tenant.
S. H. Noakes for the landlord.

EVERSHED, J. : This is an originating summons entitled " In the matter of a tenancy agreement dated June 1, 1942, and made between Ivy Ethel Swanson of the one part and Georgina Hill of the other part," the parties to which I will hereafter for brevity refer to respectively as the landlord and the tenant. The summons raised the question, and in terms only raised the question, whether, in the events which have happened and having regard to the construction of the agreement, the landlord had unreasonably withheld her consent to a proposed assignment by the tenant of what was alleged to be her interest in the premises the subject-matter of the tenancy. But, as the matter proceeded, it became apparent that there was also raised and was in issue between the landlord and the tenant a point which would not *prima facie* be appropriate for determination on an originating summons, namely, whether, as the result of certain matters which occurred in 1944, the contractual tenancy created by the agreement mentioned in the title of the proceedings had come to an end altogether, so that the tenant, at all material dates so far as this matter is concerned, was what is called a statutory tenant only. As I said, the matter is one which normally could not be dealt with in proceedings of this character, and after hearing the argument it is a matter on which I should, perhaps, have taken time to consider my judgment, but, in the circumstances of this case, which are peculiar in that, on any view of it, the tenant will be a statutory tenant only in a month's time, it seems to me that I ought to express my opinion on the matters which have been raised at once, so that, if either party desires to take the opinion of another court, she shall be able to do so before a fundamental change has taken place in the relations between the parties, on the view that I have indicated.

I will deal first with the question in terms raised by the summons and on the footing that, at the date when the tenant gave to the landlord notice of her intention to assign, there subsisted a contractual tenancy. I should say that the proposed assignee is a person as to whose respectability and responsibility there is no question whatever. The only point is whether, in the circumstances which I will mention in a moment, the refusal of the landlord to give her consent was, or was not, unreasonable. That arises because, by para. 2 (*f*) of the agreement, it is provided as follows :—

> The tenant will not assign . . . the premises without the landlord's previous consent in writing . . . such consent not to be unreasonably withheld in the case of a respectable and responsible . . . assignee.

When the tenant gave notice of her intention to assign, calling upon the landlord to give her consent, the landlord by way of reply, through her solicitors, gave a notice purporting to be a notice determining the tenancy. I shall have to refer to that matter hereafter and, therefore, it is sufficient for present purposes to say that, assuming a contractual tenancy subsisted in June, 1946, when the tenant asked her landlord's consent, the contractual tenancy would determine on Nov. 30. On that basis it is apparent that, if the assignment takes effect, the assignee, having been in possession as contractual tenant for however short a time, will obtain the benefits of what are known as the Rent Restriction Acts so as to be able to remain after Nov. 30 as statutory tenant.

The landlord, on receiving the application from her tenant and drawing therefrom the assumption that the tenant did not herself wish to remain in possession, took the step she did to put herself, in the language of her counsel, in the best possible position to get for herself, or for some other tenant of her own choice, possession of the premises. The question shortly is whether it is unreasonable to refuse consent to an assignment in other respects unimpeachable to obtain for oneself such advantages as may be obtained in the way of getting actual vacant possession. In the absence of authority it might well be said not to be an unreasonable act for the landlord to take a step, or to decline to take a step, in order to get into the best possible position for obtaining vacant possession, but the matter is not free from authority binding on this court. I refer at once to *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1) decided by TOMLIN, J., and affirmed by the Court of Appeal. In view of observations made on that authority in the House of Lords, it is to be noted that TOMLIN, J., whose judgment was affirmed, said this in the course of his judgment ([1925] Ch. 198, at p. 202) :

> . . . . the learned judges who have decided those cases have not always confined themselves to dealing exclusively with the matters in hand, and they have, as is no doubt natural and proper, embarked on statements of the principles which they held to justify them in arriving at the particular conclusion adopted in the particular case . . .

In an earlier part of his judgment TOMLIN, J., had stated in terms the two conflicting arguments. The conclusion of the matter as decided by him (and, as I say, his conclusion was confirmed by the Court of Appeal) is, I think, accurately stated thus in the headnote, :

> Grounds of objection unconnected with the person of the assignee or the user or occupation of the premises are not reasonable.

Counsel for the defendant landlord, argued that, since the point in the action of the landlord here was to prevent, if possible, a statutory tenancy arising in respect of these premises and to make them, in so far as that were possible, available for himself and a person of his own choice, that is, after all, a ground connected with the user or occupation of the premises, but it is, I think, plain from the terms of the judgment of TOMLIN, J., and of the judgment of the Court of Appeal that by "user or occupation" is meant the manner in which the premises are used or occupied—for example, for purposes which might cause offence even although they did not involve any breach of covenant—and the phrase does not mean merely length of occupation or whether the premises are occupied by one person rather than another as such. *Bates* v. *Donaldson* (2), which was cited by counsel for the tenant, makes it, I think, clear that the reason here assigned by the landlord does not fall within the grounds which have been held to be reasonable within the principle of the decisions. Nor do I think the case is altered by the fact that, on this view of the matter, the tenancy had little more than five months to run.

Before passing from that, however, I must refer to the fact that in *Tredegar (Viscount)* v. *Harwood* (3) in the House of Lords, two of the noble Lords in their opinions expressed substantial doubt about the correctness of the decision in *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1). The facts in that case were quite different from this, and it does not necessarily follow that a disapproval of *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1) would involve a result contrary to that which I think is applicable here, but, in expressing his doubt on the correctness of *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1), LORD PHILLIMORE used this language ([1929] A.C. 72, at p. 82):

> If it be a question whether a man is acting reasonably, as distinguished from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect somebody else.

Counsel for the landlord has rightly said that, if that sentence is to be taken at its face value, it might well justify a conclusion in this case which would be different from that indicated above and which would indeed be in conflict with the decision of the Court of Appeal, but, notwithstanding the *dicta* of LORD DUNEDIN and LORD PHILLIMORE in the House of Lords, it is plain that *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1) is still regarded as binding and good authority. Moreover, *Bates* v. *Donaldson* (2) has not been adversely criticised and it is now fifty years since that decision was pronounced. It would be, I think, most dangerous and wrong for me, as a judge of first instance, on the basis of *dicta* in the *Tredegar* case (3) to attempt to create fine distinctions limiting the effect, or questioning in any way the validity, of the decision in *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1).

I have ventured to refer to this matter because, should this case go further, it may be that the Court of Appeal will consider the propriety of revising, if any revision is required, conclusions which are founded on *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1). However that may be, in this case I am satisfied, as I have already stated, that, according to the authorities which I have mentioned and the principles behind them, the landlord must be taken to have been unreasonable.

That, as I have indicated, has not proved to be the end of the matter. In the course of the argument and on looking at the facts, it is plain that there also emerges the question whether at the material date the tenancy was, in fact, a contractual tenancy at all. If the contractual tenancy determined at any date before the notice was given by the tenant calling on her landlord to consent to the assignment, it is, in my judgment, plain that the right to assign, qualified or unqualified, which the tenant had under the contract had ceased. That, in my judgment, follows from the Court of Appeal's decision in *Keeves* v. *Dean, Nunn* v. *Pellegrini* (4) and I do not understand that counsel for the tenant really contests that conclusion. The real question, and the question which I have found difficult, is whether the contractual tenancy did determine.

At this stage I desire to state, I hope correctly, the facts on which I now proceed to state my opinion. I do so because, as I have indicated, this is not an appropriate form of proceeding in the ordinary way for the determination of such a question. I start with the contract itself, dated June 1, 1942. It was a lease or tenancy of premises known as 1, Howard Walk, Finchley. The term was two years from June 1, 1942 :

> . . . . and so on from quarter to quarter until the tenancy hereby created shall be determined by either party giving to the other . . . 3 calendar months previous notice in writing to determine the tenancy such notice expiring on May 31, 1944, or some subsequent quarter day.

I pause there to state that, as a matter of construction, it is plain that either party could by appropriate notice determine the contractual tenancy for the first time A on May 31, 1944, and thereafter at three monthly intervals. The rent is stated as being £108 per annum. On Feb. 22, 1944, *i.e.*, more than three months before May 31, 1944, the landlord wrote a letter in the following terms to the tenant :

> Please take notice that the rent of the above premises will as from Apr. 1, next be £115 per annum exclusive, which is the standard rent. B

The tenant replied to that letter, but it has been given in evidence that the reply has been lost. In these circumstances, secondary evidence of its contents being admissible, the tenant has herself supplied the court with her recollection of the terms of her reply. It was dated Feb. 28, 1944. I pause to state that, 1944 being a leap year, and assuming that the letter was delivered in the course of post, that letter would be received not less than three months before May 31, 1944. The summary of that letter as stated by the tenant is as follows : " Replied that C agreement for tenancy of above address terminates on May 31, 1944." On receipt of that letter, the landlord by her agent wrote a further letter on Mar. 7, 1944 :

> Dear Madam, I have your letter of Feb. 28, and regret my error. Please regard my letter of Feb. 22, as an intimation of the increase in rent as from June 1, next.

So far as the evidence goes, there is no reply or acknowledgment of that letter D whatever, but—and this has been admitted by counsel on both sides and I assume it as a fact—from June 1, 1944, onwards, rent was in fact paid at the increased figure or rate of £115 per annum.

Time passed until, two years later (as I have already stated), the tenant intimated her desire to assign and in June, 1946 communicated with the landlord to that effect. The landlord, on this occasion acting through solicitors, E wrote on June 20, 1946 :

> Dear Madam, *re* 1, Howard Walk, N.2. We have been instructed by your landlord' Mrs. I. E. Swanson, to serve you with the enclosed notice to quit. Please acknowledge receipt.

The notice to quit was as follows :

> To Mrs. Hill, 1, Howard Walk, Finchley, N.2. Take notice to determine your tenancy F of No. 1, Howard Walk, Finchley, N.2., on Nov. 30, 1946, and on that day to quit and deliver up possession of No. 1, Howard Walk aforesaid which you hold as tenant under an agreement dated June 1, 1942, and made between Ivy Ethel Swanson of the one part and yourself of the other part.

That was dated June 20, 1946.

On those facts it is said, on the one hand, that whatever the misapprehension of either party at any stage may have been, the only proper inference the court G can draw from all the facts is that the contractual tenancy came to an end on May 31, 1944, and that thenceforward, or at any rate from a date long prior to June, 1946, Mrs. Hill was merely a statutory tenant. On the other hand, it is said that the notice originally given was on the face of it an invalid notice, that there is nothing which entitles the court to infer from the facts I have stated any agreement to substitute for the contractual tenancy a statutory tenancy, and that, in any case, such a contract was not a thing which would be contemplated H by the law, a statutory tenancy being a negation of contract. It is further said that, when all the matters which I have read are considered, including the terms of the notice in June, 1946, which unequivocally are based on the view that a contractual tenancy then existed, the true view is either that the original tenancy still subsists in its entirety, or that it continues to subsist with a variation, namely, an increase of £7 a year in the rent, or that a new contractual tenancy was created which was in all respects similar to the original tenancy save that the rent was £115 per annum, and (I assume) that its term was quarterly, subject to notice. Between those two conflicting views I feel it my duty to the parties here to express an opinion.

I think it is important in considering a question of this kind to note that when this agreement was made, namely, June, 1942, plainly to the knowledge of both parties the premises were within the ambit of what are called the Rent Restrictions Acts. The effect of the impact of those Acts on matters of this character is illustrated by *Morrison* v. *Jacobs* (5) to which counsel for the landlord referred. That case has, I think, no direct bearing on the present one, but is of significance as illustrating the point I have mentioned. In the case of rent restricted houses it is notorious that the end of the contractual tenancy gives the landlord no right such as he had at common law to evict the tenant, with the result that you cannot, from the mere fact that a tenant continues in possession, infer a contract such as you would have done in the past prior to the Act. I refer to that matter for this reason. Counsel for the tenant, in his most forceful argument, has made the point that a tenancy is, after all, an estate or interest in land known to, and appreciated by, the law, and that such an estate or interest can only be determined in certain ways which the law recognises. One is by effluxion of time where the lease or tenancy is for a fixed period only. Another is by an appropriate notice where, by the terms of the contract, the tenancy is determinable upon such notice. The third is by surrender. I leave out of consideration, as did counsel for the tenant, questions of forfeiture which have no application. Proceeding from that, the argument of counsel for the tenant has laid great emphasis on the point that there was here nothing which in the eye of the law could operate to put an end to this estate or interest, there was no question here of determination by effluxion of time, there was in truth and in fact no valid notice, there was no surrender because the tenant never gave up possession. That struck me, I confess, as forcible, but I have reached the conclusion in this case that when all the facts I have indicated are considered the true view is that from June 1 onwards Mrs. Hill was a statutory tenant only. That conclusion is, in my judgment, forced on the court as a result of what was done because, as I think, the tenant here cannot now be heard to say as against the landlord that there was no valid notice. Without referring to authority, it is, I think, clearly established that where an invalid notice (*i.e.*, a notice insufficient in point of time) is given, the party to whom it is given may, as the result of his conduct, be estopped from asserting the true fact, namely, that the notice was insufficient.

What happened here ? The landlord gave a notice dated Feb. 22, purporting to impose on the tenant the obligation to pay the standard rent from April 1. Having regard to the fact that with rent restricted houses a tenant cannot be evicted merely because the contract of tenancy is at an end, the notice here given must, in my judgment be taken—and would have been taken by any ordinary person—to be an indication by the landlord that he intended to exercise the rights he then had to put an end to the contract and to place the tenant in the position of a statutory tenant, for it is only as a statutory tenant that he would be bound to pay the standard rent. It is quite plain that the tenant herself so understood the letter, because her recollection of her reply, which I have read, refers to the termination of the contract. Whatever its exact terms were, it is plain that the letter pointed out to the landlord that she could not determine the contract and impose the standard rent on Apr. 1, but that could only, at that date, be done on June 1 at the earliest. The landlord herself so understood the tenant. She replied apologising for the error and invites the tenant to regard the original notice as having contained a reference to June 1, instead of Apr. 1, the date erroneously put in. Had the original letter so read, it would not, I think, have been open to serious doubt that it would have been a notice to put an end to the contract on May 31. So far as the evidence goes, the landlord's letter of Mar. 7 was never answered or acknowledged in any way. As counsel for the tenant pointed out, by Mar. 7, if that was to be the first time notice was given, it was too late to put an end to the contract on May 31, but it seems to me that by her conduct in giving the reply she did, by not answering or acknowledging or disputing in any way the letter of Mar. 7, and, finally, by paying the standard rent without comment from June 1 onwards, the tenant must be taken, and would have been taken by any reasonable person—and I have in mind the well-known statement in regard to estoppel quoted by LORD HANWORTH, M.R., in *Farrow* v. *Orttewell* (6) from *Pickard* v. *Sears* (7) and *Freeman* v. *Cooke* (8)—as representing that the original document of Feb. 22 would be acted on by her as though "June 1" had been inserted in it. When she proceeded to pay the standard rent, any reasonable man would have continued so to believe. The landlord had intimated plainly, as I think, her intention to get the standard rent as soon as she could and for that purpose to determine the contract, and she thenceforward forebore to give any other notice until we come to June, 1946. As I have indicated, when the solicitors of the landlord gave the notice in June 1946, the terms of it were consistent, and consistent only, with the belief that there was still a contract. Weighing very carefully that letter, and considering whether the inference to be drawn from it should outweigh the conclusion which I think the court ought to draw from the earlier correspondence, on the whole I think something done two years later cannot undo the effect which I think was given to the proceedings in February and March, 1944. I only add this. I have already said that in considering these matters one has to bear in mind the very important effect that the Rent Restrictions Acts have had on tenancies, depriving landlords of premises governed by these Acts of any right to put an end to the tenants' possession. If the contention of counsel for the tenant is right, it seems impossible that by any act of this kind a tenant could be prevented from asserting at any time the invalidity of a notice, however long it had been acted upon. Nor do I think that in these circumstances it is possible for the court to infer any new contract. I do not think there is any *animus contrahendi* in these letters of February and March, 1944, nor do I think that any contract to end the tenancy or to create a statutory tenancy is involved. What is involved is the law of evidence—whether in the circumstances the tenant can give evidence of a notice which is invalid because of insufficient length. That is really the substance of it, or at least the proper way, in my judgment, of putting it.

I would add that it does not seem to me that, in a case such as this, *Doe d. Murrell* v. *Milward* (9), cited by counsel for the tenant, is any authority which compels me to hold that the present result is not one which the law should contemplate. That was a case which decided that, if an invalid notice by a tenant had been given for determination of a tenancy at midsummer and then before the notice came into effect (*i.e.*, before midsummer) the tenant corrected his mistake and gave a new notice to quit, there was nothing which prevented the tenant from setting up the true facts or entitled the landlord to evict the tenant at midsummer on the ground that there could be no agreement for a surrender *in futuro*. I do not think the principle of that case conflicts with the principle which I have attempted to describe in deciding the present case.

That being so, I apply myself to answering the questions raised in the summons. I propose, subject to what counsel may say, to answer question 1 by saying that, on the footing that at the date of the application of the plaintiff for a licence there was a contractual tenancy of the premises, 1, Howard Walk, Finchley, the refusal of the defendant to grant a licence to the plaintiff to assign the premises was unreasonable. As regards question 2, I think the right answer is: the court being of opinion that at the date aforesaid there was no subsisting contractual tenancy of the said premises, no order on question 2. Having regard to the fact that on the first point which has been argued at length I have formed a view adverse to one party and that on the second question I have taken a view adverse to the other party, I shall decline to make any provision for the costs of this application.

Declaration accordingly.

Solicitors: *Routh, Stacey, Hancock & Willis* (for the tenant); *Barfield, Child, Barry, Lucas & Sons* (for the landlord).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

ANGEL *v.* ANGEL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Byrne, J., sitting as a Divisional Court), October 17, 1946.]

Husband and Wife—Desertion—Parties continuing to live in same house.

Shortly before Sept. 3, 1939. a wife had, with her husband's consent, gone to live in South Africa. Early in Jan., 1946, she arrived back in England and lived in the same house as he, but sexual relations were never resumed. In Feb., 1946, the husband took one room in the house for his own use, locked himself in it away from his wife, and got his meals outside the house. The wife brought a summons for desertion before justices who stopped the case because "having regard to *Weatherley* v. *Weatherley* (1) . . . desertion was not proved." The wife appealed.

HELD: the justices were wrong in directing themselves that they must arrive at their decision on the facts before them in the light of the decision in *Weatherley* v. *Weatherley* (1); as the wife did not contend that her husband had refused to render her rights which she desired, it followed that, while it was impossible to say in the circumstances that *Weatherley* v. *Weatherley* (1) was entirely irrelevant, that decision had a very slight bearing on the present case and was only to be considered in conjunction with the other facts in the case; and the law applicable to the question to be decided by the justices was to be found in *Smith* v. *Smith* (3).

[**EDITORIAL NOTE.** This case is of value as indicating both to judges and commissioners dealing with divorce suits and magistrates exercising the powers of courts of summary jurisdiction in matrimonial disputes the view of the President of the Divorce Division that the law as laid down in *Smith* v. *Smith* (3) is applicable in cases where one spouse alleges desertion by the other although both parties have been living under the same roof.

Cases referred to:

(1) *Weatherley* v. *Weatherley*, [1946] 2 All E.R. 1; 174 L.T. 346.
(2) *Jackson* v. *Jackson*, [1924] P. 19; 27 Digest 308, *2852*.
(3) *Smith* v. *Smith*, [1939] 4 All E.R. 533; [1940] P. 49; Digest Supp.; 109 L.J.P. 100; 162 L.T. 333.
(4) *Littlewood* v. *Littlewood*, [1942] 2 All E.R. 515; [1943] P. 11; Digest Supp.; 112 L.J.P. 17; 167 L.T. 388.
(5) *Wilkes* v. *Wilkes*, [1943] 1 All E.R. 433; [1943] P. 41; 112 L.J.P. 43; 168 L.T. 111; Digest Supp.
(6) *Diver* v. *Diver*, unreported.
(7) *Powell* v. *Powell*, [1922] P. 278; 92 L.J.P. 6; 128 L.T. 26; 27 Digest 309, *2860*.

APPEAL by a wife against the decision of Willesden justices. The facts, so far as they became known, are set out in the judgment of LORD MERRIMAN, P.

S. E. Karminski, K.C., and *Gratton-Doyle* for the wife.
Geoffrey Howard and *G. R. Swanwick* for the husband.

LORD MERRIMAN, P.: This is an appeal from Willesden justices who dismissed a wife's summons based on desertion. Although it is impossible to come to a final decision, for reasons which I shall make plain in a moment, I regard this case as one of considerable importance, for it raises for the first time in any appellate court, so far as I am aware, the question whether or not a wife is precluded from asserting a charge of desertion by the mere fact that she and her husband were residing in the same house. As it is plain that there must be a rehearing (for the justices of their own motion stopped the case at the conclusion of the wife's evidence, and the husband has never been heard) I propose to say as little as possible about the facts and certainly to express no concluded opinion about the weight of such facts as it is necessary to refer to. Shortly, the position on the facts was this. The wife had, just before the outbreak of the late war, gone to South Africa with the child of the marriage, and we are told, and it has not been contradicted, that she went with her husband's consent. Owing to the outbreak of the war she remained in South Africa until about the end of 1945 or the beginning of 1946, and arrived in this country on a date which is not precisely fixed, except that it must have been in or about the last week of January. She asserts that she was deserted by her husband as from Feb. 10. I wish to make it plain that it is asserted, and, indeed, I think admitted, but I am expressing no final opinion about that, that the husband was very insistent on her coming back from South Africa. It is common ground that he met her at the boat and that he drove her home. There was no question, apparently, of forcing her to return to the matrimonial home. It is equally plain that the house in which they lived was her property, and not his, and one other fact is common ground, they they did not resume sexual life at any time during their brief cohabitation.

It is significant that before the summons came on the respective solicitors had exchanged letters, in one of which the solicitors for the husband said: "The essence of the matter is the question of who deserted whom," to which the solicitors for the wife replied "We agree." Moreover, we have been told by counsel for the husband that learned counsel who appeared for the husband in the court below had no intention whatever of suggesting that there was not a case to answer and was about to put his client into the witness-box to deal with the wife's evidence and to call his other witnesses, whoever they may have been, when the justices themselves stopped the case. No reason for so doing was given in open court. That, of course, is quite in order, though, no doubt, if the advocate on either side had asked for a statement of the reasons then and there, the justices might have felt inclined to give them, but justices are not bound to give reasons for decisions as judges are, and it is only if an appeal results that they are obliged to do so. Accordingly, when this appeal was made, the justices were asked for, and gave, their reasons, and they are in these words: "Having regard to *Weatherley* v. *Weatherley* (1), heard in the Court of Appeal on Mar. 29 and Apr. 1 and 16, 1946, we are of the opinion that desertion was not proved."

Speaking for myself, I find it impossible to say that that was a mere finding of fact that the wife's evidence was not sufficient to sustain the charge of desertion, or that they rejected the wife's evidence for one or other of half a dozen different reasons which might be adequate. It is the plainest possible statement that they have directed themselves that they must arrive at their decision on the facts before them in the light of that decision of the Court of Appeal. If that decision is decisive, the direction is right. If it is not decisive, and *a fortiori* if the case has little or no bearing on the facts put forward, then it is the plainest possible case of misdirection.

Weatherley v. *Weatherley* (1) was a decision dealing solely with the issue, raised by an earlier decision of this court in *Jackson* v. *Jackson* (2), whether, when the parties were living together in every other sense of the word except that one of them had refused conjugal rights, there could be any question of desertion. The headnote shows (I am quoting the ALL ENGLAND REPORTS) that, although the wife had intimated to the husband that she would no longer have sexual relations with him, and, indeed, had gone so far as to suggest that he might satisfy himself with another woman, the parties continued to share a flat which constituted the matrimonial home, the wife prepared the husband's meals for him when on leave, they had their meals together and visited social clubs together—in other words, returning to the paraphrase of the decision in *Jackson* v. *Jackson* (2) they lived together, exigencies of the service permitting, in every sense of the word except that the wife refused conjugal rights. That case is not, of course, irrelevant to the present one, because there was that element in the relation of the parties—they did not resume sexual relations, but I should like to point out in passing, that so far as I can judge from the note—and this has been expressly stated by counsel for the wife—she never put forward the absence of sexual relations as an element in the case at all, and I can see no hint in her evidence that there was a refusal on the part of the husband to render her rights which she herself desired. So, though it is impossible to say that *Weatherley* v. *Weatherley* (1) is entirely irrelevant, it is plain beyond the slightest doubt that its bearing on the case is very slight indeed, and it could not possibly be the guiding factor in the decision.

This brings me back to the point at which I started, the importance of this appeal as an appeal. Hitherto this question of desertion, when the parties are living under the same roof, has depended only on decisions of first instance. I may perhaps be pardoned if I refer to a decision of my own in *Smith* v. *Smith* (3) where the question was raised in a particularly neat form on the facts. I say I may be pardoned for referring to that since it has been made the keystone of the argument, and it has, in fact, been applied in one reported case affirmatively and in another negatively by two other judges of this Division. I am referring to *Littlewood* v. *Littlewood* (4) and *Wilkes* v. *Wilkes* (5). In a word, *Smith* v. *Smith* (3) was a case in which, there being, so to speak, three tiers of the structure in which the spouses lived (a basement, a ground floor and a first floor) the husband had withdrawn from the wife's society and had made his home, so long as she was alive, with his mother, who lived in the basement, and he only went to the ground floor on which the wife thereafter lived, because he could only get to A his bedroom on the first floor by going that way. The mother died, and the husband thereafter continued to make his own home in the basement, everything else continuing as before. I examined one or two earlier authorities, the one which was plainly the most helpful being *Diver* v. *Diver* (6), which was referred to by HILL, J., in joining with my predecessor in the judgment in *Jackson* v. *Jackson* (2). That was a case in which, out of the two material years, all but two months were accounted for by complete separation between the spouses, B but in the first two months of the material two years the husband had insisted on sleeping in a separate room, had never spoken to the wife, had never answered her when she spoke to him, and when she had asked why she was being so treated, had knocked her down. HILL, J., in *Jackson* v. *Jackson* (2) had found that the desertion for the whole two years was proved, notwithstanding the fact that the parties during those two months or thereabouts of the necessary time had lived C physically under the same roof. I also referred to *Powell* v. *Powell* (7)—not, perhaps, so clearly in point, because it was a suit for restitution—and I defined the issue in *Smith* v. *Smith* (3) as being whether the case was on what might be called the *Powell* v. *Powell* (7) side of the line rather than the *Jackson* v. *Jackson* (2) side of the line. If I may, without presumption, incorporate that part of my judgment in *Smith* v. *Smith* (3) into this judgment, I should desire to amend it by saying that this case raises the question whether it is on the *Smith* v. *Smith* D (3) side of the line or on the *Weatherley* v. *Weatherley* (1) side of the line, and that is the issue which has never been tried.

I have said I am not going to express any decisive opinion about the facts, but this case cannot possibly be said to be a case which depends wholly on the withholding of conjugal rights. I am going to mention two other facts, which are intimately connected. I have already said that this house was the wife's house. The gist of the allegation that the wife was deserted on Feb. 10 is in this fact, E that on or about that date the husband appropriated to himself, in circumstances which I need not enlarge on, one room in the house, into which he padlocked himself, and counsel for the husband has supplemented that fact by something which does not actually appear on the note, but which he admits is the fact, that the husband thereafter got his meals outside the house. I am not going to express any opinion one way or the other whether that fact is decisive or not, but it is beyond question that it is material as a fact to be considered with all F the other facts in the case, including the background of the parting and the background of the wife's return, before any court can come to a conclusion on the question whether there was a wrongful withdrawal from cohabitation, in the full sense of the word, against the will of the wife. Of course, in that connection there must be taken into account, among other things, the fact that, after the summons was issued, the husband made an offer (to which he adhered in open G court and the truth or falsehood of which is, no doubt, one of the things to be considered) to resume cohabitation, but, speaking now as a member of this Divisional Court, and being of the opinion that *Smith* v. *Smith* (3) and *Wilkes* v. *Wilkes* (5) were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house, I think it is plain that this issue, the issue raised by *Smith* v. *Smith* (3), has never H been considered at all. That being so, in my opinion, this order dismissing the wife's summons for desertion must be set aside, and there must be a rehearing.

BYRNE, J.: I agree. I think the justices made a mistake with regard to the law applicable to the evidence of the wife. The law that they applied to the facts, as they have stated in their reasons, is the law as laid down in *Weatherley* v. *Weatherley* (1). That case decided only that the refusal of sexual intercourse does not by itself amount in law to desertion. Of course, the refusal of sexual intercourse is involved in the complete cessation of cohabitation, but in the case before the justices the evidence of the wife went far beyond the question of refusal of sexual intercourse. Indeed, that aspect of the matter was never specifically raised or dealt with, for, according to her evidence, the husband withdrew completely from her company, and lived an entirely separate life behind a padlocked door in another part of the house. The justices did not hear the whole of the case, but, in my view, having regard to the nature of so much of the case as they did hear, that is to say, the case as put forward by the wife, the law applicable to the facts to be decided by the justices is to be found in the judgment of my Lord in *Smith* v. *Smith* (3), a judgment which has been followed in other cases in this Division, among these cases being *Wilkes* v. *Wilkes* (5). I am, therefore, clearly of opinion that the justices made a mistake in law, and that the case should be remitted to them, in order that they may have an opportunity of applying the law as laid down in *Smith* v. *Smith* (3) to the facts as they find them when they have heard the whole of the evidence.

LORD MERRIMAN, P.: The order will be, then, that the appeal is allowed, the order dismissing the summons is set aside, and the summons is remitted to be heard by a fresh panel of justices for the petty sessional division of Willesden in light of the directions given in our judgment.

Case remitted.

Solicitors: *Kingsley & Co.* (for the the wife); *Goodman, Monroe & Co.* (for the husband).

[*Reported by* R. HENRY WHITE, ESQ., *Barrister-at-Law.*]

Re KENT & SUSSEX SAWMILLS, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 4, 1946.]

Companies—Charges requiring registration—Charge on book debts—Authority to third person to pay to company's account at bank all moneys due to company under a contract—Instructions "to be regarded as irrevocable unless the bank should consent to their cancellation"—Companies Act, 1929 (c. 23), *s.* 79 (2) (*e*).

To enable a company to carry out a contract with the Ministry of Fuel and Power, a bank agreed to provide overdraft facilities on the condition that the company wrote to the ministry authorising the ministry to remit all moneys due under the contract direct to the company's account at the bank, the bank's receipt being a sufficient discharge. The letter further stated: "These instructions are to be regarded as irrevocable unless the bank should consent to their cancellation." The company later went into voluntary liquidation. The question to be determined was whether the letter of authority constituted a charge on the book debts of the company under the Companies Act, 1929, s. 79 (2) (*e*), and, not having been registered under that section, was, therefore, void as against the liquidator. It was contended by the bank that the transaction evidenced by the letter amounted to a sale by the company to the bank of the whole of the company's interest in the moneys due under the contract:—

HELD: on the true construction of the letter of authority, no out-and-out sale by the company to the bank was intended, but that the letter amounted to an equitable assignment by way of security and constituted a charge on book debts of the company under s. 79 (2) (*e*) of the Act of 1929, and, not having been registered under that section, it was void as against the liquidator. *Bell* v. *London & North-Western Rly. Co.* (1) distinguished.

[**EDITORIAL NOTE.** Whether or not a transaction creates a charge on the book debts of a company must always depend on the circumstances of the case. *Ladenburg & Co.* v. *Goodwin, Ferreira & Co., Ltd.*, [1912] 3 K.B. 275 and *Saunderson* v. *Clark* (2) afford examples where charges were held to have been created, while *Re Allester, Ltd.*, [1922] 2 Ch. 211, *Ashby, Warner & Co., Ltd.* v. *Simmons*, [1936] 2 All E.R. 697; *In re Geo. Inglefield, Ltd.*, [1933] Ch. 1, are instances of decisions to the contrary effect. In the present case it is held that the provision in the letters that the instructions for payment were irrevocable save with the consent of the bank must be regarded as having been introduced to protect the bank and the letters must be treated as amounting to equitable assignments. Further, an equity of redemption is held to result from the provision for the consent of the bank to possible revocation, leading to the conclusion that the assignment was by way of security and was not an out-and-out assignment of the benefits accruing to the company under the contracts.

As to Charges Requiring Registration, see HALSBURY, Hailsham Edn., Vol. 5, pp. 504-506, para. 814; and for Cases, see DIGEST, Vol. 10, p. 789, Nos. 4942-4946, and Supplement.]

Cases referred to:

(1) *Bell* v. *London & North Western Ry. Co.* (1852), 15 Beav. 548; 19 L.T. (O.S.) 292; 8 Digest 427, *62*.

(2) *Saunderson & Co.* v. *Clark* (1913), 29 T.L.R. 579; 10 Digest 789, *4945*.

Adjourned Summons by the liquidator of a company to determine a question under the Companies Act, 1929, s. 79. The facts appear in the judgment.

J. G. Strangman for the liquidator.
D. B. Buckley for the bank.

Wynn-Parry, J.: This summons which was taken out by the liquidator in the liquidation of Kent and Sussex Sawmills, Ltd., raises a short, but not uninteresting, question under the Companies Act, 1929, s. 79.

On June 6, 1944, the company entered into a contract with the Ministry of Fuel and Power for the supply to that ministry by the company of 30,000 tons of cut logs. The company approached their bankers, Westminster Bank, Ltd., who are the respondents to the summons, for overdraft facilities in connection with the carrying out of the contract. The bank was agreeable to provide those facilities on the terms that the company should write a letter to the Ministry of Fuel and Power, which it did under date Sept. 18, 1944. The letter is addressed to the Ministry of Fuel and Power and after referring to the contract proceeds as follows:

> With reference to the above-mentioned contract, we hereby authorise you to remit all moneys due thereunder direct to this company's account at Westminster Bank, Ltd., Crowborough, whose receipt shall be your sufficient discharge. These instructions are to be regarded as irrevocable unless the said bank should consent to their cancellation in writing, and are intended to cover any extension of the contract in excess of 30,000 tons if such should occur.

That letter was sent by the bank to the ministry on Sept. 19, 1944, under cover of a letter of that date to which I need not refer in detail. On Sept. 26, 1944, the ministry replied to the bank acknowledging their letter of Sept. 19, 1944, and in effect expressing their agreement to follow the directions as to payment contained in the company's letter of Sept. 18, 1944.

In May, 1945, the company entered into a further contract with the Ministry of Fuel and Power for the supply to that ministry by the company of 70,000 tons of logs. The company made a request to the bank for increased overdraft facilities which the bank agreed to provide up to the sum of £70,000 on the terms that the company should write a further letter to the Ministry of Fuel and Power, which it did under date June 4, 1945. After referring to the contract, the letter proceeds:

> With reference to the above mentioned contract, we hereby authorise you to remit all moneys due or to become due thereunder direct to the Westminster Bank, Ltd., Crowborough, for the credit of the company's account. The bank's receipt shall be your sufficient discharge.

Then follows a paragraph similar in all respects to the last paragraph of the letter of Sept. 18, 1944, except that the number of tons referred to is 70,000 instead of 30,000. This letter was sent by the bank to the Ministry of Fuel and Power under cover of a letter of June 5, 1945, and the bank's letter is acknowledged by the ministry in a letter of June 15, 1945, in which the ministry stated that payments would be made to the bank in accordance with the authority contained in the company's letter of June 4, 1945. On Feb. 12, 1946, the company went into voluntary liquidation, the liquidation being a creditor's liquidation. £30,000 then remained owing to the company under the two contracts while the company's overdraft with the bank at that date amounted to £83,674.

It is in those circumstances that this summons comes before me. The liquidator asks for a declaration that the two letters of authority to which I have referred constitute charges on book debts of the company under the Companies Act, 1929, s. 79 (2) (*e*), and that, not having been registered under that section—as is admitted—they are void as against the liquidator. It is admitted on behalf of the bank that the subject-matter of the application is properly to be regarded as coming under the heading of book debts within the section. That leaves for consideration the question whether the transactions evidenced by the two letters of Sept. 18, 1944, and June 4, 1945, amounted to an out-and-out assignment in each case of the whole of the company's beneficial interest in the proceeds of the respective contracts or whether in each case nothing more was effected than the hypothecation of the respective book debts by the company to the bank by way of security.

It is clear from the authorities that it is the duty of the court to come to a conclusion on what is the substance of the matter, and for the sake of convenience I shall test this matter by reference solely to the language of the letter of Sept. 18, 1944. Counsel for the liquidator submitted as his first point that the proper conclusion is that in this letter there can be found no assignment at all, in which case *cadit quaestio.* In support of that argument he referred to *Bell* v. *London & North Western Ry. Co.* (1). In that case, a railway contractor gave his bankers a letter directing the railway company to pass the cheques which might become due to him " to his account with the bank," and it was held that that was not an equitable assignment, but that it would have been if it had directed the cheques to be passed to the banker. In his judgment, Sir John Romilly, M.R., said (15 Beav. 548, at p. 552) :

> The words of this letter are these : " You will oblige by passing the cheques that may become due on my contract No. 1, of the Rugby and Stanford Railway, into the National Provincial Bank of England . . . to my account with the Rugby branch." If the letter had been simply, " You will oblige by passing the cheques that may become due on my contract No. 1 of the Rugby and Stamford Railway to the National Provincial Bank of England," I should have thought that an effectual assignment of all that might become due to Thomas Burton under that contract had been made to the bank ; but this order directs it to be paid to the account of Thomas Burton, not therefore, as it appears to me, doing more than constituting the bank to be Thomas Burton's agents for the receipt of the money.

If the letter of Sept. 18, 1944, had stopped at the end of the first sentence, then, in my view, it would have followed that this case was completely covered by what was said by Sir John Romilly, M.R., in *Bell* v. *London & North Western Ry. Co.* (1). I have to consider the effect on this aspect of the matter of the second sentence, which opens with these words :

> These instructions are to be regarded as irrevocable unless the said bank should consent to their cancellation in writing . . .

I think that the effect of those words on the matter is really as submitted by counsel for the bank, because, as he points out, it appears from *Bell* v. *London & North Western Ry. Co.* (1) that Sir John Romilly, M.R., arrived at the conclusion at which he did in view of the circumstance that, as he said (15 Beav. 548, at p. 553) :

> An order of that description would always be revocable by the person giving it, but not so an order to pay to the third person absolutely.

Effect must be given to those words and, in my judgment, the proper way of construing this letter, looking at it as a whole, is never to lose sight of the circumstance that the relationship of the two parties in question, the company and the bank, was that of borrower and lender, and that this letter was brought into existence in connection with a proposed transaction of borrowing by the company and lending by the bank. So regarded, I think the opening words of the second sentence fall naturally into the picture and that they must be regarded as having been introduced for the protection of the bank. Once that is admitted, it throws light on the whole of the letter and serves to underline what is obviously equally the intention of the first sentence, namely to provide protection for the bank. It, therefore, appears to me that the result of that is to take this case out of *Bell* v. *London & North Western Ry. Co.* (1) and to lead to the conclusion that I must treat this letter as amounting to an equitable assignment.

That, however, does not conclude the matter because I have now to investigate the question whether that assignment, on its true construction, is an out-and-out assignment of the whole of the benefit accruing or to accrue to the company under the contract or whether it was no more than an assignment by way of security. Here again I think the truth is to be found by bearing in mind the relationship between the parties. *Prima facie*, at any rate, when one has to look at a document brought into existence between a borrower and a lender in connection with a transaction of borrowing and lending, one must approach the consideration of that document with the expectation of discovering that it is intended to be given by the borrower to the lender to secure repayment of a proposed indebtedness of the borrower to the lender. Counsel for the bank, however, has submitted, in a very attractive argument, that the true view of this matter, particularly when one regards the effect of payments made to a bank on behalf of a customer, is that the transaction evidenced by this letter amounts to a sale by the company to the bank of the whole of the company's interest in the moneys due or to become due under the contract. He points out that the ultimate test whether this can be said to amount to a security is that one must be able to discover on the face of the letter, either in express words or by necessary implication, an equity of redemption in the company and that, properly read, this letter discloses neither expressly nor by implication any such equity of redemption.

I approach this matter more in the expectation of finding that the parties have brought into existence a document consistent with their relations of borrower and lender rather than finding that, notwithstanding the continuance of those relations, they have brought into existence a document in which their relationship is changed to that of vendor and purchaser. In my judgment, by implication an equity of redemption is to be discovered in the language of the second sentence. I can see no commercial business reason for the introduction of those words: "These instructions are to be regarded as irrevocable unless the said bank should consent to their cancellation," except on the basis that the parties deliberately contemplated that circumstances might arise in which it would become desirable that a cancellation of the instructions should be given by the bank. The existence of the previous sentence appears to me to operate strongly to lead to the conclusion that there was nothing in the nature of a sale. One is entitled to test the matter by looking at the situation in Sept., 1944, unembarrassed by what has happened since, and to consider what possibilities were open. Suppose that, in fact, through one source or another the company's account had become in credit with the bank, is it to be supposed that the parties ever contemplated that, notwithstanding that circumstance, it should remain entirely a matter for the bank whether it should give its consent to the cancellation of these instructions, so that, if it did not give that consent, then for the rest of the period over which the contract had to be worked out, the payments still had to be paid into the company's account at the bank? Did the parties contemplate that in those circumstances, whatever change might have occurred in the friendly relations between the company and its bankers, the company would have had to maintain that account with the bank until the contract had been worked out? I recoil from coming to such a conclusion. In my view, if the company's account had come into credit, the company would then have been entitled, on the true view of this letter, to require the bank to give the necessary instructions to the ministry. The ministry is in no way concerned with the position as between the bank and the company, and as between those two parties I can see no ground, either in law or in equity, on which the bank could have resisted a request or a requirement by the company to cancel the instructions. That at once shows that there is discoverable in the first half of this latter sentence a true equity of redemption. I think the matter is, if anything, underlined by the second half of the sentence, "to cover any extension of the contract in excess of 30,000 tons if such should occur."

The authorities, except to the limited extent to which I have referred to them on the first point, really do not help in this matter, which is primarily one of construction, but I should mention that, as is made clear in *Saunderson & Co.* v. *Clark* (2), the requirements of s. 79 of the Companies Act, 1929, to use the words of BUCKLEY ON THE COMPANIES ACTS, 11th ed., p. 173:

> . . . . cannot be evaded by making what is in fact a mortgage or charge in form an absolute assignment, or otherwise adopting a form which does not accord with the real transaction between the parties.

Counsel for the bank very properly pressed on me that the court should not be astute so to construe the letter as to bring it within the terms of the section. On the other hand, looking at the matter as best I can, and giving to it such reality as I can, I think if I were to hold that this was an out-and-out sale I should be guilty of being too astute to extract from what appears to me the reasonably plain language of this section a result which, in my view, on its language can never have been intended by the parties.

For these reasons, I propose to declare in answer to this question in the summons that the two letters of authority which I have read constitute charges on the book debts of the company under the Companies Act, 1929, s. 79 (2) (*e*), and, not having been registered under that section, are void as against the liquidator.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the liquidator); *McMillan & Mott* (for the bank).

[*Reported by* B. ASHKENAZI, ESQ, *Barrister-at-Law.*]

ROYSTER *v.* CAVEY.

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), November 11, 1946.]

Constitutional Law—Action for tort against servant of Crown—Accident to employee in government factory—Action for damages for negligence or breach of statutory duty—Superintendent of factory nominated by government as defendant—Jurisdiction of court to hear case against nominal defendant.

Practice—Action against nominal defendant—Accident to employee in government factory—Action for damages for negligence or breach of statutory duty—Superintendent of factory nominated by government as defendant—Jurisdiction of court to hear case against nominal defendant.

R., an employee in a royal ordnance factory, met with an accident while at work and wished to bring an action for damages for negligence, or breach of statutory duty under the Factories Act, 1937, s. 26 (1) against the occupier of the factory. Since no action for tort lies against the Crown, the Treasury Solicitor, following the usual practice in regard to government departments, supplied R. with the name of a nominal defendant, C., superintendent of the factory, who, however, had no connection with the factory at the material time:—

HELD: in view of the principles expressed in the House of Lords in *Adams* v. *Naylor* (1), to the effect that a case could not be dealt with where the defendant was merely a nominal defendant, the court had no jurisdiction to hear the case.

[**EDITORIAL NOTE.** *Adams* v. *Naylor* (1) was decided on the ground that the claim failed by reason of the provisions of the Personal Injuries (Emergency Provisions) Act, 1939, and, therefore, the remarks of their Lordships on the practice of suing "nominated" defendants were, strictly speaking, *obiter*. Any pronouncement by a member of the supreme appellate tribunal is, however, treated with the greatest respect, even though it was not necessary to the actual decision of the House, and the Court of Appeal feels that it cannot with propriety entertain the appeal in the present case. As a result, there is now a definite decision of the Court of Appeal that proceedings cannot be brought against nominated defendants, and so the matter no longer rests merely on the effect of *dicta*, however eminent.

AS TO LIABILITY OF CROWN SERVANTS FOR TORTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 24-26, paras. 28, 29, Vol. 6, pp. 489, 490, paras. 602, 603, and Vol. 32, p. 175, note (*d*); and FOR CASES, see DIGEST, Vol. 38, pp. 61-63, Nos. 366-387.]

Case referred to:

(1) *Adams* v. *Naylor*, *ante*, p. 241; 115 L.J.K.B. 356; 175 L.T. 97.

APPEAL by plaintiff from an order of His Honour JUDGE ESSENHIGH, at Rotherham County Court, on Apr. 16, 1946. The facts appear in the judgment of SCOTT, L.J.

N. R. Fox-Andrews, K.C., and *R. Cleworth* for the appellant.

J. F. Drabble for the respondent.

SCOTT, L.J.: The plaintiff claimed in the county court action for personal injuries suffered on premises occupied by the Ministry of Supply. It was a royal ordnance factory and she was one of the work-people there employed. Early in the morning of Dec. 9, 1944, in darkness, she was making her way from that part of the premises where the persons employed had to "clock-in" to the part of the premises where she was going to work and she fell into a trench dug across the road. On the facts of the case the judge came to the conclusion that she had not proved her right of action which was based on the ground that the occupier had been guilty of want of care in regard to the trench and the absence of lights, or, alternatively, of a breach of statutory duty under the Factories Act, 1937, s. 26, which provides :

> There shall, so far as reasonably practicable, be provided and maintained safe means and access to every place at which any person has at any time to work. A

The defendant to the proceedings could not be the Ministry of Supply, which was the occupier of the factory, because that ministry, like every other government department, is in law the Crown, and in English law an action of tort, such as an action for negligence or breach of a statutory duty of this type, does not lie against the Crown. For that reason a practice has grown up over a long period of years under which an action has been facilitated by the government department B concerned allowing it to proceed against some named person representing the department who may or may not have been concerned in the particular accident that caused the damage or injuries in respect of which the action is desired. That applied at common law in actions of negligence. In Admiralty, in regard to an action against a King's ship for collision with the plaintiffs' ship, the name of the commanding officer has usually been given by the Admiralty which, of course, C is a department of state representing the Crown. In all such cases the government department paid the damages and the costs if judgment was given in favour of the plaintiff and all worked well, but it was, in law, a fiction.

In *Adams* v. *Naylor* (1) a case of the kind came before the House of Lords on appeal from the Court of Appeal. There, two boys on the sand hills south of Southport on the Lancashire coast strayed on to a minefield which had been put there for defence against the enemy. A mine exploded. One boy was killed D and the other was seriously injured. The House of Lords held that there was no cause of action because it had been taken away by the Personal Injuries (Emergency Provisions) Act, 1939, but, having dealt with that, their Lordships all expressed their views on the practice of giving the name of a nominal defendant to facilitate justice being done and prevent the plaintiff, if he proves that he has suffered an injury in such circumstances as would, if the defendant had been a private person or company, entitle him to recover damages, being deprived of that E right by the provision of our law that no action of tort lies against the Crown. Their Lordships pointed out that, if the particular name given is that of a person who is personally liable for the accident in question, then, of course, judgment might be given against him, but only if the defendant is a person who occupied that capacity. In the case of factories occupied by the Crown, it is very difficult to know whom to sue.

F In the present case a name was furnished, and the particulars of claim said that the defendant, whose name was given, was the occupier of the premises and that he was negligent. As a matter of fact, as counsel for the plaintiff very frankly admitted, the defendant so named had nothing whatever to do with the matter. He was not the occupier. He had been guilty of no negligence and of no breach of statutory duty under the Act. That was before the decision of the House of Lords in *Adams* v. *Naylor* (1) and the Treasury there were following the G ordinary practice.

Early in the opening of the case by counsel for the plaintiff, against whom in the court below the judge had decided (for reasons I will deal with in a moment), I noticed that the description of the defendant was "Superintendent of the royal ordnance factory, Maltby, near Rotherham." That made me ask whether the superintendent was a merely nominal defendant ? Counsel for the plaintiff very rightly said at once : "Yes, he was a nominal defendant. The name came H from the Treasury Solicitor." That raised the question what we ought to do. What I say is absolutely without prejudice to the merits of the appeal, but the fact is that the appeal could not succeed, for this court could not enter judgment in favour of the plaintiff without transgressing the principles expressed by their Lordships' House in *Adams* v. *Naylor* (1). VISCOUNT SIMON referred expressly to the practice. He said (*ante*, p. 241, at p. 244) :

> But it is to me somewhat surprising and, I think, misleading, to refer to him, as the evidence does, as the "nominal" or nominated" defendant. Such language seems to suggest that the issues at the trial are really issues between the plaintiffs and the Crown

> and that the defendant is mentioned as a party merely as a matter of convenience. That is not the true position. The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owes a duty of care to the plaintiffs and has failed in discharging that duty.

The other noble Lords agreed and LORD UTHWATT put it very strongly. He added this (*ante*, at p. 247):

> VISCOUNT SIMON has emphasised that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with LORD SIMONDS, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question. The matter could not be dealt with on the basis wished by the Crown.

That wish by the Crown has been stated to the court by counsel for the defendant. The Treasury Solicitor instructing him, both before and since the decision in *Adams* v. *Naylor* (1) in the House of Lords, says that he has no desire to take that point against the plaintiff, but would like to see the appeal disposed of on the merits. That being the position, what is the duty of this court? I think the effect of what the House of Lords said is that this court has no jurisdiction to continue the hearing of a case where the cause of action alleged against a defendant is, in truth, not against the real defendant, but against a name furnished for the purpose of trying an issue by agreement between the parties. It is true that in *Adams* v. *Naylor* (1) the House of Lords had decided the appeal on the footing that the accident in that case was covered by the Personal Injuries (Emergency Provisions) Act, 1939, and that to that extent it may be said that the passages I have read, in which all the members of the House concurred, were not necessary for the decision which could *ex hypothesi* have been decided solely on the other basis, but I think it is the duty of this court to treat those opinions as an expression of principle, whether it was *obiter* or whether it was not, which this court ought to follow.

What is the position resulting from that conclusion? I will assume that counsel for the plaintiff might have succeeded in his appeal and satisfied us that this poor woman had suffered an injury for which she would have been entitled to recover damages against the Crown if the Crown had been liable. As it is she cannot, because the Crown is not liable in tort. What is the prospect? For a long time past there has been a very strong argument in favour of the adoption by Parliament of legislation—usually known as a "Crown Proceedings Bill"—by which actions against the Crown in tort could be permitted. I had the honour of being a member of the committee that dealt with that matter 20 years ago and action has been waited impatiently by a large number of people in this country on the lines of that report. As pointed out by LORD SIMONDS in *Adams* v. *Naylor* (1), on the instructions of LORD HALDANE, when he became Lord Chancellor, an additional task was given to the committee, namely, to draft a bill. That we did. It may be that that bill could be amended. It may be that it is good as it stands, but the fact is that the complexity of modern business to-day, the number of government departments that are carrying on commercial concerns, the great increase of the activities of concerns representing the government, acting for the government and owned by the government, makes it a crying evil, in my opinion, that the legislation should not be passed by Parliament. There have recently been answers to questions in both Houses of Parliament and it is said that many members of the government would like the legislation introduced. I recognise that the government has a very big list of measures to pass in this session, but I do desire to express the opinion as strongly as it is possible to express it that it will be a crying wrong if that legislation is not introduced at an early date.

Counsel for the plaintiff asked the court, if we felt bound to dismiss the appeal or not to hear it, simply to adjourn it in the hope that when legislation is introduced there may be a retrospective clause saving actions which had been started before the decision in *Adams* v. *Naylor* (1), but I pointed out to him that it is no use to preserve this action by adjourning it. This action against this defendant could not succeed. I agree with the suggestion of counsel for the plaintiff that Parliament might well consider whether actions which have been started in the belief that the old voluntary practice of government departments would continue might not be saved from extinction. That would involve, of course, a reconsideration of the effect on such actions of the Limitation Act, 1939, and a consequent extension of time. Subject to those observations the court must dismiss this appeal and does not see its way to adjourn it.

BUCKNILL, L.J. I agree that this appeal must be dismissed. Counsel for the defendant told the court that the defendant has given the Treasury Solicitor a retainer to defend him, but that, in fact, the defendant is as nominal as he can be and had no connection with the factory at any material time. It may surprise the plaintiff that in those circumstances the case should have proceeded to trial and to judgment and even to this court. On the pleadings, the defendant, by his silence, impliedly admitted that he was the employer and the occupier of the factory, and the case was dealt with on that footing by the county court judge before the decision of the House of Lords in *Adams* v. *Naylor* (1). In truth, the defendant was neither the employer nor the occupier of the factory, and, presumably, if the defendant had lost the case before the county court judge or on appeal, the state would have indemnified him against damages and costs. The House of Lords has dealt with a position almost identical in its main features with this case and I need not read the speech of VISCOUNT SIMON to which my Lord has already referred. The result is, in my view, that this court cannot pronounce judgment against a defendant when in truth and in fact he is not under any liability at all. I do not know who is liable in this case, if anybody. *Prima facie* it would be the employer of the plaintiff and the occupier of the factory—in other words, the government. As the law stands at present, she has no remedy against the government, and if she is to have a remedy for such damages as she has suffered, it is for Parliament to give her that remedy by legislation.

SOMERVELL, L.J.: In dealing with claims against the Crown servants, where the evidence shows that the acts relied on were acts in breach of a duty owed to the plaintiff by a servant of the Crown who can be identified and made a defendant, the position is unaffected by what was said in the House of Lords in *Adams* v. *Naylor* (1). In the present case, however—and this has already been referred to—it is not, and cannot be, suggested that the defendant here owed any duty to the plaintiff, a breach or breaches of which gave rise to the claim. The claim is also based on duties which fall on the occupier, and the defendant clearly was not in law the occupier. The claim, therefore, as made is admitted to fall within what was said by the noble and learned Lords in the House of Lords in *Adams* v. *Naylor* (1). Although, as has been pointed out, those observations were not necessary to the actual decision in that appeal it seems to me that when their Lordships—and all of them either took this course or concurred—lay down principles in general terms, it is the duty of this court to follow them. We were invited to adjourn this case instead of to dismiss it, on the assumption that, if there was future legislation, it might be easier or more practicable to deal with cases of this kind if they were adjourned than if they were dismissed. I am not, myself, sure that it would be easier, but, in any event, I think it is too speculative to justify the court in refusing to do what, as I understand, the House of Lords has said must be done.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Dictum of LORD PORTER, at p. 647, *applied.* MINT *v.* GOOD. [1950] 2 All E.R. 1159.

McCARRICK *v.* LIVERPOOL CORPORATION.

[HOUSE OF LORDS (Lord Thankerton, Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt), October 17, 18, November 22, 1946.]

Landlord and Tenant—Small houses—Implied undertaking by landlord—To keep house " in all respects reasonably fit for habitation "—Need of notice by tenant of material defect—Housing Act, 1936 (*c.*5), *s.* 2.

By the Housing Act, 1936, s. 2 (1), it is provided that in any contract for letting for human habitation a house at a rent not exceeding a specified amount there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation :—

HELD : the provision imported by the sub-section into the contractual tenancy must be construed in the same way as any other term of the tenancy, and, so construed, does not impose any obligation on the landlord unless and until he has had notice of the defect which has rendered the dwelling-house not " reasonably fit for human habitation."

Morgan v. *Liverpool Corporation* (1) *approved. Fisher* v. *Walters* (9) *criticised.*

[AS TO IMPLIED UNDERTAKING BY STATUTE TO KEEP HOUSES IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 204-206, paras. 223, 224 ; and FOR CASES, see DIGEST, Vol. 31, p. 181, Nos. 3158-3160, p. 348, Nos. 4902-4905.]

Cases referred to :

(1) *Morgan* v. *Liverpool Corpn.*, [1927] 2 K.B. 131 ; 96 L.J.K.B. 234 ; 136 L.T. 622 ; 91 J.P. 26 ; Digest Supp.

(2) *Summers* v. *Salford Corpn.*, [1943] 1 All E.R. 68 ; [1943] A.C. 283 ; 112 L.J.K.B. 65 ; 168 L.T. 97 ; 107 J.P. 35 ; Digest Supp.

(3) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25 ; 40 L.J. Ex. 33 ; 23 L.T. 592 ; 31 Digest 316, *4582.*

(4) *London & South Western Ry. Co.* v. *Flower* (1875), 1 C.P.D. 77 ; 45 L.J.Q.B. 54 ; 33 L.T. 687 ; 42 Digest 746, *1709.*

(5) *Manchester Bonded Wharehouse Co* v. *Carr* (1880), 5 C.P.D. 507 ; 49 L.J.Q.B. 809 ; 43 L.T. 476 ; 45 J.P. 7 ; 31 Digest 258, *3990.*

(6) *Huggall* v. *McKean* (1884), 1 Cab. & El. 391 ; *affd., sub. nom. Hugall* v. *M'Kean* (1885), 53 L.T. 94 ; 31 Digest 316, *4578, 4584.*

(7) *Tredway* v. *Machin* (1904), 91 L.T. 310 ; 31 Digest 346, *4890.*

(8) *Torrens* v. *Walker*, [1906] 2 Ch. 166 ; 75 L.J.Ch. 645 ; 95 L.T. 409 ; 31 Digest 315, *4570.*

(9) *Fisher* v. *Walters*, [1926] 2 K.B. 315 ; 95 L.J.K.B. 846 ; 135 L.T. 411 ; 31 Digest 315, *4569.*

(10) *Broggi* v. *Robins* (1899), 15 T.L.R. 224 ; 31 Digest 346, *4889.*

(11) *Murphy* v. *Hurly*, [1922] 1 A.C. 369 ; 91 L.J.P.C. 116 ; 127 L.T. 49 ; 31 Digest 317, *4588.*

(12) *Melles & Co.* v. *Holme*, [1918] 2 K.B. 100 ; 87 L.J.K.B. 942 ; 119 L.T. 101 ; 31 Digest 317, *4589.*

(13) *Ryall* v. *Kidwell & Son*, [1914] 3 K.B. 135 ; 83 L.J.K.B. 1140 ; 111 L.T. 240 ; 78 J.P. 377 ; 31 Digest 348, *4903.*

(14) *Walker* v. *Hobbs & Co.* (1889), 23 Q.B.D. 458 ; 59 L.J.Q.B. 93 ; 61 L.T. 688 ; 54 J.P. 199 ; 31 Digest 181, *3159.*

(15) *Mackay* v. *Dick* (1881), 6 App. Cas. 251 ; 29 W.R. 541 ; 39 Digest 647, *2424.*

(16) *Vyse* v. *Wakefield* (1840), 6 M. & W. 442 ; 8 Dowl. 377 ; 9 L.J.Ex. 274 ; *affd.* 7 M. & W. 126 Ex. Ch. ; 29 Digest 364, *2938.*

APPEAL from a decision of the Court of Appeal affirming a decision of the Liverpool Court of Passage. The facts are set out in the opinion of LORD SIMONDS.

Neville Laski, K.C., and *A. D. Pappworth* for the appellant.
H. Nelson, K.C. and *Allister Hamilton* for the respondents.

The House took time for consideration.

Nov. 22. LORD THANKERTON : My Lords, I have had the privilege of considering the opinion of LORD SIMONDS, and Iagree with his reasoning and his conclusions. This case has provided the occasion for consideration of the decision of the Court of Appeal in *Morgan* v. *Liverpool Corporation* (1) as to which I reserved my opinion in *Summers* v. *Salford Corpn.* (2), and such consideration has fully satisfied me that the decision in *Morgan* v. *Liverpool Corpn.* (1) was right. The effect of the Housing Act, 1936, s. 2 (1) is to incorporate the prescribed condition in the contract of letting so that it becomes an integral part of the contract, the whole of which falls to be looked at for purposes of construction, and the statutory origin of the condition, once it has been inserted in the contract, does not differentiate it from any of the conventional stipulations in the contract in any question of construction. It follows that the implied condition as to notice of the material defect, established by the long line of authority referred to by LORD SIMONDS, falls to be implied in the present case, and the appeal fails.

LORD PORTER: My Lords, this appeal is brought in order finally to determine a point which was decided in favour of a landlord and against a tenant in *Morgan* v. *Liverpool Corpn.* (1), but was left open in your Lordships' House in *Summers* v. *Salford Corpn.* (2)

The question arises under the Housing Act, 1936, s. 2, a section which repeats the Housing Act, 1925, s. 1, and substantially re-enacts the provisions of the Housing of the Working Classes Act, 1890, s. 75. The section in force at the material time was that contained in the Act of 1936, and was as follows:

> 2 (1) In any contract for letting for human habitation a house at a rent not exceeding [a certain figure (which was not exceeded in this case)] there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation . . .
>
> (2) The landlord or any person authorised by him in writing may, at reasonable, times of the day, on giving twenty-four hours notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof.

My Lords, admittedly in the present case there was evidence on which the judge could find that the house was not kept in the state required and he has so found. *Prima facie*, therefore, the landlord has failed to perform the duty laid on him and is liable to the tenant unless there is some term implied in the agreement of tenancy which is not inconsistent with the statutory obligation and excuses him from such performance. The term which it is said must be read into the contract between landlord and tenant is that, though the landlord must, indeed, keep the premises in a proper state of repair, yet his obligation only arises and he is guilty of a breach only if the tenant has given notice of the want of repair.

My Lords, in construing this statute its exact terms must be considered. It does not impose extraneously a duty on the landlord. It merely inserts a term into the tenancy agreement, and this term then becomes part of the contract between the parties, whether they wish it or not. In such a tenancy there is no reason why any term should not be implied provided it is necessary to secure the business efficacy of the contract and it is not contrary to the provisions of the Act. In determining this question one must treat the tenancy agreement as if the provision enjoined by the Act was inserted in it and consider whether an agreement in that form means that the landlord must keep the premises habitable though no notice has been given to him that they were or are not fit for human habitation.

My Lords, I cannot see that the insertion of the words "provided he knows that the premises are not in habitable repair," or, if you please, "provided that the tenant has given him notice of the want of repair," is contradictory of the wording of the section, though, no doubt, it limits its effect, but it still has to be determined whether their insertion is necessary to give business efficacy to the contract. I think it is. In an ordinary case where a landlord undertakes to repair the outside of the main structure of a house it is unusual to insert an express covenant entitling him to enter and do the repairs, though where the tenant undertakes to do some repairs or decoration it is usual to insert a covenant permitting the landlord to enter and view in order to ascertain that the tenant has complied with his covenant. Nevertheless, in the former case a right to enter and repair has, I think, been implied, and the landlord's obligation has been held only to arise if he has knowledge or notice of the want of repair: see *Makin* v. *Watkinson* (3). The reasoning in that case was that it would be impossible for a landlord to carry out his obligations unless he could ascertain whether repairs were required and if they were could enter and do them. If cases under the Act are taken into consideration there are a number of decisions to the same effect. Among those quoted were: *London & S.W. Railway* v. *Flower* (4), *Manchester Bonded Warehouse Co.* v. *Carr* (5), *Huggall* v. *McKean* (6), *Tredway* v. *Machin* (7), *Torrens* v. *Walker* (8), and *Morgan* v. *Liverpool Corpn.* (1). In *Summers* v. *Salford Corpn.* (2) which was also referred to, the point did not arise since notice had in fact been given.

My Lords, whatever view might have been taken of the section if no previous A
history lay behind it, one has to remember that similar provisions in earlier Acts had been interpreted as only requiring the landlord to repair after notice, and it is, in my view, too late to re-interpret that meaning. Perhaps the most forcible way of supporting the judgment of the Court of Appeal is to point out that *Morgan* v. *Liverpool Corpn.* (1) was decided in 1927 and that the provisions of s. 2 were re-enacted in the same form in 1936. When considering this topic it is only necessary to add that no question of the latency of the B
defect comes in issue as it did in *Fisher* v. *Waters* (9). If it did, the decision in that case would require to be carefully scrutinised.

It is, however, said that, though notice may have to be given by the tenant in certain cases, the class to which such an obligation applies is only that in which the landlord by his tenancy agreement has no right, express or implied, to enter and view the state of repairs. At any rate, it is contended that the C
principle has no application to a case where there is an express term empowering the landlord to enter. In *Broggi* v. *Robins* (10), Lord Russell of Killowen, C.J., decided that notice was necessary in order to saddle the landlord with liability, but that was a case of an implied not of an express right to enter to view the state of the house. In *Torrens* v. *Walker* (8), however, there was an express right of entry, yet the landlord was held excused unless he had notice. When, moreover, one comes to premises under the Act there are D
at least three cases where there was an express term giving the landlord a right of entry, viz.: *Huggall* v. *McKean* (6), *London and S.W. Railway* v. *Flower* (4), and *Morgan* v. *Liverpool Corpn.* (1). In each of these cases it was held that notice was necessary before the landlord's liability could be established. *Huggall* v. *McKean* (6), it is true, came in for some criticism from your Lordships' House in *Murphy* v. *Hurly* (11), but its conclusion was accepted, and, in any case, the criticism only touched a case where the tenant E
had or could have no knowledge of the defect beforehand, and, indeed, where a jury had found that the landlord had means of knowledge and the tenant had not. Notwithstanding the criticism contained in it, *Murphy* v. *Hurly* (11), in my view, supports the respondent's contention in the present case. In particular, the words of Lord Sumner are apposite. He says [1922] 1 A.C. 369, at p. 387):

F

> The rule requiring a notice of want of repair by the tenant to the landlord, in the case of an ordinary landlord's repairing covenant . . . is well settled and no one proposes to alter or restrict it. The nature and conditions of this rule are, however, equally well settled. As a rule of construction, which reads into the covenant words—namely "upon notice"—which are not there, its application naturally depends on the existence of those strong circumstances of necessity, which alone justify the implication of a condition upon an obligation, which is itself expressed unconditionally. Those G
> circumstances are (1) that the tenant is in occupation and the landlord is not; (2) that the tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time; . . . and (3) perhaps I may add, that the repairs of dwelling-houses, however frequently required, are still casual and occasional, and not, as here, such as to demand of the landlord incessant vigilance and almost daily care.

My Lords, I doubt whether it is accurate to say that a landlord who is under H
an obligation to repair has no right of access, but at least the tenant has the means of knowledge peculiarly in his possession and the requirements of repair are casual. In such circumstances, it would, I think, be unreasonable to require of the landlord the incessant vigilance and almost daily care envisaged by Lord Sumner, even though he had under his contract a right to enter and inspect. Particularly do these considerations apply when the duty imposed on the landlord is so stringent as that falling on him under the Act. For my own part I find myself in agreement with the result arrived at in *Morgan* v.

Liverpool Corpn. (1), and, in particular, with the reasoning and decision of ATKIN, L.J., in that case.

I should add that nothing I have said is meant to affect one way or the other such a case as *Melles & Co.* v. *Holme* (12), where no notice was given by the tenant, but the landlord had knowledge *aliunde* of the want of repair or to lessen the landlord's obligation where he keeps part of the premises under his own control and has a constant opportunity of observing the state of repair. A I would dismiss the appeal.

LORD SIMONDS: My Lords, this appeal from an order of the Court of Appeal, which affirmed a judgment of the deputy presiding judge of the Court of Passage of the City of Liverpool, is brought to test the correctness of an earlier decision of the Court of Appeal in *Morgan* v. *Liverpool Corpn.* (1).

The relevant facts are few and not in dispute in this House. The appellant B was at all material times the tenant of the respondent corporation of a dwelling-house, No. 6 Brown Street, in the city of Liverpool. This house, which was subject to the provisions of the Housing Act, 1936, was, by reason of the defective condition of two stone steps leading from the kitchen to the back-kitchen, not "reasonably fit for human habitation." In consequence of this defect the appellant's wife fell and fractured her leg. The appellant suffered special damage assessed at £70. The question is whether this damage is recover- C able in law from the respondents. They have so far successfully contended and contend before your Lordships that it is not recoverable, alleging that no notice of the defect was given to them and that notice is a condition precedent to their liability. It has been found as a fact, and your Lordships will not disturb that finding, that no notice was given. The question of law remains whether notice is a condition precedent to liability. So it was held in *Morgan's* case (1), which must now be reviewed.

D By the Housing Act, 1936, s. 2, it is provided that:

> (1) In any contract for letting for human habitation a house at a rent not exceeding—(*a*) in the case of a house situate in the administrative county of London forty pounds; (*b*) in the case of a house situate elsewhere, twenty-six pounds; there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be E kept by the landlord during the tenancy, in all respects reasonably fit for human habitation;
>
> (2) The landlord or any person authorised by him in writing, may at reasonable times of the day, on giving twenty-four hours notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof.

The first question for consideration is what is the effect of a statutory pro- F vision that "in any contract for letting . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition . . ." In *Ryall* v. *Kidwell & Son* (13) the same question arose on the Housing, Town Planning, etc., Act, 1909, s. 14, which contained a provision precisely similar, so far as the point now under consideration is concerned, to the Housing Act, 1936, s. 2, and it was there held that the effect of the enactment was to import a new term into the contract of tenancy and no more. I think that this was manifestly G right and respectfully adopt the language used by LUSH, J. ([1914] 3 K.B. 135, at p. 143):

> But the character and quality of the obligation which is imported by the statute are none the less contractual, although the contract is derived from and owes its existence to the statute.

To the same effect is the observation of ATKIN, L.J., in *Morgan's* case (1) H ([1927] 2 K.B. 131, at p. 149):

> The clause in the Housing Act is imposed as a contractual term and as such it appears to be only available to the tenant because it is a term of the tenancy.

The second question, then, is what is the meaning and effect of such a provision in a contract of tenancy. It was, I think, rightly decided in *Walker* v. *Hobbs & Co.* (14) (a decision on a similar provision in the Housing of the Working Classes Act, 1885), that the word "condition" has no technical meaning. All that is intended by the statute is that the contract is to have effect as if it contained a certain promise, agreement, or covenant by the landlord.

The rival contentions can now be stated. By the appellant it is said that the promise by the landlord thus imported into the contract is an absolute one; by the respondents that the obligation is not absolute, but that it is a condition of liability that notice of the material defect shall be given to them.

My Lords, I find it impossible to approach a question of this kind as if similar questions had not for generations been the subject of decisions in the courts of this country and conveyancing practice had not grown up on the faith of them. On a long line of authority, beginning with *Makin* v. *Watkinson* (3), it is clear that on a covenant by a lessor to keep demised premises in repair he cannot be sued for non-repair unless he has received notice of want of repair. In the case cited it appears that the lease did not reserve to the lessor the right to enter and inspect the demised premises and counsel for the appellant has urged that this makes all the difference and that the right of entry given by the imported term distinguishes the present from other cases. I think that this is not a valid distinction. In *London and South Western Railway Co.* v. *Flower* (4), the principle was applied though, as Brett, J., said (1 C.P.D. 77, at p. 84):

> I will assume also that by implication they had a right to go upon the railway for the purpose of examining the condition of the bridge and ascertaining whether or not it needed repair.

So, also, in *Huggall* v. *McKean* (6) (a case which was I think misunderstood in *Fisher* v. *Walters* (9), itself a decision which is, I think, inconsistent with higher authority and cannot stand). So also in *Torrens* v. *Walker* (8), where Warrington, J., after referring to *Huggall* v. *McKean* (6), of which case he says ([1906] 2 Ch. 166, at p. 172):

> There, as here, the lease contained a covenant by the lessee to repair the inside of the premises, and to allow the lessor to enter and view the state of repair.

applied the same principle. I will refer finally to *Morgan's* case again (1). Atkin, L.J., closely examines the principle ([1927] 2 K.B. 131, at pp. 150, 151). I will cite only two short passages. At p. 150 he says:

> The result is, to my mind, that in all cases of that kind, speaking generally, it is a condition of the liability of the landlord that he should receive notice of the repairs.

and at p. 151:

> I think that the power of access that is given, extensive though it may be, does not take the case away from the principle from which the courts have inferred the condition that the liability is not to arise except on notice.

The judgment that I have cited of Atkin, L.J., is the more valuable because it was given after the judgment of this House in *Murphy* v. *Hurly* (11), on which the appellant relies. There, the question being whether notice was a condition precedent to the liability of a landlord to keep in repair a sea-wall erected by him for the common protection of a number of holdings, it was held that it was not. The salient fact was that the sea wall, so far from being in the exclusive occupation of any tenant, was, as Lord Buckmaster said ([1922] 1 A.C. 369, at p. 373) "intended to be within the control of the landlord." It is, I think, true that in the speeches of Lord Buckmaster and of the other noble and learned Lords who heard the case there are observations which suggest that the principle has no application where the landlord has means of access and, therefore, means of knowing of the defect, but the *ratio decidendi* of the case was that the sea-wall was not in the exclusive occupation of any tenant, a fact always held sufficient to exclude the principle: see *e.g.*, *Melles & Co.* v. *Holme* (12). In none of the speeches is there any suggestion that the cases in which, though there was a right to enter, and, therefore, means of knowledge, yet the principle was applied, were wrongly decided. It is on this footing that the Court of Appeal decided *Morgan's* case (1) and, in my opinion, they were right.

I conclude, then, that the provision imported by statute into the contractual tenancy must be construed in the same way as any other term of the tenancy and, so construed, does not impose any obligation on the landlord unless and until he has notice of the defect which renders the dwelling not "reasonably fit for human habitation." That is the only question which your Lordships have to decide and I do not think it desirable or necessary to consider what may constitute such notice. I will only add that any doubt that I might have had on this case would be removed by the fact that, *Morgan's* case (1) having been decided in 1927 on the Housing Act, 1925, the relevant provisions of that Act were without amendment re-enacted in the Act of 1936 on which this action was founded. It is not easy to believe that the Legislature intended the provisions to have any other meaning than that which had been judicially assigned to them. I would dismiss this appeal.

My Lords, Lord Macmillan has asked me to say that he has read my opinion and concurs in it.

Lord Uthwatt: My Lords, it is provided by the Housing Act, 1936, s. 2, that in any contract for letting for human habitation a house at a rent not exceeding a specified amount there is, notwithstanding any stipulation to the contrary, to be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation.

The Act applies to the tenancy here in question. In one respect the house became not reasonably fit for human habitation. The tenant knew of the defect. The landlord did not, but might have discovered it had he exercised the statutory right of entry and inspection given by s. 2 (2) of the Act. The question at issue is whether in the circumstances the landlord broke the undertaking by his failure to repair the defect. The landlord contends that it is implicit in the undertaking that he should receive from the tenant notice of a defect of which the tenant is aware and the landlord is not before an obligation to remedy the defect arises. The tenant contends that no such implication ought to be made.

On the language of the section it is clear that the effect of the section is to include in the tenancy agreement a contractual obligation binding the landlord to the tenant, not to subject the landlord to a statutory duty of performance. The policy of the statute so far as relevant begins and ends in the birth and continued life of the condition and undertaking as part of the tenancy agreement. The undertaking of the landlord thrust on the parties enters into the intendment of the contract and its statutory origin is immaterial in construing it. Any stipulation qualifying the undertaking must by virtue of this Act be disregarded, but full effect must be given to any term inherent in the undertaking.

There is no rule of law that, where an obligor is subject to an obligation of a general character which may or may not as circumstances turn out require him to do certain acts, the obligor should be informed by the obligee of the necessity for action under the obligation, or otherwise should become aware of that necessity, but in any contract, whatever its nature, it is a general rule that, if the thing agreed to be done cannot effectually be done unless both parties concur in it, the proper construction of the contract requires the implication of a term that each agrees to do all that is necessary to be done on his part for the carrying out of that thing: see *Mackay* v. *Dick* (15). Where the obligation is of the general character I have mentioned, it may be that, though activity on the part of the obligee is not necessary for carrying out the thing agreed, yet he is implicitly bound in some measure to assist performance: see *Vyse* v. *Wakefield* (16). What, if any, part is assigned to the obligee depends on all the circumstances and is purely a matter of construction. The question is not, whether an implication is permissible, but whether for the business efficacy of the particular obligation, common sense demands it.

The matters bearing on construction which are here relevant are: (1) that the tenant is in exclusive occupation of the property; (2) that the terms of the undertaking impose very onerous duties which may demand dealing with many comparatively trivial matters discoverable by the landlord, if he is to rely exclusively on his own efforts, only by continuous attention; and (3) that the landlord has a statutory right to enter and view the state of the property. Two observations may be added. First, the object of the stipulation is the comfort and needs of the tenant, not the physical condition of the property as an isolated fact. Second, the landlord's right to enter and view, though it may help the landlord in complying with his obligation, also serves the landlord as an owner who for his own ends may desire to keep his property fit for human habitation. His failure so to do may entail the pulling down of the house: see the Housing Act, 1936, s. 11.

My Lords, in my opinion, it is an implied term, resulting only from the comprehensiveness of the statutory term and the circumstances necessarily involved in the tenancy, that, in a case where the tenant knows the defect and the landlord does not, the obligation to do a specific act directed to the reparation of that defect does not arise until at least the landlord becomes aware of the need for it.

A tenant is entitled to remain inert. Looking at the matter from the tenant's point of view, the true intendment of the undertaking can hardly be that the tenant bargained that, whenever a defect, however trivial, appeared, he should be disturbed by the work of reparation whether he wished it or not. Surely the contrary is the case. The landlord, again, cannot at the outset of the tenancy envisage what specific action will be required to maintain the property in habitable condition though he might well envisage that much work would from time to time be required. Looking at the matter from the landlord's point of view the true intendment of the undertaking can hardly be that continuous and detailed inspection under the statutory power was in contemplation or that the landlord undertook to do something which he might not know to be demanded by the condition of the property for the benefit of a tenant who knew it was so demanded and who might or might not want it done. Surely a reasonable reading of the undertaking is that for its business efficacy it authorizes abstinence from action by the landlord until, at any rate, the landlord knows the position or it may be until he is required to remedy it. The only part the tenant is on this basis required to play in performance is that, knowing what he wants, he should say so. That is, I think, demanded of him by the undertaking. To my mind, the implication of a term to this effect is irresistible. The making of the implication, I may add, accords with the long established rule as to the construction of a landlord's covenant to repair. The term is involved in the statutory undertaking. It does not modify it.

That is sufficient to dispose of this appeal. I would only make two observations. Section 2 of the Act of 1936 reproduces *verbatim* s. 1 of the Housing Act, 1925. In *Morgan* v. *Liverpool Corpn.* (1), the Court of Appeal attributed a particular construction to s. 1 of the Act of 1925. That was a considered decision of the Court of Appeal which had in 1936 stood unchallenged for more than a decade. There is much to be said for the view that in the Act of 1936 the legislature for the purpose of the Act of 1936 adopted the construction that had been placed on the Act of 1925. Secondly, latent defects are not here in question and I express no opinion as to their position in relation to the undertaking. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Isadore Goldman & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *Cree & Son*, agents for Town Clerk of Liverpool (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Distinguished. BOWNESS *v.* O'DWYER [1948] 2 All E.R. 181.

Applied. WELCH *v.* NAGY. [1949] 2 All E.R. 868.

STONE (J. & F.) LIGHTING & RADIO, LTD. *v.* LEVITT.

[HOUSE OF LORDS (Lord Thankerton, Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt), October 15, 16, 17, November 22, 1946.]

Landlord and Tenant—Rent restriction—Tenancy "in consequence of employment"—Tenancy continued on termination of employment—Rent increased—Order for possession refused—Counterclaim for overpayment of rent allowed—Counterclaim satisfied and reduced rent subsequently accepted—"Rent payable in respect of tenancy" less than two-thirds of rateable value—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12, 1 (*e*), (7)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 3, *sched.* I (*g*).

In 1937 the respondent was engaged by the appellants as manager of one of their shops and was given occupation of a flat above the shop at a rent of 10*s.* a week, which brought the tenancy within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (*g*). Although the respondent ceased to be in the appellants' employment in March, 1943, he continued to occupy the flat, but by agreement he paid an increased rent of £1 a week as from Apr. 7, 1943. In 1944 the appellants, having engaged a new manager whom they desired to instal in the flat, served a notice to quit on the respondent on Oct. 21, 1944, and on his failure to quit brought an action in a county court to recover possession, the particulars of claim alleging, *inter alia,* that the respondent was tenant of the flat at a rent of £1 a week. In his defence the respondent admitted the tenancy, but denied that the rent was £1 a week, and, alleging that the "proper and lawful rent" was 10*s.* a week, counterclaimed on that basis for £35 10*s.*, being the amount of overpayment from April, 1943, until Dec. 5, 1944. The county court judge held that a new agreement at a rent of £1 a week was entered into in Apr., 1943, the respondent then being no longer in the appellants' employment; that, accordingly, para. (*g*) of sched. I to the Act of 1933 did not apply; and that he had no jurisdiction to make an order thereunder. As regards the counterclaim, he held that the principle of *Read* v. *Gordon* (1) applied and gave judgment for repayment of the £35 10*s.*, a judgment which necessarily implied that the respondent was a statutory tenant and that the lawful and proper rent was 10*s.* a week. The judgment on the counterclaim was satisfied by the appellants and accepted by the respondent, who also, thereafter, paid two weeks' rent at the rate of 10*s.* which was accepted by the appellants. On Jan. 18, 1945, the appellants served a further notice on the respondent to quit on Jan. 29, 1945, and, the respondent having failed to comply with the notice, the appellants brought another action on Feb. 21, 1945, to recover possession of the flat, the claim being based on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), which provides that where the rent of a dwelling-house is less than two-thirds of the rateable value thereof (which was here agreed to be £42 per annum), the Act does not apply to the tenancy. The county court judge held that in these circumstances the question whether the tenancy was protected by the Rent Restrictions Act was *res judicata* as a result of his previous decision on the counterclaim and refused an order for possession:—

HELD: the parties, by their actions, had accepted that the "rent payable in respect of the tenancy" at the material date was 10*s.* a week; the material date at which the rent payable fell to be determined was when s. 12 (7) was sought to be applied, it being unnecessary in the present case to decide whether that time was when the notice to quit was given, or when it expired, or when the appellants' claim for possession came before the county court judge; and, as neither estoppel nor *res judicata* could give the court a jurisdiction under the Rent Restrictions Acts which the Acts said it was not to have, the respondent's tenancy was not protected under the Acts and the appellants were entitled to possession.

Decision of the Court of Appeal, [1945] 2 All E.R. 268, *reversed.*

[AS TO DWELLINGS LET AT RENT LESS THAN TWO-THIRDS OF RATEABLE VALUE, see HALSBURY, Hailsham Edn., Vol. 20, p. 316, para. 373; and FOR CASES, see DIGEST, Vol. 31, pp. 562, 563, 564, Nos. 7092, 7111, 7112.]

Cases referred to :
(1) *Read* v. *Gordon*, [1941] 1 All E.R. 222 ; [1941] 1 K.B. 495 ; 110 L.J.K.B. 719 ; 165 L.T. 113 ; Digest Supp.
(2) *Griffiths* v. *Davies*, [1943] 2 All E.R. 209 ; [1943] 1 K.B. 618 ; 112 L.J.K.B. 577 ; 169 L.T. 201 ; Digest Supp.

Appeal by the landlords from a decision of the Court of Appeal (MacKinnon and du Parcq, L.JJ. and Stable, J.) dated June 7, 1945, reported [1945] 2 All E.R. 268. The facts are set out in the opinion of Lord Thankerton.

C. L. Henderson, K.C., and *Elliot Gorst* for the appellants.
D. Weitzman for the respondents.

The House took time for consideration.

Nov. 22. Lord Thankerton : My Lords, the appellants are owners of a shop and of a flat above it, consisting of three rooms, with kitchen, bathroom and lavatory. The respondent is in occupation of the flat. On Jan. 18, 1945, the appellants served on the respondent notice to quit on Jan. 29, 1945, and, the respondent having failed to comply with the notice, the appellants brought the present action on Feb. 21, 1945, to recover possession. In the statement of claim it was stated that the respondent was tenant at a rent of 10*s*. per week, and the ground of the claim for possession was that the rent was less than two-thirds of the net assessment of £42 per annum. This claim was based on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), which provides as follows :

> Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dewlling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed.

The application of this section depends on the ascertainment of two facts, namely, firstly, the rateable value of the dwelling-house as defined by s. 12 (1) (*e*), and, secondly, the rent payable in respect of the tenancy.

It is agreed that the rateable value of the premises here in question was £42. As regards the rent payable, I am clearly of opinion that the point of time at which it falls to be determined is when sub-s. (7) is sought to be applied, and it matters not in the present case whether the relevant date is when the notice to quit is served or when it expires. It is also clear, in my opinion, that an earlier fixing of a standard rent, and the fact of the tenant having been previously a statutory tenant, are irrelevant to the present purpose, except in so far as these earlier facts may be of assistance in ascertaining the rent payable at the relevant date. The very purpose of the enquiry is to settle whether the Rent Restrictions Acts apply at all to the existing tenancy, and equally whether the tenant is a statutory tenant with rights in regard to a standard rent and otherwise.

It will, therefore, be convenient to consider the earlier relations between the parties, in order to see how far they can throw light on the position at the relevant date. In 1937 the respondent was engaged by the appellants as manager of one of their shops and was given occupation of the flat here in question at a rent of 10s. a week, which brought the tenancy within para. (*g*) of sched. I to the Act of 1933, as a tenancy "in consequence of his employment." Although the respondent ceased to be in the appellants' employment in March, 1943, he continued to occupy the flat, but, by agreement, he paid an increased rent of £1 a week as from Apr. 7, 1943. In 1944, the appellants having engaged a new manager, whom they desired to instal in the flat, served notice to quit on the respondent on Oct. 21, 1944, and, on his failure to quit, they brought an action to recover possession, based on para. (*g*) already mentioned, in the Epson County Court, and the particulars of the claim stated *inter alia* that the respondent was tenant of the flat at a rent of £1 per week. In his defence, the present respondent admitted the tenancy, but denied that the rent was £1 per week, and he made a counterclaim, alleging that "the proper and lawful rent" was 10s. per week, and, on that basis, claiming a refund of the over-payments from Apr. 7, 1943, until Dec. 5, 1944. It was mentioned in the evidence that the rateable value of the flat was £42. I will state without comment the findings of the county court judge. He held that a new agreement at a rent of £1 per week was entered into in Apr., 1943, the respondent then being no longer in the appellants' employment; that, accordingly, para. (*g*) did not apply; and he had no jurisdiction to make any order thereunder. The claim, therefore, failed. As regards the counterclaim, he held that the principle of *Read* v. *Gordon* (1) applied and gave judgment for repayment of £35 10*s*. It is not disputed that the judgment for that repayment necessarily implied that the respondent was a statutory tenant and that the lawful and proper rent was 10*s*. a week. That judgment was delivered on Jan. 10, 1945, and no appeal was taken by the present appellants. On the contrary, the judgment on the counterclaim was satisfied by them and accepted by the respondent, who also thereafter paid two weeks' rent at the rate of 10*s*., which was accepted by the appellants. The subsequent notice to quit on Jan. 29, 1945, was served on the respondent on Jan. 18, 1945.

From these facts it appears clear to me that, however bad in law the judgment on the counterclaim may now be demonstrated to be on the ground that it was without jurisdiction in view of s. 12 (7) of the Act of 1920, the fact remains that the parties, by their actions, were agreed that the "rent payable in respect of the tenancy" at the material date was 10*s*. per week. Having reached this conclusion, in fact, it is idle to suggest that either estoppel or *res judicata* can give the court a jurisdiction under the Rent Restrictions Acts, which the statutes say it is not to have. I agree with the comments of Lord Greene, M.R., in *Griffiths* v. *Davies* (2) ([1943] 2 All E.R. 209, at pp. 210-212). With all respect to the opinion of du Parcq, L.J., I am of opinion that, looking at the facts at the relevant date, untrammelled by the previous decision, the rent of 10*s*. was agreed on by both parties at that date. Accordingly, I am of opinion that the respondent's tenancy is not protected under the Rent Restrictions Acts, and that the order appealed against should be reversed and the case remanded to the Epsom County Court with a direction that the respondent should be ordered to deliver up possession of the premises to the appellants within a period of six weeks from the date of such order. The respondent should pay the appellants' costs in the action, including the costs of this appeal.

My Lords, I am asked by Lord Macmillan to say that he concurs in this opinion.

Lord Porter: My Lords, the facts in this case have been fully stated and it is only necessary to consider their legal result.

Admittedly the house, possession of which is sought to be recovered, is subject to the provisions of the Rent Restrictions Acts. It is accepted by both parties that a new tenancy began in April, 1943, and that the rent then chargeable, which was £1 a week, was that at which it was first let before Sept. 1, 1939, unless 10*s*. be regarded as the rent at which it was first so let. In the former case the standard rent would be £1 a week under the terms of s. 12 (1) (*a*) of the Act of 1920 and in the latter it would be 16*s*. 2*d*. under the proviso to that subsection. In either case the premises would be subject to the Act and the landlord could not increase the rent beyond those rates to anyone whether a sitting or future tenant.

But though the house was a protected house it does not follow that the particular tenancy is a protected tenancy. Under the terms of s. 12 (7) of the Act of 1920:

> Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed.

It is common ground that, if the rent at the material time was less than two-thirds of the rateable value, then the respondent's tenancy was unprotected and he enjoyed, not a statutory but only a common law, right. The questions, therefore, which your Lordships have to determine are what was the material time and what was the rent at that time.

The fixing of the material time does not give rise to any difficulty. At earliest it was the date on which notice to quit was given, *i.e.*, on Jan. 18, 1945, at latest, it was the date of the county court judge's decision on Mar. 28, 1945. At either of these dates and at any date in between them, the county court judge had given his decision in the earlier action, and, whichever date be taken, no difference in principle affects the conclusion to which your Lordships should come. In that earlier action the landlords had claimed possession on the ground that the tenant, being their tenant at £1 per week, occupied the premises as their employee, and that they required possession for the use and occupation of their manager. The respondent admitted the tenancy, but not that he was then an employee or that the rent was £1 a week. He counterclaimed that the proper and lawful rent was 10*s.* only and prayed for the return of the sum overpaid in respect of past weeks.

At the trial the landlord agreed that the standard rent was 10*s.* a week and the county court judge, finding that a new tenancy had been entered into when the tenant ceased to be in the employment of the landlord, refused to grant an order for possession, but made an order on the counterclaim for the repayment to the tenant of £35 10*s.* 0*d.* for rent overpaid. This order is admittedly based on an assumption that 10*s.* a week was the standard rent and therefore all that the landlord could recover. In compliance with this judgment the landlord repaid the £35 10*s.* 0*d.* and for two weeks thereafter the tenant paid and the landlord received rent at 10s. a week. On Jan. 18, 1945, when these weeks had elapsed, the landlord gave the tenant notice to quit on the ground that the rent, being 10*s.* a week, was less than two-thirds of the rateable value which was, in fact, £42 a year, and that, therefore, by reason of the provision of s. 12 (7) of the Act, the tenancy was unprotected. The county court judge held that in these circumstances the question whether the tenancy was protected by the Rent Restrictions Acts was *res judicata* as a result of his previous decision on the counterclaim and refused an order for possession. The Court of Appeal upheld the judge's decision on a different ground. They held, as I understand, that the standard rent was not 10*s.* a week, that that rent had never been agreed between the parties, and that the premises and the tenant were still protected. It followed that, though they were of opinion that the matter was not *res judicata*, nor the landlord estopped from saying that the tenancy was unprotected, yet they were prohibited by s. 3 of the Act of 1933 from making an order for possession. Their judgment ended in the words :

> We are thus bound to decide the case according to the facts, and we are clearly of opinion that the only reason given by the plaintiffs for their claim to possession was a bad reason, based on a fundamental error of law, and that they have made out no claim to possession.

My Lords, undoubtedly the county court judge was wrong in deciding that the landlord must repay £35 10*s.* 0*d.* and inferentially that 10*s.* a week was the standard rent. He had, however, jurisdiction under s. 3 of the Act of 1933 to determine what the rent, the standard rent, and the net rent were, and he did, in fact, decide that the rent was 10*s.* a week though he did so under the mistaken impression, induced by the agreement of the parties, that that was the standard rent. Not only did he so decide, but the claim was made by the tenant that the proper and lawful rent was 10*s.* a week, the landlord agreed, and the tenant both accepted a repayment on that basis and for two further weeks after the judgment paid rent at that figure. Until after the decision in the Court of Appeal that position was never controverted, and I cannot think that the letter, which the tenant's representative then wrote, can alter the position. In the face of the county court judge's decision and its acceptance by the parties, in my view, the rent at all material times was 10*s.* a week. It was said, however, on behalf of the respondent that when he ceased to be employed by the appellants and occupied the premises at a rent of £1 a week he became a statutory tenant and that no agreement on his part to occupy on any other conditions could be inferred. An agreement, it was conceded, to pay less than two thirds of the rateable value would take him out of the Act, but not such a payment under the mistaken belief that he owed no more. For this proposition *Griffiths* v. *Davies* (2) was cited. In that case, however, the tenant was always protected by the Act—he paid too much and not too little. Under the Acts a tenant cannot be liable to pay more than the standard rent, but there is nothing to prevent his paying less. Here, as I have said, he claimed, accepted, and paid 10*s.* a week and no more, and obtained a judgment with that result. The landlord could have recovered no more so long as that judgment stood. It was in force until long after notice to quit was given. In my view, during the material period 10*s*. a week was and remained the rent. Nor does it make any difference that the decision, or its acceptance, was based on a mistaken view of the law. The question is not whether the unappealed decision was right, but what it was. It decided what the rent was at the material time. Whether in the county court there would have been jurisdiction to determine the true standard rent on a fresh application before notice to quit was given does not here come in question. No such application was made until after the decision in the Court of Appeal. 10*s*. a week was the rent. That is less than two-thirds of the rateable value and this tenancy is not, though the premises are, protected. I would allow the appeal.

LORD SIMONDS: My lords, I concur.

LORD UTHWATT: My Lords, the effect of s. 12 (7) of the Act of 1920 is that, if and so long as the rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of its rateable value, the Act does not apply to that rent or to that tenancy. The phrase "the rent payable" clearly means the rent which the landlord is entitled to demand and the tenant bound to pay. The point to be determined is whether the landlord is right in his assertion that the rent payable at the critical date was 10*s*. a week—a sum which comes out at less than two-thirds of the rateable value. There was no change in the state of affairs between the date of the service of the notice to quit and the date of the expiry of that notice and it is unnecessary, therefore, to consider which of these two dates is for the purpose of this section the critical date.

In the normal case there is no difficulty in ascertaining the rent payable as respects any dwelling house to which the Act applies. If the tenancy of such a dwelling house is not one to which the Act applies, the agreement of the parties concludes the matter. If the tenancy is one to which the Act applies, then the rent payable—both during the agreed term and any retention after the determination of that term (see s. 15 of the Act of 1920)—is the agreed rent subject to the statutory maximum. The standard rent plus the permitted increases is not automatically the rent in the case of any dwelling-house, whatever be the nature of the tenancy. The standard rent attaches to the house, not to the tenancy.

In the case before the House the parties did not, after the first proceedings in the county court, direct their attention to the making of any new agreement as to the amount of the rent payable, but both accepted the position that the exigible rent was 10*s*. a week and rent was paid and accepted on that basis. That sum represented their common intention as to the rent and neither party could assert that any other sum came into the picture as the rent payable down to the date of the expiration of the notice to quit. A new position had been created by the acts of the parties. Once the common intention is apparent, the peculiar circumstances that led to that intention become irrelevant. The facts are undisputed. The proper inference of law from those facts is, in my opinion, that at the critical date the rent payable was 10*s*. a week. I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Moreton Phillips & Son* (for the appellants); *Sidney Samson* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-law*].

Re 36, 38, 40, & 42 JAMAICA STREET, STEPNEY

[Chancery Division (Vaisey, J.), October 21, November 22, 1946.]

Emergency Legislation—War damage—Cost of works—" Direct result " of enemy action—Structural damage to defective walls—Re-instatement of building in pre-existing form—War Damage Act, 1943 (*c.* 21), *ss.* 2, 6, 8.

The explosion of a bomb dropped from an enemy aircraft caused structural damage to houses, and so seriously affected the stability of the front walls, which were already in bad condition owing to the inherent nature of the brick, that the walls had to be rebuilt. The War Damage Commission determined that, as the walls were defective before the bombing, the proportion of the cost to be borne by the commission should be 40 per cent. (subsequently reduced to 33⅓ per cent.) :—

Held : on a true construction of the relevant provisions of the War Damage Act, 1943, where there was war damage and works were thereby made necessary in order to reinstate the building in its pre-existing form, the whole cost of such works must be borne by the commission, except in a case where the building would at the time of the war damage have had to be reinstated (not repaired) in any case.

[For the War Damage Act, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 334.]

Cases referred to :

(1) *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K.B. 584 ; *sub nom. Re Mardorf & Accident Insurance Co.*, 72 L.J.K.B. 362 ; 88 L.T. 330 ; 29 Digest 400, *3173*.

(2) *Re Etherington and Lancashire & Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591 ; 78 L.J.K.B. 684 ; 100 L.T. 568 ; *sub nom. Etherington* v. *Lancashire & Yorkshire Accident Insurance Co.*, 25 T.L.R. 287 ; 29 Digest 396, *3148*.

Appeal from a determination of the War Damage Commission. The facts appear in the judgment.

Ewen E. S. Montague, K.C., and *Michael Hoare* for the appellants.
Michael E. Rowe, K.C., and *H. O. Danckwerts* for the Commission.

Cur. adv. vult.

Nov. 22. Vaisey, J., read the following judgment : The appellants own, with a large number of neighbouring properties, four houses in the metropolitan borough of Stepney known as Nos. 36, 38, 40 and 42, Jamaica Street. The respondents to the appeal are the War Damage Commission (hereinafter called " the commission "), an organisation originally constituted by the War Damage Act, 1941, but now to be deemed to have been set up under the consolidating Act at present in force, namely, the War Damage Act, 1943 (hereinafter called " the Act "). Section 127 (3) of that Act provides that it is to have effect and to be deemed to have had effect as if it had come into operation at the time of the passing of the War Damage Act, 1941, which it repealed with certain exceptions not material to be here stated.

This is an appeal from a determination of the commission with respect to the four houses which I have mentioned. The facts of the case are simple, and were agreed between the representatives of the appellants and the commission as I will now state them. The houses on a day unknown to me were structurally damaged by the explosion of a bomb which fell on the opposite side of the street. The explosion (in addition to the injury it caused to other property) seriously affected the stability of the front walls of the appellants' four houses, which were old houses. The front walls (with which alone this case is concerned) were in a bad condition, due mainly, it is said, to the inherent nature of the brickwork. However, adopting the phraseology of the parties' representatives, those defects were so " accentuated " by blast effect that the front walls had to be rebuilt as particularised in a schedule to the document, dated May 27, 1943, from which I am quoting. The sentence which follows discloses what I understand to be the " determination " of the commission from which this appeal is brought. It reads thus :

> As the walls were defective prior to the bombing, the proportion of the proper cost to be borne by the commission has been agreed by me [that is the commission's representative] as detailed in the schedule.

And I pause here to observe that the word " agreed " was not and is not indicative of any such contract or arrangement between the parties as would preclude the appellants from maintaining this present appeal. The schedule to the document states that the approximate amount of rebuilding was, as regards Nos. 36 and 38, three-quarters of the fronts, and, as regards Nos. 40 and 42, the whole of the fronts, the percentage of proper cost to be borne by the commission being in each case 40 per cent. This appears to have been subsequently reduced to 33⅓ per cent. The exact figure does not matter, for it is the appellants' contention that the commission ought to bear the whole, *i.e.*, 100 per cent., and not any smaller percentage of the cost. The question which I have to decide is whether that contention is well-founded. I will say at once that the principle of such an apportionment of the cost of rebuilding these walls, based on and having regard to their condition prior to the occurrence of the war damage, strikes me as being in itself fair and reasonable, but the solution of the question must, in my judgment, depend on the actual expressions of the Act, which fall to be examined with some particularity.

The effect of s. 1 of the Act is sufficiently summarised in the side-note, which says:

> Provision to be made with respect to war damage to land and to goods.

Section 2 defines "war damage" under various heads, but I need only mention head (*a*), which says that "war damage" means:

> . . . damage occurring (whether accidentally or not) as the direct result of action taken by the enemy . . .

I may assume that the bomb which exploded was, in fact, a bomb dropped from an enemy aircraft. Now, the expression "direct result" is, in my judgment, very important, and on its true meaning the decision in the present case may largely depend. I will refer to it again presently. The commission is constituted by s. 3, or, by virtue of s. 127 (3), already mentioned, must be deemed so to be. By s. 4 proceedings under the Act are to be assigned by the Lord Chancellor to nominated judges. Section 5 provides for the commission dealing with hereditaments as separate units, and defines a "developed hereditament" as one which comprises a building or a part of a building and the site thereof, and this we have in the present case. Section 6 provides that payments in respect of damage to hereditaments shall be either (*a*) a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by s. 8 of the Act; or (*b*) a value payment, being a payment of an amount determined by reference to the depreciation in the value of the hereditament caused by the damage, as provided by s. 10 of the Act. Admittedly, the present case falls under head (*a*) as one for a cost of works payment, because s. 7 provides that in the case of a developed hereditament the payment shall be a payment of cost of works unless the war damage involves total loss which, of course, it did not do here.

I now come to s. 8, which lays down the method of computing a cost of works payment, and I must first read sub-s. (2):

> If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof.

Let it be noted that the damage has to be made good, and the hereditament reinstated, and that pre-existing form only, and not pre-existing state or condition, is mentioned. I now pass to sub-s. (4), which, so far as it is material, is as follows:

> The preceding provisions of this section shall have effect subject to the provisions of sched. III to this Act as to deductions in respect of the value of materials, of failure to take steps to minimise war damage, of physical changes not directly attributable to war damage occurring between the occurrence and the making good of war damage . . .

Here it must be observed that physical changes occurring before the war damage are not mentioned. Section 9 provides who is to receive the cost of works payment. Section 10 should be read by way of contrast to s. 8, for it lays down that a value payment shall be an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage, that is to say, the amount by which the value of the hereditament in the state in which it was immediately after the occurrence of the damage is less than its value in the state in which it was immediately before the occurrence of the damage, and it is to be observed that the "state" of the hereditament before and after the occurrence of the war damage is here a determining factor in the ascertainment of the amount.

Section 32 is to the effect that any question arising in carrying out the provisions of ss. 6 to 8, or s. 10, and certain other sections and provisions of the Act, shall be determined by the commission with a right, under sub-s. (3), for any person aggrieved by any such determination—with exceptions which I need not state—to appeal therefrom on any question of law to the High Court. The making of rules of court is authorised by the same section, and this has been done by R.S.C. Ord. 55c, which, in its revised form, bears date Apr. 25, 1946, and is printed in the *Weekly Notes* of May 11, 1946. I may mention that I heard this case as a nominated judge within the meaning of s. 4 of the Act, and of Ord. 55c. In s. 123 there are a few definitions which may be relevant, especially of the expression "making good" and "proper cost," but I need not go into the details of these. Schedule III to the Act is, I think, only material for the present purpose in what is stated in para. 3 (1), which reads thus:

> The amount of a payment of cost of works shall be reduced by any amount by which the proper cost of the works executed for making good the war damage is increased by reason of any physical change in the hereditament not directly attributable to war damage (other than ordinary wear and tear) occurring between the time of the occurrence of the damage and the time when it is made good.

As already noted, there is no reference to precedent physical changes.

I have now referred to all the provisions of the Act which seem to me to bear on the matter which I have to decide. The documents in the case consist of: (i) the appellants' notice of motion, which is dated Mar. 28, 1946; (ii) the commission's statement of the case filed May 24, 1946, and (iii) certain notes of interviews, supplied by the Treasury Solicitor, forming an annexe or *addendum* to the statement of the case. From these documents, from the Act itself, and not least from the able arguments of counsel, I have to form my conclusions on a point which is not, in my judgment, an easy one.

I was invited by counsel for the commission to dismiss the present appeal on the ground that it involved no question of law and that the determination sought to be appealed from was a finding of fact from which no appeal lies. In my judgment, no such easy way of disposing of the case is open to me. I think that it does turn on a question of law, and one that arises out of the terms of the Act itself.

This is, I believe, the first case of its kind, and there is no previous judicial pronouncement to guide me. No authority of any kind was cited to me by counsel, nor have I since the hearing been able to discover any really useful decision or *dictum* in any reported case dealing with an analogous subject-matter. Some little light is, however, thrown on the expression "direct result" by two insurance cases to which I will briefly refer. The first of these is *Mardorf* v. *Accident Insurance Co.* (1). There, a person was insured under a policy whereby the defendants agreed to pay him a certain sum in case he should be injured by accidental violence and should die within 3 months of its occurrence if the injury should be the "direct and sole cause" of his death. There was, however, a condition that the policy was not to apply to "death caused by or arising wholly or in part from disease or other intervening cause, even although the disease or other intervening cause may either directly or otherwise be brought on or result from accident." "Disease" was defined as meaning certain specified illnesses not including erysipelas, septicaemia, or septic pneumonia. The facts were that the assured accidentally scratched his leg, which ten days later became inflamed, and erysipelas set in, followed in three days by septicaemia and soon afterwards by septic pneumonia, of which in less than a week the man died. The defendants admitted that the septic germs, the development of which caused the man's death, were introduced into his body at the time of the infliction of the wound. It was held that the erysipelas, septicaemia, and septic pneumonia were not "intervening causes" within the meaning of the policy, but merely stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and that the man's death was caused directly and solely, by the accidental injury to his leg.

The other case is *Re Etherington and the Lancashire and Yorkshire Accident*

Insurance Co. (2). It will suffice if I read the headnote to the report:

> By the terms of a policy an accident insurance company undertook, if, at any time during the continuance of the said policy, the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of £1,000. The policy contained the following proviso: "Provided always and it is hereby as the essence of the contract agreed as follows: that this policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." The assured, while hunting, had a heavy fall, and, the ground being very wet, he was wetted to the skin. The effect of the shock and the wetting was to lower the vitality of his system, and being obliged to ride home afterwards, while wet, still further lowered his vitality. The effect of this lowering of his vitality was to cause the subsequent development of pneumonia in his lungs, of which he died. The pneumonia was not septic or traumatic, but arose as a direct and natural consequence from the fact that the diminution of vitality caused through the accident, as above mentioned, allowed the germs called "pneumococci," which in small numbers are generally present in the respiratory passages, to multiply greatly and attack the lungs:—*Held* (affirming the judgment of CHANNELL, J.), that the death of the assured was directly caused by accident within the meaning of the policy, and that the case did not come within the proviso therein, and the company were consequently liable on the policy.

I am well aware that analogies do not always conduce to clear thinking, but let me take as comparable to the present the case of a man whose foot is so severely injured by a bomb (*i.e.*, enemy action) that it has to be amputated. It seems to me that the injury, and the necessity for re-instating his leg by the provision of an artificial foot, would be the direct result of such enemy action, and that the fact that the man's foot had been gouty or rheumatic is immaterial. It is noticeable that the word "defective", which occurred so frequently in the course of this case, is nowhere to be found in the Acts—neither, I believe, are the words "age," "instability," or "weakness," at any rate, not in any of the relevant sections.

The contentions of the parties respectively have been formulated in various ways, some of which are plainly, in my judgment, untenable. Thus, in a letter dated Oct. 9, 1945, the commission wrote as follows:

> The commission's contention is that the rebuilding of the front walls of these properties is more than is necessary to reinstate the war damage, particularly in view of the fact that the condition of the walls is not wholly the result of enemy action.

To that way of putting it, I would point out that according to s. 8 of the Act the war damage has not to be re-instated but has to be made good by the re-instatement of the hereditament in its previous form though not necessarily in its previous state. In the same letter the commission disclaim, I think rightly, the contention that the appellants should contribute to the cost because they will have obtained "betterment," and it is now admitted that the substitution of new work for old is inevitable in practically every case, and does not in itself give rise to a case for apportionment of cost of works.

At the end of the hearing before me, counsel for the commission put the commission's case in a form which was, to my mind, attractive, and, expressing it in my own language as I understood it, I think it came to this. If the unsoundness of the building was of such a character that the war damage was greater than it would have been if the building had previously been perfectly sound, then the commission should not be called on to pay more towards the cost of re-instatement than they would have had to pay to re-instate the hypothetically sound building. My difficulty in accepting that is two-fold: first, I cannot find that the commission have ever applied any such formula to the present case, and, secondly, that it would be impossible to apply it to any case without some sort of onquiry which could rarely, if ever, be satisfactorily answered, for it is well-known that a well-built rigid structure may suffer greater damage from "blast" than an old building possessing qualities of suppleness, resilience and flexibility.

In the present case, three-quarters of two of the walls and the whole of the other two, have had to be pulled down and rebuilt, and for myself I cannot see how it could ever be known whether the same or a less amount of work would have had to be done if the four walls had just previously to the time when the bomb exploded been free from all structural defects. There is no finding to the effect that the walls would have fallen down within any measurable distance of time if no enemy action had injured them. I think also that the damage done to them necessitating the works of re-instatement was the " direct result " of the explosion ; that the explosion was (in other words) the proximate or immediate cause of the damage and not merely a contributory cause acting in conjunction with the structural defects as another contributory cause ; and that, even if (which is by no means shown to be the case) those defects constituted a *causa sine qua non*, the enemy action was none the less the sole *causa proxima*, which is, to my mind, only another way of saying that the damage occurred as its direct result.

The contentions of the parties, however variously expressed, all seem to me to come to much the same thing. For instance, it was said, on behalf of the commission, in their statement of the case, that they " could not accept the contention that they were bound to pay the full cost of rebuilding a structure which was in fact defective before it sustained war damage. It was a question of fact in each case to be decided by the judgment and good sense of the surveyors on both sides to decide how far the property was defective before the occurrence of the war damage and to reach a fair settlement." Observe the repetition of the word "defective" here. As against this, the appellants say: "The fact is that all this work was necessitated by bomb damage." How fine the line dividing the rival contentions is appears very clearly from the concluding sentence of the statement of the case, in which the commission state that they " have never denied that, if the whole of the works had been necessary to make good war damage, the amount of the payment of cost of works which can be claimed by the appellants would not be liable to be reduced either by reason of the condition or age or instability or weakness of the said front walls or because the works had improved the hereditaments or because structural defects existing in the said walls immediately before the occurrence of the war damage had incidentally been remedied by the execution of the works."

I confess that I find it very difficult to reconcile the expressions of the sentence just quoted with the " determination " of the commission from which this appeal is brought, and with the words of the quotation taken from the statement of the case. My own understanding of the Act is that, if there is war damage, and if works are thereby made necessary in order to re-instate the building in its pre-existing form, the whole cost of such works must be borne by the commission, and I can see no exception to or qualification of this proposition short of a case in which the building would, at the time of the war damage, have had to be re-instated (not repaired) in any case, as, for instance, where a chimney stack had just previously to the occurrence of the war damage, been blown down (not merely weakened) by a gale.

For the reasons which I have endeavoured to explain I have come to the conclusion that the view taken by the appellants in regard to the four houses is to be preferred to the view put forward on behalf of the commission, and I propose to declare that the payment to be made is the whole, and not 40 per cent., nor 33⅓ per cent., of the cost of works in respect of the rebuilding of the two three-quarter fronts or the two whole fronts of those houses. I am not disposed to make a declaratory order in any general terms, but the decision of this case will presumably affect many other cases. If any leave to appeal is required, I very willingly give it, for I may (without, I hope, impropriety) say that the matter is, in my judgment, one well meriting review by higher courts, and possibly (if my decision is right) calling for some amending legislation, retrospective or otherwise. I must order the commission to pay the costs of the present appeal.

Appeal allowed with costs.

Solicitors: *M. T. Turner & Co.* (for the appellants); *Treasury Solicitor* (for the commission).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Applied and Distinguished. KORNER v. WITKOWITZER BERGBAU UND EISENHUETTEN GEWERKSCHAFT. [1950] 1 All E.R. 558.

Considered. VITKOVICE HORNI A HUTNI TEZIRSTVO v. KORNER. [1951]

MALIK v. NARODNI BANKA CESKOSLOVENSKA

[COURT OF APPEAL (Lord Goddard, C.J., Morton and Tucker, L.JJ.), November 13, 14, 1946.]

Practice—Service—Service out of jurisdiction—Action for breach of contract—Necessity for evidence that breach occurred within jurisdiction—Leave on terms.

(i) In an action for breach of contract where leave is sought, under R.S.C. Ord. 11, r. 1, to serve a writ of summons or notice of a writ of summons out of the jurisdiction, the question for the court is whether or not it is shown clearly on the affidavits that the breach occurred within the jurisdiction. If it is so shown, leave may be given; if it is not, leave cannot be given.

(ii) The question whether there is a breach and the question whether it is committed within the jurisdiction are not on the same footing. On an application for leave to serve a writ or notice of a writ out of the jurisdiction, the court must approach the matter on the assumption that there has been a breach and consider whether the breach has been committed within the jurisdiction.

(iii) In an action for breaches of contract, some of which were committed within the jurisdiction and some outside it, leave may be granted on an undertaking by the plaintiff that judgment would not be taken in respect of breaches which were not committed within the jurisdiction.

Thomas v. *Hamilton* (*Duchess Dowager*) (3) explained.

[AS TO SERVICE OUT OF THE JURISDICTION IN ACTIONS ON CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 31, para. 44; and FOR CASES, see DIGEST, Practice, pp. 343-351, Nos. 605-666.]

Cases referred to:

(1) *Johnson* v. *Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; 39 Digest 660, *2515*.

(2) *Hemelryck* v. *Lyall Shipbuilding Co.*, [1921] 1 A.C. 698; 125 L.T. 133, P.C.; *sub. nom. Van Hemelryck* v. *William Lyall Shipbuilding Co., Ltd.*, 90 L.J.P.C. 96; Digest, Practice, 345, *613*.

(3) *Thomas* v. *Hamilton* (*Duchess Dowager*) (1886), 17 Q.B.D. 592, 596, 597; 55 L.J.Q.B. 555; 55 L.T. 385; Digest, Practice, 371, *816*.

(4) *Diamond* v. *Sutton* (1866), L.R. 1 Exch. 130; 35 L.J. Ex. 129; 13 L.T. 800; Digest, Practice, 371, *815*.

(5) *Fowler* v. *Barstow* (1881), 20 Ch. D. 240; 51 L.J. Ch. 103; 45 L.T. 603; Digest, Practice, 369, *796*.

(6) *Bremer Olltransport G.M.B.H.* v. *Drewry*, [1933] 1 K.B. 753; 102 L.J.K.B. 360; 148 L.T. 540; Digest Supp.

(7) *Kroch* v. *Rossell et Compagnie Societe des Personnes a Responsibilite Ltd.*, *Kroch* v. *Societe en Commandite par Actions le Petit Parisien*, [1937] 1 All E.R. 725; 156 L.T. 379; Digest Supp.

APPEAL by plaintiff from an order of CROOM-JOHNSON, J., dated June 21, 1946. The facts are set out in the judgment of LORD GODDARD, C.J.

Ewen Montagu, K.C., and *H. C. Leon* for the plaintiff.

Sir Valentine Holmes, K.C., and *Clive Burt* for the defendants.

LORD GODDARD, C.J.: In this case the plaintiff, who is a subject of the state of Czechoslovakia, obtained an order from Master Horridge giving leave to serve the defendant bank, which is also a Czechoslovakian subject, with notice of a writ out of the jurisdiction. The claim endorsed on the writ is for £33,000 for arrears of salary and moneys due under a contract between the plaintiff and the bank, and for damages for breach of contract. The bank entered a conditional appearance, took out a summons before Master Ball to have the service set aside, and the master made an order. On appeal, CROOM-JOHNSON, J., set it aside, being of opinion that this was not a case within the rule authorising service to be effected out of the jurisdiction.

In my opinion, the judge was plainly right. The circumstances which attend the matter, and in which the plaintiff seeks to bring his action, show that he was a prominent official in the Bank in Czechoslovakia, which was a national bank. At its head was a governor and a board of directors, and a board of management. I suppose the board of management would be similar to what in this country we would call general managers. The plaintiff was one, and he was in charge of the foreign exchange department. He was paid a large salary in crowns, and his salary had always been paid by crediting his account with the bank. In Aug., 1939, when the political situation was grave and threatening, the plaintiff had some leave due to him, and he decided to take advantage of that to go to Switzerland to see what could be done with regard to a considerable deposit of gold in Switzerland belonging to the bank. I dare say it was considered better that the Germans, who had occupied Czechoslovakia since the previous March, and were, no doubt, taking a considerable interest in the bank, should think that he had simply left on leave. It is obvious that he did not intend to come back, and he has said that some of his superiors knew that he did not intend to come back. He went to Switzerland, and during August, or early in September, he arranged for the blocking of this gold in Switzerland, taking precautions to see that the Swiss bank, at which the gold was lying, did not hand it over to the Germans. Then he went to various other countries, including France and this country where he has been for a long time. His salary was paid up to the end of September, and I understand it has been credited up to Nov. 8.

I do not think that for the purposes of this action we need go into the question whether or not the bank actually dismissed him, or whether, if they purported to dismiss him, they took the proper steps to dismiss him. The fact is that after he left Switzerland he did not receive any further sum of money from the bank. He came to this country, having brought with him some letters of credit which could be operated both in France and in this country to the extent of some £800 —not an excessive amount, but the sort of amount that a man intending to go for a holiday and do certain business might bring. He now desires to bring an action to recover the arrears of salary ever since 1939 because he says that the bank were obliged to pay him in England, that there has been a breach of contract to pay him in England, and, therefore, he can obtain leave to serve notice of the writ out of the jurisdiction.

Service out of the jurisdiction is entirely regulated by R.S.C. Ord. 11, and the rules of that Order. I need not emphasise, because it has been emphasised in very many cases, that it is a jurisdiction which the court has to administer with considerable care. It is a jurisdiction exercised by the court here which to some extent, as has often been pointed out, interferes with the sovereignty of a foreign country. The courts in this country have taken upon themselves to say that, in certain circumstances, they will entertain actions against people who are either British subjects resident abroad or are subjects of other states who are resident abroad, but it is only under certain well defined conditions, and the one which I think most commonly comes before the court is that which is set out in Ord. 11, r. 1 (*e*), which provides as follows :

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract (i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law, or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

The last words were, I think, added after the decision of the House of Lords in *Johnson* v. *Taylor* (1).

The first thing that the plaintiff has to show is that he is bringing his action in respect of a breach committed within the jurisdiction. I say at once that I cannot accede to the part of the argument of counsel for the plaintiff in which he says that the question whether there is a breach, and the question whether it is committed within the jurisdiction, stand exactly on the same footing. The court in these cases must approach the matter on the footing of the assumption that there has been a breach, and then they have to consider whether or not the breach has been committed within the jurisdiction because it is only if the breach has been committed within the jurisdiction that this court can allow the writ to be served out of the jurisdiction.

The case to which counsel referred as supporting his argument that the two matters are on exactly the same footing is *Hemelryck and William Lyall Shipbuilding Co., Ltd.* (2) in the Privy Council, but I do not think that that case goes anything like the length that he asks us to go for this reason. No doubt, when the court is considering whether it will give leave to serve notice of the writ out of the jurisdiction the court wants to see that there is, at least, an arguable case. If it can see, by what appears on the affidavits, that the case put up is a groundless or frivolous one, the court can refuse to give leave because it can say: Whether you allege a breach within the jurisdiction or not, you are putting up a case which on the face of it is groundless and we are not going to allow notice of a writ to be served, wherever the breach took place. On the other hand, the court, having looked at the affidavits, could say that there were disclosed on the affidavits facts which, if they were proved at the trial, would show that there had been a contract and breach of the contract. The action has to be in respect of the breach of contract. The court on this application is not going to enquire whether the case is one in which the plaintiff must necessarily succeed, but, if they see on the face of the proceedings that it is a groundless action, no doubt, they will not allow an order to go for service out of the jurisdiction. As a general rule, the court will approach the case on the footing that the plaintiff has got a case which can be properly put before the court and argued, and one in which, if the court finds in accordance with the facts alleged by him, the result would probably be judgment for him. When, however, it comes to the question whether a breach has been committed within the jurisdiction, that is another and very different proposition. We have been reminded by counsel for the bank during the course of the argument that r. 4 of Ord. 11 expressly says that:

> . . . no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order.

Therefore, the court has to be satisfied on the affidavits that the action is brought in respect of a breach committed within the jurisdiction.

I think that this case can be decided on a very short ground. The plaintiff, as I say, was a servant of a bank in Czechoslovakia. He worked in Czechoslovakia. He might be required, of course, to go elsewhere than Czechoslovakia, but his salary was paid in Czechoslovakia. It was paid in crowns, and has always been so paid. There is no vestige of a case that I can see for saying that when he went away on leave, whether it was known to the officials of the bank or not (and I will assume for this purpose that it was not known), that he was going to take himself to foreign countries, nor—and I will take it, even, that it was known that he would very likely not be able to get back to Czechoslovakia—is there any trace of a contract by the bank to pay him his salary in London. The contract under which he was employed was a contract under which he was to be paid in Czechoslovakia. I cannot see any ground for saying that there was a contract by the proposed defendants to pay the proposed plaintiff in London, and, in those circumstances, the failure to pay him in London is no breach of the contract.

That is, I think, enough to dispose of the case, and, accordingly, I do not think it necessary to go into the questions what the substance of the action was, or whether or not there were any grounds for saying that the plaintiff had been dismissed, or whether his action should be for wrongful dismissal if he could get back and prosecute his claim in Czechoslovakia. I think his action fails *in limine*. It does seem to me, however, that the pith and substance of the case (to use an expression often used in such matters) is: Where the proposed defendants justified in dismissing him as he claims they have done? It mya be they were not, but I do not think that is a matter for us to go into because I can see no ground for saying that there was a contract here to pay him in London. Therefore, I think the appeal fails.

Counsel for the plaintiff has argued strenuously that under art. 905 of the Czechoslovakian Civil Code it was the duty of the bank to remit the plaintiff's wages to him wherever he happened to be. I think it is clear on the evidence of the foreign lawyers which has been filed that that might be the case if they had undertaken to pay him in London. If they had undertaken to pay him in London there would be a duty owing from them to the plaintiff which they could only discharge in London, but, if the contract was to pay him in Czechoslovakia, the fact that he might not be in Czechoslovakia at the time cannot affect the bank. They can only set aside the money or put it to his credit until he returns to Czechoslovakia.

I want to say one word with regard to *Thomas* v. *Duchess* (*Dowager*) *of Hamilton* (3). There is, certainly, a passage in that case which has caused very considerable difficulty. It was decided as long ago as 1886, that is to say, 60 years ago. It followed closely on a case that had also been decided some years before, I think under the Common Law Procedure Act, *Diamond* v. *Sutton* (4). Reference was also made to *Fowler* v. *Barstow* (5), a decision of SIR GEORGE JESSEL, and one, therefore, to which this court would pay great attention.

The plaintiff in *Thomas* v. *Duchess* (*Dowager*) *of Hamilton* (3) was claiming against the defendant the balance of an account with respect to the price of goods sold and delivered. There were a variety of articles of jewellery which had been supplied by the plaintiff to the defendant who was a foreigner residing abroad. Originally the matter came before FIELD, J., in chambers. FIELD, J., was, of course, a great authority on chamber practice in those days because he was the judge expressly appointed when the new rules came into force, to sit in chambers that he might settle the practice. He granted an application made *ex parte* for leave to serve out of the jurisdiction because, as he said (17 Q.B.D. 592 at p. 594), when the matter came before the Divisional Court of which he was a member:

> I was satisfied that the breach of contract (if any) was within the jurisdiction as required by the rule.

The defendant applied to DAY, J., at chambers to set aside the order. DAY, J., refused to do so, but put the plaintiff on terms that his " claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial that a writ could have been properly served out of the jurisdiction." Then the Divisional Court set aside that part of the order of DAY, J., which had limited the plaintiff's claim in that respect, the court thinking, as I understand it, that the matter was clear that the price was payable within the jurisdiction, and that, therefore, there was a breach within R.S.C. Ord. 11. When the matter came before the Court of Appeal, LORD ESHER, after having said that it was a matter for discretion, went on (*ibid* at pp. 595, 596):

> It would appear that some judges, when asked to set aside an order for service out of the jurisdiction, and being in doubt whether on the affidavits there has been a breach of the contract within the jurisdiction, have made terms with the plaintiff, and imposed a condition upon the exercise of their discretion in his favour by refusing to set aside the order for service out of the jurisdiction upon his undertaking to confine his claim at the trial to breaches of contract within the jurisdiction. Where the judge is clear on the affidavits that there was no (*sic.*) breach of the contract within the jurisdiction he has allowed service out of the jurisdiction. If he is clear to the contrary he has rescinded the order for service out of the jurisdiction . . . I cannot say that the affidavits shew clearly to my mind that there was any breach of the contract in England.

and, therefore, the judge was right in imposing that condition.

A great deal of water has flowed under the bridges since 1886. I cannot find that that case has ever been followed, or that in recent years, at any rate, judges have made orders in that form. Certainly, since I have known anything about the practice the court has always asked itself the single question: Is it shown clearly on the affidavits that the breach occurred within the jurisdiction, or is it not so shown? If it is shown that the breach occurred within the jurisdiction, leave can be given. If it is not so shown, as I have always understood it, leave cannot be given. I think nowadays, *Thomas* v. *Duchess* (*Dowager*) *of Hamilton* (3) could be upheld on the ground that, if the plaintiff sues, as in that case, for the price of goods, some of which were sold on the terms that payment was to be made within the jurisdiction, that is enough to give the plaintiff leave to serve notice of his writ out of the jurisdiction, and the judge can say: " With regard to the other items in your claim, I shall limit you to this extent. It is not a general leave, and, if it turns out that there are some items in your particulars in respect of which the price was not payable within the jurisdiction, you are not to claim those at the trial." That seems to have been the interpretation put on that case by, at any rate, one member of the court, SLESSER, L.J., in *Bremer*

Olltransport G. M.B.H. v. *Drewry* (6). SLESSER, L.J., said ([1933] 1 K.B. 753, at p. 765):

> If it appears that a claim is partly within and partly without the order authorizing service out of the jurisdiction, the judge may give leave for service; it is a matter within his discretion: see *Thomas* v. *Duchess (Dowager) of Hamilton* (3).

In accordance with modern practice, if the judge sees that, at any rate, part is within the order, he can grant leave to serve out of the jurisdiction, though he may limit the plaintiff by saying; "In respect to any items which it turns out are not to be paid for within the jurisdiction, you must undertake not to take judgment." In the present case I do not think we are hampered by any such considerations, or, indeed, by any considerations of foreign law. If there is no contract—and it appears to me plain that there is not—to pay in London or in England, the plaintiff shows no breach of any contract within the jurisdiction. Accordingly, in my opinion, the judge was right in setting aside the order giving leave to serve notice out of the jurisdiction.

MORTON, L.J.: I agree that this appeal should be dismissed because it is not shown that a breach of contract has been committed within the jurisdiction. That being so, this court has no discretion to allow service of notice of the writ out of the jurisdiction.

In deference to the able argument of counsel for the plaintiff, though it may be rather cold comfort for the plaintiff in this case, I shall add this. If I had thought that the case did come within Ord. 11, I should have had no hesitation in saying that it would be right to exercise the discretion then vested in the court in favour of allowing service of notice of this writ out of the jurisdiction. I found that view on certain statements which were made by the plaintiff in his evidence, and which were not contradicted, although it would have been easy for the bank to contradict them if they were not true, for the bank filed quite a lot of affidavits in opposition. These statements are mainly, but not entirely, statements which are summarised in a paragraph of one of the plaintiff's affidavits. I do not propose to read that paragraph because I am conscious that what I am saying is *obiter*, but, in my view, the present case is one to which the observations of SCOTT, L.J., in *Kroch* v. *Russell & Co.* (7) may well be applied. SCOTT, L.J., said ([1937] 1 All E.R. 725 at p. 731):

> France is obviously the right place to try the issue in this action, the right jurisdiction to try that issue, unless there are strong grounds of justice which require that, in the particular claim that is brought, the plaintiff should be allowed to bring it within this jurisdiction.

In the present case I should have thought that, if we had jurisdiction, there were strong grounds of justice for allowing the plaintiff to bring his action here. However, as matters stand, the appeal must be dismissed.

TUCKER, L.J.: I agree that the appeal fails. I express no view with regard to what I should have thought if it had been necessary to consider the exercise of discretion with regard to the *forum conveniens*. I wish only to add one or two words out of deference to the foreign lawyers who have testified to the Czechoslovak law in the affidavits relied on by the plaintiff, because I should not like it to be thought that I had lightly put on one side the views of foreign lawyers with regard to the law of their own country. As I read the evidence of those gentlemen with regard to art. 905 of the Code, it appears to me that that article only comes into operation where there is no agreement to the contrary. It is, therefore, very similar to English law on the subject. In this case, for the reasons explained by my Lord, I think it is clear that under the subsisting contract between the parties under which the plaintiff is suing, the obligation was to pay him, a Czechoslovak subject employed in Czechoslovakia, in the currency of his own country, and I think it is implicit in that contract that payment was to be made in Czechoslovakia. It is not suggested that there was any variation of that contract, or any new contract made at the time when he left Czechoslovakia, and, therefore, the original contract remains the operative contract, and under it it is clear that payment had to be made in Czechoslovakia.

Appeal dismissed with costs.

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiff); *Blyth Dutton & Co.* (for the defendants).

[*Reported by* RONALD ZIAR, ESQ., *Barrister-at-Law.*]

Distinguished. LITTLECHILD *v.* HOLT.
[1949] 1 All E.R. 933.

FOWLE *v.* BELL.

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), November 12, 13, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Premises required by landlord as residence for himself—" Not being a landlord who has become landlord by purchasing dwelling-house after Sept. 1, 1939 "—*Defendant becoming tenant after purchase—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (*c.* 32), *sched. I, para.* (*h*).

In 1941 the landlords purchased a dwelling-house which was already occupied by a tenant who subsequently left. In 1944 the defendants became tenants of the house. The landlords sought possession against the tenants under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, which provides: " A court shall . . . have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939]) for occupation as a residence for—(i) himself . . ."

Held: the object of the exception in brackets to para. (h) is to protect a sitting tenant from eviction after having his house bought over his head, and, therefore, the exception has no application where the tenant against whom possession is sought was not the sitting tenant at the time of the purchase by the landlord, but became tenant of the dwelling-house after that purchase.

[As to Restrictions on the Landlord's Right to Possession, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-332, paras. 392-396; and for Cases, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297.]

Cases referred to:

(1) *Epps* v. *Rothnie*, [1945] K.B. 562; 114 L.J.K.B. 511; 173 L.T. 353; Digest Supp.

(2) *Lloyd* v. *Cook*, [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452; 92 J.P. 199; Digest Supp.

Appeal by plaintiffs from an order of His Honour Judge Topham, K.C., made at Portsmouth County Court and dated June 13, 1946. The facts appear in the judgment of Scott, L.J.

Lionel A. Blundell for the plaintiffs.
H. Heathcote-Williams for the defendants.

Scott, L.J.: In this case the plaintiffs, husband and wife, who were married in December, 1939, and had a son born in 1940, jointly bought a house from the wife's father on Aug. 13, 1941. The house was in White Hart Lane, Portchester. There was then a tenant in it, and he stayed there for some time. In July, 1944, he left, and for a time the house was untenanted. Then the plaintiffs let it to the defendants, also a husband and wife, who had a son of 21 living with them.

The plaintiffs asked the county court judge for possession on the basis of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h). That schedule begins with an enacting provision referring back to s. 3 of the Act, as follows:

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939]) for occupation as a residence for (i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in paragraph (*h*) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether

other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

I think that that provision puts the onus in regard to the hardship issue on the tenant, but, be that as it may, the judge in this case was satisfied that he [illegible] order as all the other conditions set out in the paragraph [illegible] ere, in his opinion, fulfilled.

The question raised is as to the construction of the words in brackets. The judge said:

> I am satisfied that the plaintiffs reasonably require the house for their own occupation, and I am not satisfied that greater hardship would be caused if I made the order. If it were not for the legal difficulty caused by the provisions of para. (*h*) of the schedule to the Rent Act of 1933, I should have made an order for possession in two months with costs (scale A). But Mr. Stokes, for the defendants, contends that the plaintiffs are disqualified from claiming under para. (*h*) because of the words in the bracketed clause "not being a landlord who has become landlord by purchasing the dwelling-house after" the specified date.

He says that the plaintiffs purchased the house in 1941 when there was a tenant in possession, and, therefore, became landlords by purchasing the house in that year.

The issue is whether the bracketed words ought to be construed in relation to the tenant before the court, or whether, disregarding that tenant, we should interpret the word "landlord" as if it meant almost the same thing as the word "owner," making the provision read thus: "not being an owner who has become owner by purchasing the dwelling-house or any interest therein after" the named date. I put it in that bald way because I think that is the real antithesis of interpretation. Having analysed the question, I go on with the judgment. The judge said:

> I should like, if I could, to construe the exception in a manner which would not apply to the plaintiffs. If it applies, it would only do so by an accident, and it is not, in my view, the sort of case which was intended to be excluded by the provision. It is not the case of a person buying a house and trying to eject the sitting tenant.

The judge then further considered the matter, and came to the conclusion that he was compelled to decide against the landlords for whom he would have liked to make an order, the other conditions of the schedule being satisfied, but he felt prevented from so doing by a decision of this court in *Epps* v. *Rothnie* (1).

The contention of the tenants below and in this court, as stated by their counsel, has been that the bracketed exception should be read as saying that if, when the plaintiff originally became the owner of the house, there happened to be a tenant in occupation, that accidental fact excludes the court's jurisdiction. If that is right, the plaintiffs are prevented from asking for possession and enjoying the benefit of the paragraph by reason merely of that fact of past history. I do not so read it. The whole of the rent restriction legislation is concerned primarily with the relationship of the landlord to the sitting tenant. The county court judge is made the arbiter between them about that relationship and about the administration of the statutory control over it. It is the present relationship as it is disclosed to the judge at the time of the hearing that matters. The Acts are not concerned, except in a secondary and limited way, with past history. The chief exception is to be found in the provisions present in all the Acts from 1915 onwards that, if the house is not a tenanted house let at a rent at the time of the royal assent, then the court is required to look back in history and take as the rent of the house which is to be the standard rent the last rent that was paid before the Act was passed.

In considering the bracketed exception to para. (h), we must bear in mind that it is found in an enabling provision which confers jurisdiction on the judge to order possession to be given to the landlord, and, therefore, if there be ambiguity in the exception, it ought to be construed in favour of the landlord and not against him. The phraseology seems to me necessarily to mean this, "not being a landlord who, in relation to the tenant before the court, has become that tenant's landlord by purchasing the dwelling-house or any interest therein after" the given date. The exception so read would achieve what I cannot help thinking was the object of enacting it, namely, to prevent an outsider buying a house occupied by a tenant, giving the tenant notice to quit, and coming to the court for an order to get rid of him. If, as was not the case here, the person who became owner by buying the house had thereby become landlord to the tenant from whom possession was asked of the court, then it would be perfectly reasonable, and I think would carry out the object of Parliament, if the paragraph should make it impossible for such an owner to have the benefit of the Act without proof of suitable alternative accommodation. I can see no reason whatever why Parliament should have made any difference between the case where a landlord buys a house empty and untenanted and subsequently lets it, and then has the benefit of this paragraph, and the case where he buys a house with a tenant in it, the tenant leaves after some years, and the landlord then gets another tenant. I see no rhyme nor reason for any such distinction, and it seems to me to be inconsistent with the general purpose of the Act so to construe the bracketed words.

I cannot understand the view taken by the judge that *Epps* v. *Rothnie* (1) compelled him to reach a decision with which he obviously disagreed. I do not think that case is strictly relevant, but, if it is, it is in favour of the plaintiffs here and against the view taken by the judge. In *Epps* v. *Rothnie* (1) this court had to consider the case of the purchaser of an unoccupied house after the statutory date referred to in the paragraph who subsequently let it to a tenant, and it was held that the bracketed words did not exclude the landlord from the benefit of the paragraph. I gave the first judgment of the court, and said ([1945] K.B. 563, at p. 564):

> Accordingly, the county court judge held, and, in my view, held rightly, that the plaintiff did not become landlord by purchasing the dwelling-house. He took the view, with which I agree, that the object of the exception in para. (*h*) is to protect a sitting tenant from having his house bought over his head, and that it has no application to a case where the owner of a house purchases it after the statutory date at a time when the house is actually empty, and thereafter lets it to a tenant. In my opinion the county court judge's decision was right on this point.

MacKinnon, L.J., after citing the paragraph, said (*ibid*, at p. 566):

> Manifestly, a landlord who had a tenant could not be in possession of the house and that mere fact shows that the word "landlord" in that sub-section does not mean one of the two parties to a contract of tenancy—that would be ridiculous—but the owner of a house who is in a position to become a party to such a contract. The considerations applicable to the meaning of the word "landlord" in that sub-section are obviously entirely different from those which govern the meaning of the simple words "a landlord who has become landlord by purchasing the dwelling-house," which we have to construe.

That was a reference to another section altogether with which I need not trouble for the purpose of this judgment. I cite that case only for the purpose of showing that it gives no support to the tenants' argument here. The appeal must be allowed with costs here and below.

Bucknill, L.J.: I agree. The point which the court has to deal with is the interpretation of para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. It seems to me that the material words of para. (h) are these: "not being a landlord who has become landlord by purchasing the dwelling-house" after the specified date. I think there are two possible interpretations of these words. One is "not being a landlord who has become landlord of the dwelling-house," and the other "not being a landlord who has become landlord of the present tenant by purchasing the dwelling-house." I feel the more comforted in being a party to reversing the judge in that the judge himself appears to lean towards the second interpretation. He says this:

> The words might also be read as meaning "has become the landlord," meaning "the landlord of the present tenant" . . . and this would, I think, satisfy the apparent object of the exception, but, having regard to the reasoning adopted by the Court of Appeal in *Epps* v. *Rothnie* (1), I do not feel justified in construing the exception in that way which involves reading into the exception the words "of the present tenant."

With the greatest respect to the county court judge, I cannot see how he extracts that from the decision in *Epps* v. *Rothnie* (1). That decision, so far as it goes, seems to me to support the reading which the judge himself favoured, and which I also favour. In *Epps* v. *Rothnie* (1), MacKinnon, L.J., in dealing with the same words, said (*ibid*, at p. 566):

> If the construction for which [counsel for the defendant] contends is correct, it

> is inconceivable that the Legislature would have wasted ink and paper by inserting the unnecessary words " who has become landlord by purchasing the dwelling-house " since it would have been sufficient simply to have said " not being a landlord who has purchased a dwelling-house."

That seems to be a cogent criticism. For these reasons, I think that this appeal should be allowed.

Somervell, L.J. : I agree. There was some discussion in the course of the argument as to the meaning of the word " landlord " in the Rent Restrictions Acts, and we were referred to some authorities dealing with that point. I do not myself think that these authorities, or expressions of opinion, are really relevant to the question that we are considering here, although I am rather inclined to agree with what Sankey, L.J., said in *Lloyd* v. *Cook* ([1929] 1 K.B. 103, at p. 146) :

> I am forced to the conclusion that the meaning of the word must to some extent be governed by the context in which it is used and the circumstances under consideration.

The present case, to my mind, turns on the construction of the whole of para. (h) of sched. I to the Act of 1933, with special reference to the words in brackets. The question is whether the exclusion of the landlord referred to in the brackets covers all landlords who bought their interest after the date in question irrespective of whether the tenant sought to be evicted was the sitting tenant at the time of the purchase or whether he became tenant by a subsequent tenancy agreement, or whether the exclusion covers only those who became landlord, as a result of the purchase, of the tenant whom it is sought to evict. In other words, is the exclusion restricted to cases in which the tenant sought to be evicted was the sitting tenant at the time of the purchase ? In one sense the landlord in the present case became landlord within the exclusion because he had bought the house after the relevant date. If he had not bought the house in 1941, he could not have let it to the defendants in 1944. Are the words then used in the wider sense of the two senses which I have already set out ?

We were referred to *Epps* v. *Rothnie* (1) by which we are bound, and the reasoning of which, I think, negatives what I call the wider construction of the words. In the course of his judgment Scott, L.J., expressed the view that the object of the exception in para. (h) is to protect a sitting tenant from having his house bought over his head. Admittedly, on the facts of the present case, the defendants were not the sitting tenants, and did not have the house bought over their heads. If the object of the section is to protect the sitting tenant, it would be doing something other than its object if it could be successfully relied on in the present case. I think that the construction placed on these words in *Epps* v. *Rothnie* (1) covers the argument in this case, although there is a difference in the facts of the two cases, namely, that in that case when the house was bought it was vacant and in the present case there was a tenant other than the present defendants. For my part, I think the only possible constructions are the two which I have stated. *Epps* v. *Rothnie* (1) negatives the wider one, and I cannot myself see how the words can be given a construction consistent with *Epps* v. *Rothnie* (1) which would make the exclusion apply to the present facts. Of course, we have to interpret the words as they appear in the Act, but it is satisfactory to feel that this seems to accord with common sense. I cannot see any reason why, once the house has become empty after the purchase, so that the landlord could at that moment, if he liked, go into it, the question of when he purchased it should have any relevance to his rights. If he chooses to let it again to another tenant (which may be a thing he ought to be encouraged to do), then I do not think he ought to be in any different position from anybody else because the purchase may be after the date referred to in the Act. For these reasons, I think the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Kingsford, Dorman & Co.*, agents for *Blake, Lapthorn, Roberts & Rea*, Portsmouth (for the plaintiffs) ; *Amphlett & Co.*, agents for *R. V. Stokes & Metcalfe*, Portsmouth (for the defendants).

[*Reported by* C. St. J. Nicholson, *Barrister-at-Law.*]

SMITH *v.* PENNY.

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), November 13, 1946.]

Landlord and Tenant—Rent restriction—Possession—"Dwelling-house required by landlord"—House required by landlord as family home—Landlord himself unable to reside in house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *sched. I* (*h*) (i).

The words "for himself" in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, (*h*) (i), should not be strictly interpreted as meaning occupation for residence by the landlord personally, but should be interpreted as covering the case of his wanting the house as a family home, whether he intends to live in it himself or is unable to do so for some special reason.

Therefore, where the owner of a house, who, as manager of a public house, was compelled to reside continuously on the premises, sought possession of his own house for occupation by his two young children and a housekeeper :—

Held : in the absence of proof by the tenant of greater hardship, the owner was entitled to an order for possession.

Per curiam : The wording of the proviso to para. (*h*) puts on the tenant the onus of proving greater hardship.

[As to Possession Required by Landlord for his own Occupation, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396 ; and for Cases, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Appeal by the tenant from an order of His Honour Judge Archer, K.C., made at Worthing County Court, and dated June 18, 1946. The facts are set out in the judgment of Scott, L.J.

Dutton Briant for the tenant.
N. Curtis-Raleigh for the landlord.

Scott, L.J. : This is an appeal from Judge Archer at Worthing County Court by the tenant of a house claiming to retain the house under the Rent Restrictions Acts in a claim for possession brought against him by his landlord in rather exceptional circumstances.

Schedule I to the Act of 1933 provides :

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord . . . for (i) himself ; or (ii) any son or daughter of his over eighteen years of age ; or (iii) his father or mother : Provided that an order or judgment shall not be made or given on any ground specified in para. (*h*) . . . if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

The landlord was employed under a contract entered into in April, 1943, with the Portsmouth and Brighton United Breweries, Ltd., to occupy an hotel or public house of theirs as tenant and manager on the terms of a long printed agreement which contained a series of covenants by the tenant, one of which was that he would not "cease personally and continuously to reside upon the premises." The hotel was not a large one and he, as manager, under that agreement had to be there throughout the day and to sleep there at night. In 1943 he bought a house with vacant possession close to the hotel, with a view to putting staff in after the war. He has two children, a boy and a girl, and, unfortunately, he had been for some years separated from his wife in circumstances of which the judge was given no details except that they were evidently permanently separated. After a time he let the house to a tenant who is the defendant in the present proceedings. The judge held that the landlord was entitled to possession.

The first question that arises is this. Under para. (*h*) the occupation for which the house is wanted as a residence must be either of the landlord himself or of his son or daughter of eighteen years of age, or of his father or mother. It was contended below, as it has been before us, that the words "for himself" must be strictly interpreted as meaning occupation for residence by the landlord personally and cannot be interpreted as covering the case of his wanting the house as a family home when he cannot live in it himself, being, for instance, obliged for the sake of earning his income to live elsewhere. I think, however, that the latter is the right interpretation. That is shown, I think, by the second of the two purposes mentioned in the paragraph, "or any son or daughter of his over eighteen years of age." It is impossible that the legislature could have put in that downward age limitation, unless they had recognised that the word "himself"—the father and husband—necessarily included the children and the mother and wife. I do not think there is any authority directly on the point, and I leave it at that. The family is the unit of our civilisation. To keep the family together is of high public importance. Had there been no separation and the mother had been available, what I have been saying would have been directly in point. If, unfortunately, a separation takes place between husabnd and wife, this court ought to assume that it is a separation which is, in the circumstances, proper and unavoidable. No blame ought to be attributed to the husband who asks for a home for his children because he has been separated from his wife in circumstances of which the court knows nothing and has properly not asked for information. I, therefore, deal with the question as if the person available to look after the two young children had been the wife. What the landlord did was to arrange with a friend of his, a Mr. Caley, that he and Mrs. Caley should live in the house and that she should be paid as housekeeper to look after the children. She gave evidence before the court and the judge saw her and, I think, was satisfied that the landlord was proposing to make proper arrangements for the welfare of the family.

That disposes of the main question in the case, but it was further said that there was no evidence before the judge on which he could decide against the tenant on the issue of hardship. On that issue I revert to the wording of the Act:

> . . . if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

That wording clearly puts on the tenant the onus of proving greater hardship. [His Lordship referred to the evidence and continued]: The judge, after hearing the evidence, held that the tenant had not proved greater hardship to himself. For these reasons the appeal must be dismissed with costs.

Bucknill, L.J.: I agree that the appeal should be dismissed for the reasons given by my Lord.

Somervell, L.J.: I agree. It is necessary for the tenant to show that the county court judge misdirected himself or that he based his judgment on some finding of fact of which there was no evidence. I will not repeat the facts which have been stated by my Lord. I thought at one time that counsel for the tenant might argue that where the landlord is under an agreement of this kind—bound to sleep and spend his working day in licensed premises—it was impossible for him as a matter of law to invoke this paragraph and seek to show that he reasonably required the house for his wife and children, or, if he has no wife, then for his children. Counsel for the tenant agreed with me that, if the fact was that, if the premises, be they licensed or other premises, in which the landlord had to sleep, did not as a matter of cubic feet contain accommodation in which his wife and children could be accommodated, then the section was available for him, provided, of course, he could satisfy the other conditions. In the present case, although as a matter of cubic feet there is accommodation in this hotel for the children, the landlord maintained in his evidence, and I am clear that the county court judge accepted in his judgment, that it was not a proper place for these young children who had no mother to look after them. In my view, on that basis, it cannot be said that, as a matter of law, the landlord cannot reasonably require the house for occupation as a residence for himself. The word "himself" in para. (*h*) (i) clearly includes his wife and children. I can imagine arguments of considerable force being put up on both sides, but, in my opinion, the county court judge came to his decision with a proper regard to the construction of the paragraph, and I see no reason why we should disagree with it.

Appeal dismissed with costs.

Solicitors: *Burton, Yeates & Hart,* agents for *Charles, Malcolm & Wilson,* Worthing (for the appellant); *Petch & Co.,* agents for *Bowles & Stevens,* Worthing (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re UNITED LAW CLERKS SOCIETY.

[Chancery Division (Evershed, J.), October 24, November 13, 1946.]

Friendly Societies—Investments—"Any other security expressly directed by the rules of the society"—Preference stocks and shares in chartered or statutory companies—Friendly Societies Act, 1896 (c. 25), s. 44 (1) (e).

A friendly society applied to register an amendment of its rules in regard to the investment of its funds so as to include among permissible investments a limited class of preference stocks and preference shares in companies incorporated by royal charter or Act of Parliament. The Chief Registrar refused registration of the amendment on the ground that such investments were not authorised under the Friendly Societies Act, 1896, s. 44. The question was whether the word "security" in the phrase "any other security expressly directed by the rules," in s. 44 (1) (*e*) of the Act, meant any form of investment of money or was confined to the more narrow significance of debts or money claims the payment of which was "secured" or "guaranteed" by a charge on some property or by some document recording the obligation of some person or corporation to pay:—

Held: "security", as used in the Friendly Societies Act, 1896, s. 44 (1) (*e*), was used in its narrower sense, and the Chief Registrar was right to refuse registration of the amendment of the society's rules.

[As to Investments by Friendly Societies, see HALSBURY, Hailsham Edn., Vol. 15, pp. 363-367, paras. 668-675; and for Case, see DIGEST, Vol. 25, pp. 318, 319, No. 211.]

Cases referred to:

(1) *Re Rayner, Rayner* v. *Rayner,* [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 43 Digest 919, *3587.*

(2) *Singer* v. *Williams,* [1921] 1 A.C. 41; 89 L.J.K.B. 1218; 123 L.T. 625; 9 Digest 225, *1435.*

(3) *Re Smithers, Watts* v. *Smithers,* [1939] 3 All E.R. 689; [1939] Ch. 1015; 108 L.J.Ch. 369; 161 L.T. 193; Digest Supp.

Appeal by motion from a decision of the Chief Registrar of Friendly Societies. The facts appear in the judgment.

S. Pascoe Hayward, K.C., and *Charles Russell* for the friendly society.

H. O. Danckwerts for the Chief Registrar of Friendly Societies.

Cur. adv. vult.

Nov. 13. Evershed, J., read the following judgment: This is an appeal by or on behalf of the United Law Clerks' Society, a friendly society registered under the Friendly Societies Acts, against a refusal (dated Aug. 20, 1946) on the part of the Chief Registrar of Friendly Societies to register an amendment of the society's rules.

In accordance with the Friendly Societies Act, 1896, s. 9, r. 42 of the society's rules makes provision for the investment of the society's funds and specifies the class of investments in which such funds may be invested. Apart from the amendment which has given rise to the present appeal, the investments authorised do not comprehend investment in the shares of joint stock companies. The proposed amendment (which has, no doubt, been occasioned by the difficulty under present monetary conditions of obtaining from "gilt edged securities" other than a low rate of interest) would extend the permissible range of investment so as to include (among others) a limited class of preference stocks and preference shares in companies incorporated under royal charter or by special or general Act of Parliament. In so far as the amendment comprised this class of investment, the registrar was of opinion that it fell outside the authority conferred by s. 44 of the Act of 1896 and would, accordingly, be unlawful. He, therefore, refused registration. The present appeal is brought pursuant to ss. 12 and 13 of the 1896 Act. The sole point in the appeal is whether the word " security " occurring in the phrase " any other security " in s. 44 (1) (*e*) of the Act of 1896, is meant to include any form of investment of money or must be confined to the stricter or more narrow significance of debts or money claims the payment of which is " secured " or " guaranteed " by a charge on some property or by some document recording the obligation of some person or corporation to pay and so as not to include the holding of shares in limited companies which are of the nature of participations in an enterprise and do not involve the conception of a creditor-debtor relationship.

There is no doubt that at the present day the words " security " and " securities " are not uncommonly used as synonymous with " investment " or " investments," and it is tempting in a case such as the present so to stretch the meaning of the words. Several cases were cited in argument to illustrate this popular usage of which *Re Rayner* (1) is an example. It is necessary for me to refer in detail to the authorities since it was conceded by counsel for the appellants that the *prima facie* meaning of the words " security " or " securities " is the narrower of the two alternatives already posed and that the meaning will not be extended to the wider alternative in the absence of some context requiring such extension : see, for example, the opinion of VISCOUNT CAVE in *Singer* v. *Williams* (2), followed recently by CROSSMAN, J., in *Re Smithers* (3). I may add that in cases relating to wills, and, particularly, to " home-made " wills, the courts will concede some degree of latitude in the interpretation of inelegant expressions which are not to be expected in Acts of Parliament. I am bound, however, to say, as regards drafting elegance, that the language used in the section under review is hardly less delphic than that employed by many an inexpert testator, but, applying what I conceive to be proper principles of interpretation to the present case, I do not think that I can, as a judge of first instance, do other than attribute to the word " security " as used in s. 44 (1) (*e*) of the Act of 1896 the narrower or stricter interpretation.

Section 44 (1) reads as follows :

> The trustees of a registered society or branch may, with the consent of the committee or of a majority of the members present and entitled to vote in general meeting, invest the funds of the society or branch, or any part thereof, to any amount in any of the following ways : (*a*) in the Post Office Savings Bank, or in any savings bank certified under the Trustee Savings Bank Act, 1863 ; or (*b*) in the public funds ; or (*c*) with the National Debt Commissioners as in this act provided ; or (*d*) in the purchase of land, or in the erection or alteration of offices or other buildings thereon ; or (*e*) upon any other security expressly directed by the rules of the society or branch, not being personal security, except as in this Act authorised with respect to loans.

To this sub-section an amendment has been made by the Friendly Societies Act, 1908, s. 4, providing that the following further words be added after (be it noted, " after " and not " before ") para. (*e*), namely :

> . . . or (*f*) in any investment in which trustees are for the time being by law authorised to invest trust funds.

Section 14 (3) of the Act of 1908 requires that s. 44 (1) of the principal Act shall, as from the commencement of the Act of 1908, be construed as if the added paragraph had originally formed part of the principal section.

The first and main argument for the appellants rested on the two words " any other " immediately before the word " security " in para (*e*) of the sub-section. According to the ordinary and proper use of language, these two words must, it was claimed, import a reference to the subject-matter of all the four preceding paragraphs, *i.e.*, the phrase " any other security " must mean any security other than the kinds of security mentioned in all the paras. (*a*) to (*d*) inclusive. On this view, and having particular regard to the terms of para. (*d*) " in the purchase of land, or in the erection or alteration of offices or . . . buildings thereon " (a form of investment which could not be brought within the narrower significance of the word " security "), it was urged that " security " must have been intended to be synonymous with any form of investment. On the other hand, it was said that the proper interpretation of the phrase " any other security " was any security other than those securities previously mentioned; that it was not necessary for the word to be understood as comprehending all the matters in all the preceding four paragraphs; and that, in any event, the application of the funds of the society in the erection or alteration of offices or buildings was not an investment in any sense which the word "security" could legitimately bear.

Before stating my view on this, which constitutes the short but principal issue of construction in the case, I refer to the argument based on the amendment introduced by the Act of 1908. It was strongly urged by counsel for the Chief Registrar that, since the Act of 1908 was plainly an enabling Act, it was only sensible to suppose that the terms of the relevant amendment proceeded on the basis that trustee investments (save such as were covered by para. (*a*) (*b*) and (*c*) of the original section) were outside the scope of the authority conferred by s. 44 of the Act of 1896. On the other side, attention was directed to the distinction between those classes of investments which were in any case allowable under the Act of 1896 (*i.e.* those covered by paras. (*a*) to (*d*) inclusive) and those which might in addition be made allowable by virtue of a direction in the society's rules according to para. (*e*). It was said that the scheme of the Act (as shown by s. 9 and sched. I) was that *prima facie* a society could provide for its own classes of authorised investments as it chose, and that, since s. 44 (1) was a limitation on that power, it should not be construed as having a greater limiting effect than was strictly necessary, and, accordingly, that the only effect and purpose of the amending Act was to enlarge the range of permitted investments which were in any case allowable in the absence of a direction in the rules.

I am bound to say that I find difficulty in accepting this argument of the appellants. If the purpose of the amending statute had been as the appellants contend, I should have expected the new para. (*f*) to have preceded and not followed para. (*e*), in which case the whole argument of the appellants might have been on other grounds much simplified. But I also feel some difficulty in interpreting the words of a statute *ex post facto*, as it were, by reference to a later amending Act even when (as in the present case) the latter Act requires that the original section should read as if the amendment had originally formed part of it, and I prefer, accordingly, to assume for the purpose of the argument that the amending Act throws no light one way or the other on the meaning to be attributed to the word "security" in the original section. Even so, I come to a conclusion adverse to the appellants on their main submission. In deciding between the two alternatives offered, I must, as I have already stated, proceed on the view that *prima facie* the word "security" will not be interpreted as comprehending all forms of investment. I look, therefore, to see in what senses the word has been used in other sections of the Act. In the first place, there is the phrase "not being personal security" in the same paragraph of the sub-section in question—a phrase indicative of the narrower, rather than the wider, meaning of the word. Further, in the same fasciculus of sections in which s. 44 is found, the word "security" occurs in s. 45 (twice), s. 46 (twice) and s. 48 (once). The plural "securities" is used in s. 50 and the word "secured" in s. 53. In the next part of the Act the word "security" is again used, in s. 54. In each of these other places the word "security" (or a cognate word) is, in my judgment, plainly used in the narrower sense. So far as I have discovered, neither the word "security" nor any cognate term is elsewhere used in the Act. According to well recognised canons of construction a word will *prima facie* be taken to be used in the same sense throughout a document. In my judgment, I cannot say that there is a context in s. 44 (1) (*e*) sufficient to give to the word "security" in that paragraph a meaning different from that in which it is elsewhere used. Put the other way, the sense in which I think the word and cognate words are elsewhere used in the Act compels me to attribute to it in the former place the narrower and stricter significance.

It is well settled that, in attempting to resolve an ambiguity of language in an Act of Parliament, it is permissible to refer to previous Acts *in pari materia*. I have, therefore, with the assistance of counsel, referred to the history of the legislation affecting friendly societies. The first general Act regulating such societies was passed in 1793 and since that date there have been numerous amending and (from time to time) consolidating statutes. Before making any reference to the terms of any of these Acts, one general observation may be made. It is, I think, clear from the general tenor of the legislation that special care has been taken by Parliament to protect from risk the funds of societies which form the source of the benefits to be provided to their members. In s. 1 of the amending Act of 1846 one of the purposes of a friendly society is stated to be the frugal investment of the savings of members. I turn to the statutes themselves. It is, in my judgment, plain from the terms of the original Act of 1793 and the amending and consolidating Acts prior to 1855 that investment in the shares of joint stock or trading companies was outside the authority of the Acts and that the word "security" when used in those Acts (*e.g.* in s. 12 of the consolidating Act of 1850) bore its narrower and stricter meaning. In 1855 a further consolidating Act was passed. Section 32 of that Act provided for the investment of a society's funds:

> . . . in any savings bank, or in the public funds, or with the Commissioners for the Reduction of the National Debt, as hereinafter mentioned, or in such other security as the rules of such society may direct, not being the purchase of house or land, (save and except the purchase of buildings wherein to hold the meetings or transact the business of such society as hereinbefore mentioned,) and not being the purchase of shares in any joint stock company or other company, with or without charter of incorporation, and not being personal security, except in the case of a member . . .

The language of this section, having regard particularly to the words "not being the purchase of shares" etc., plainly gives ground for the argument that the word "security" is there used in its widest sense. In 1875, however, the Act of 1855 was in turn repealed and replaced. In the new Act, a new formula was, in s. 16 (1), applied to the provisions in regard to investment, such new formula being in substance identical with that contained in s. 44 (1) of the Act of 1896. It is to be noted that the Act of 1875 was passed following the report of the Royal Commission on Friendly Societies associated with the name of Sir Stafford Northcote and it provided for the first time an additional safeguard to members in the form of compulsory periodical valuations of the society's assets.

If the arguments of the appellants is well founded, it must follow that Parliament must be taken, by the adoption of a new form of words in regard to investment (which new form did not contain the language in the Act of 1855, expressly excepting investment in shares of companies) to have intended in 1875 for the first time to authorise the trustees of friendly societies to invest their funds in any form of investment, however speculative and hazardous. When regard is had to all the relevant circumstances, including the general characteristics of the legislation to which I have referred, such a conclusion appears to me untenable. I, therefore, fail to find in an examination of the statutes prior to 1896 any basis for giving to the word "security" in s. 44 (1) of the Act of 1896 the wider or more general significance claimed.

One other matter may be mentioned. Counsel for the Chief Registrar, in the course of his argument, drew my attention to the corresponding statutory provisions relative to industrial and provident societies to be found in s. 38 of the Industrial and Provident Societies Act, 1893, by virtue of which Act such societies were, as I understand, for the first time regulated distinctly from friendly societies. It is, I think, clear that there is, at the least, strong ground for supposing that the word "security" in the opening sentence of the Industrial and Provident Societies Act, 1893, s. 38 (1), was used in its widest sense, and, in any case, by para. (*c*) of that sub-section, shares in limited companies were included in the permitted range for investment of the funds of such societies; but it is, in my judgment, not legitimate to proceed from the use of the word "security" in the Industrial and Provident Societies Act, 1893, s. 38, to the conclusion that the word was used in the same sense in the Friendly Societies Act, 1896, s. 44. Parliament may well have considered a much wider range of investment than that permitted to friendly societies was requisite to societies the principal purpose of which was defined to be "for carrying on any industry, trade, or business." In conclusion, I draw attention to the fact that according to the SHORTER OXFORD ENGLISH DICTIONARY, published in 1933, the most extended meaning of the word "security" is given as follows:

> A document held by a creditor as guarantee of his right to payment. Hence, any form of investment guaranteed by such documents. [to which meaning the date 1690 is assigned.]

For the reasons I have stated, I come to the conclusion that the Chief Registrar was right to refuse registration of the amendment of the rules of the United Law Clerks Society in so far as such amendment comprehended preference stock or shares in chartered or incorporated companies. The motion must be refused accordingly.

Motion dismissed with costs.

Solicitors: *Church, Adams, Tatham & Co.* (for the friendly society); *Treasury Solicitor* (for the Chief Registrar).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Distinguished. Insall *v.* Nottingham Corpn. [1948] 2 All E.R. 232.

Distinguished and observations of Scott, L.J., at p. 680, *criticised.* Black Mill, Ltd. *v.* Straker. [1949] 2 All E.R. 919.

ROBERTS *v.* JONES

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), November 11, 12, 1946.]

Landlord and Tenant—Rent restriction—Standard rent—"First let"—House within Housing (Rural Workers) Acts first let at rent of 7s. 6d. a week imposed under those Acts—House later freed from Housing (Rural Workers) Acts and let at rent of 17s. 6d. a week—Whether standard rent 7s. 6d. a week or 17s. 6d. a week—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. I.

A dwelling-house to which the Housing (Rural Workers) Acts applied was first let in 1938 at a rent of 7*s.* 6*d.* a week, the rent being fixed by the local authority under those Acts. In 1941, the house ceased to be subject to the Housing (Rural Workers) Acts, and the landlord let the house at a rent of 17*s.* 6*d.* a week. The question was whether the standard rent, for the purpose of the Rent Restrictions Acts, was the rent imposed under the Housing (Rural Workers) Acts or the rent at which the house was let after it became free from those Acts:—

Held: the standard rent provisions of the Rent Restrictions Acts did not apply *prima facie* to houses the rent of which was subject to a different and special legislation, and, therefore, the standard rent of the house was 17*s.* 6*d.* a week, the first rent freely agreed between landlord and tenant after the house became free from the restrictions of the Housing (Rural Workers) Acts, and not the rent of 7*s.* 6*d.* a week, imposed under those Acts.

[As to Standard Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369, and 1946 Supplement; and for Cases, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

(1) *Gloucester (Bishop)* v. *Cunnington*, [1943] 1 All E.R. 61; [1943] 1 K.B. 101; 112 L.J.K.B. 151; 168 L.T. 68; Digest Supp.

(2) *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K.B. 294; 104 L.J.K.B. 30; 152 L.T. 111; Digest Supp.

(3) *Signy* v. *Abbey National Building Society*, [1944] 1 All E.R. 448; [1944] K.B. 449; 113 L.J.K.B. 486; 170 L.T. 238; Digest Supp.

Appeal by the landlord from an order of His Honour Judge Evans, K.C., at the Caernarvon County Court, on June 5, 1946. The facts appear in the judgment of Scott, L.J.

Gilbert Dare for the landlord.
G. Krikorian for the tenant.

Scott, L.J.: This appeal raises a question of considerable interest, and, strange as it may seem in view of the enormous number of the decisions which have been given by the Court of Appeal under the Rent Restrictions Acts, it raises, I think, a new point, though not one on which there is no authority which is helpful for our guidance. The question of general public interest in this case is whether the standard rent of a house that came into existence as a new house through the complete reconstruction of an old house under the terms of the Housing (Rural Workers) Acts, 1926 and onwards, is or is not to be computed, for the purpose of the Rent Restrictions Acts, by reference to the rent which was imposed on it under the Housing (Rural Workers) Acts or by the rent which was fixed in relation to the house when free from those Acts. The appeal is by the landlord, who is seeking to reverse the decision of the county court judge under the Rent Restrictions Acts ordering the landlord to repay to the tenant some £50 odd of rent which the tenant claimed, and the judge held, as having been overpaid during a period of some 2 years before the proceedings were brought.

Before 1937 the old house had been let at a rent of 2*s.* 6*d.* a week. About that time the owner came to the conclusion that by drastic reconstruction of the house he could turn it from a very indifferent house into a good house with modern conveniences. He, in fact, spent some £450 on it. To help his financing of the operation, he applied to the local authority under the Housing (Rural Workers) Act, 1926, for a grant in aid and he received from that local authority a grant of £100. The judge has held as a fact that of the £450 which he spent on the house £325 was a reasonable figure for the work of reconstruction after allowing for certain unnecessary cost through his doing it by direct labour. The judge further found that the result was that a house which had been condemned as unfit for human habitation was converted into a house which was fit for human habitation and for which "a rent of 7*s.* 6*d.* per week was considered reasonable." That was the figure arrived at by the local authority, who, under the Act of 1926, had to decide what was the reasonable rent having regard to "the average rent for the time being paid by agricultural workers in the district," as provided by s. 3 (1) (*b*) (i) of the Act, after allowing for extra expenditure incurred by the landlord over and above the grant that he received from the local authority.

The object of the Act was to enable landlords, who could not themselves find the whole of the money necessary for reconstructing old cottages to make them into good houses, to obtain finance. Under the Act two sources of finance were made available: (i) a grant out and out which was not repayable; (ii) a loan, at a specified rate of interest, which was repayable. This landlord obtained a grant. The conditions of the grant, as laid down by s. 3 (1) of the Act, are that for 20 years from the date when the house is made fit for occupation on the completion of the works:

> (*a*) The dwelling shall not be occupied except by a person . . . whose income is, in the opinion of the local authority, such that he would not ordinarily pay a rent in excess of that paid by agricultural workers in the district . . . (*b*) The rent . . . shall not exceed the amount of the normal agricultural rent, increased by a sum equal to three per cent. of the amount by which the estimated cost of the works in respect of which assistance has been given, exceeds the amount of the assistance given by way of grant . . .

Under those provisions 7*s.* 6*d.* was fixed by the authority as the proper figure payable by agricultural workers or other persons, and that condition would remain obligatory on the landlord for 20 years from 1938 when the work was done.

The old tenant gave up possession in the spring of 1937 and after the work was completed the new tenant paid the rent of 7*s.* 6*d.* a week until 1941. In March, 1941, he gave up possession and the landlord put in a man who was in his employment, namely, the tenant who brought these proceedings and who agreed to pay 17*s.* 6*d.* I have no doubt that, when that rent was arranged, it was on the footing that the landlord was going to pay off the grant of £100. It may be that he had, at that time, already made an application to pay off. The grant was, in fact, paid off by Sept., 1941.

During the period down to the departure of the tenant who had been paying 7*s.* 6*d.*, a certain status was imposed on the house, namely, that of a rural worker's house under the Housing (Rural Workers) Acts. That status was imposed, as it were, *in rem* on the house, to that extent taking it outside the realm of free contract between the landlord and a tenant. On Sept. 2, 1939, the Rent and Mortgage Interest Restrictions Act, 1939, came into force, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), as amended by the new Act, provided a definition of the standard rent for this house, namely:

> . . . the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let.

The question of law which arises in this case is whether the provision which I have read from s. 12 (1) (*a*) of the Act of 1920, as amended by the Act of 1939, compels the court to say that 7*s*. 6*d*. was the criterion of the standard rent within the meaning of the section.

The interesting point is that there is a finding of fact by the judge (obviously right, if I may say so, though that is not for us) that the reconstruction of the house in 1937 and 1938 meant that after reconstruction it was a totally new house. The judge's finding to that effect is one of fact. There would, in that event, be no question, for instance, of going back to the rent in earlier days when the old house, which *ex hypothesi* had ceased to exist, was let at 2*s*. 6*d*. a week. The question we have to decide is whether 7*s*. 6*d*., the rent fixed by the local authority for the purpose of the Housing (Rural Workers) Acts, is to be regarded as the standard rent.

On that I look at the terms of s. 12 (1) (*a*) of the Act of 1920 as amended by the Act of 1939:

> The expression "standard rent" means the rent at which the dwelling-house was let on Sept. 1, 1939.

If the letting of the house under the Housing (Rural Workers) Acts at 7*s*. 6*d*. is to be regarded, 7*s*. 6*d*. is the criterion, but if the Rent Restrictions Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house, the court can have no regard to the time when the rent was 7*s*. 6*d*., for the house was not then free and its rent cannot be the standard. It must have regard to the rent of 17*s*. 6*d*., which was the first rent of this house freely agreed between landlord and tenant after the time when the house became free from the restrictions of the Housing (Rural Workers) Acts.

That raises a question of first principle on which there is no direct authority, though there is authority which is relevant. The Rent Restrictions Acts impose a status on a house. In my view, in exactly the same sense, the Housing (Rural Workers) Acts impose a status on a house. That, I think, leads to the necessary conclusion of law that the Rent Restrictions Acts are not intended to apply to houses the rent of which is fixed within the Housing (Rural Workers) Acts.

A somewhat similar question was dealt with by this court in *Bishop of Gloucester* v. *Cunnington* (1) where the issue was whether the Rent Restrictions Acts applied to houses governed by pre-existing Acts containing, so to speak, special legislation. That case concerned a house within the Pluralities Act, 1838, s. 59, which provided that a house that was required for the convenience of a rectory should be subject to the terms of that Act. This court decided that the Rent Restrictions Acts, being general Acts, did not apply to a house governed by special legislation of that kind, on the principle of the maxim *generalia specialibus non derogant*. That same principle applies, though in a different way, I think, to the Rent Restrictions Acts generally. They constitute general legislation. The Housing (Rural Workers) Acts are special legislation. *Prima facie*, the general was not intended to override or to conflict with the special legislation, and that, in my opinion, is the proper interpretation to be put on the Rent Restrictions Acts. Indeed, it is to a certain extent, I think, declared to be so by an express provision in the Act of 1939, s. 3 (2) which says:

> The principal Acts shall not, by virtue of this section apply . . . (*c*) to any dwelling-house being, or forming part of, a house or dwelling in respect of which a local authority for the purposes of the Housing Act, 1936, pt. V, are required by s. 128 of that Act to keep a housing revenue account.

Section 128 of the Housing Act, 1936, provides that every local authority shall keep a housing revenue account of:

> (*c*) all dwellings in respect of which either (i) the authority have received assistance under the Housing (Rural Workers) Acts, 1926, s. 1; or (ii) the Minister has undertaken to pay a contribution to the authority under s. 4 (2A) of that Act.

That is this case, as a matter of fact, because in this case the local authority in respect of their grant were in receipt of assistance from the Minister as there provided. One, therefore, gets in s. 3 (2) (*c*) of the Act of 1939, a declaratory recognition of the principle that the standard rent provisions of the Rent Restrictions Acts do not apply *prima facie* to houses the rent of which is subject to a different and special legislation. The judge dealt with that, but, in my view, he came to a wrong conclusion of law when he said that the Rent Restrictions Act, 1939, made it obligatory on him to take as the standard rent of the house, for the purpose of the Rent Restrictions Acts, the artificial rent of 7*s.* 6*d.*, fixed under other legislation when the house was first let. Therefore, on principle, I come to the conclusion that the appeal must be allowed.

We have been referred to several cases which I do not propose to discuss, but counsel for the tenant has relied particularly on *Wheeler* v. *Wirral Estates, Ltd.* (2), where LORD WRIGHT gave the leading judgment of this court. That case was one in which the house in question had been constructed and owned by the Crown and had been let to the plaintiff in 1916 at a rent of 9*s.* 6*d.* a week, subsequently reduced by the Crown to 7*s.* 2*d.* a week. Subsequently, the Crown had sold it to the defendants, subject to the plaintiff's tenancy. In 1929 the defendants gave the plaintiff notice to quit, with the alternative of paying an increased rent of 10*s.* 6*d.* The question before the court under s. 12 of the Act of 1920 was what was the time when the house was first let within the meaning of the Rent Restrictions Acts. The court held that the house was first let when it was let at the rent of 9*s.* 6*d.* The sentence particularly relied on by counsel for the tenant is at the end of LORD WRIGHT's judgment, where he said ([1935] 1 K.B. 294, at p. 304) :

> It is not, as I think, the law that property which while belonging to the Crown has obtained an immunity from conditions and charges under statutes which do not bind the Crown retains that immunity after the Crown's interest has ceased.

I fail to see how that helps the tenant. The only question in this case is whether this house had a status as long as it was within the Housing (Rural Workers) Act which prevented the Rent Restrictions Acts applying to it. I think that the nearest analogy to the present case is *Signy* v. *Abbey National Building Society* (3), where an attempt was made to treat the rent paid for the house when furnished as a criterion when fixing the standard rent of the house when unfurnished. LUXMOORE, L.J., delivered the judgment of the court, consisting of himself, LORD GREENE, M.R., and MACKINNON, L.J., and he said of s. 12 of the Act of 1920, as amended by the Act of 1939 ([1944] 1 All E.R. 448, at p. 450) :

> The object is plainly to fix the standard rent of a dwelling-house to which the Acts apply . . . A letting of a dwelling house completely furnished is a letting of something more than the dwelling-house, for it includes also the letting of the furniture in it.

He, therefore, held that a furnished house was not the kind of house to which regard could be paid when the standard rent of the house unfurnished was being fixed. That is analogous, in my view, to the case of a house which had an artificially low rent because it carried the standard rent of the Housing (Rural Workers) Acts. I, therefore, think that the appeal must be allowed, with costs here and below.

BUCKNILL, L.J. : I agree that the appeal should be allowed, and, as we are reversing the judgment of the judge, I will try to state very shortly my reasons. It seems to me that the crucial part of the judgment comes where the judge said :

> On Sept. 10, 1941, the house came within the provisions of the Rent Act, 1939, under which the relevant date for ascertaining the standard rent is Sept. 1, 1939.

It seems to me to be clear that the house did not come within the provisions of the Rent and Mortgage Interest Restrictions Act, 1939, until the grant had been repaid. That appears to be clear under s. 3 (2) (*c*) of the Act of 1939, to which my Lord has referred, which takes the house, in respect of which such a grant has been made, out of the Act.

Then the question is : Is the judge right in saying that the relevant date in a case of this kind for ascertaining the standard rent is Sept. 1, 1939 ? In my view, that is incorrect, because this was not, within the meaning of the Act, a dwelling-house which was let on Sept. 1, 1939. It did not become a dwelling-house within the meaning of the Act until the grant had been repaid. Therefore, it comes within the words of s. 12 (1) (*a*) of the Act of 1920 (as amended by the Act of 1939) which deals with the case of a dwelling-house first let after Sept. 1, 1939. In that case the standard rent is to be the rent at which it was first let. The rent at which this house was first let after Sept. 1, 1939, was 17*s.* 6*d.* a week, and, in my view, that should be taken as the standard rent, Somervell, L.J.: This house came into existence for the purpose of the Acts which we are considering as a result of reconstruction made by the landlord under the Housing (Rural Workers) Act, 1926. In 1938 the rent of the house was fixed at 7*s.* 6*d.* by the local authority under the provisions of s. 3 of that Act. In 1941, the house being then vacant, the landlord was minded to let it to the present tenant. The present tenant, by reason of the wages which he was getting, was thought not to come within s. 3 (1) (*a*) of the Act of 1926, which puts an income restriction on those who may become occupiers of houses in respect of which grants have been received under that Act. The landlord, therefore, proposed to pay off the grant under proviso (ii) to s. 3 (1) of the Act, the final words of which are that, if the grant is paid off:

> . . . the conditions contained in this section shall cease to have effect in relation to that dwelling.

The landlord took the view that, if he paid off the grant, he would be entitled to charge a rent higher than the 7*s.* 6*d.* which had been fixed under the Act and he and the tenant agreed that the tenant should have the house at 17*s.* 6*d.* a week. I do not think that any importance can be attached to the fact that that agreement was made, and the applicant entered into occupation, some time before the grant was, in fact, paid off.

The tenant now says that he need not pay 17*s.* 6*d.*, but need only pay the 7*s.* 6*d.*, on the ground that the 7*s.* 6*d.* should be regarded as the standard rent under the Rent Restrictions Acts. This house having now ceased to be subject to the conditions of the Housing (Rural Workers) Acts, I think that it is agreed that the Rent Restrictions Acts apply, but the argument is as to what is the result of their application. The argument of counsel for the tenant is simple. He turns to the definition in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, as amended, which says that the standard rent means, for the purpose with which we are concerned, the rent at which the dwelling-house was first let. He says that the house was first let at 7*s.* 6*d.* after the reconstruction and there is no reason why the words should not be given their literal meaning and applied in that way. Our attention has been drawn to two authorities, to which my Lord has already referred and to which I can refer very briefly. In *Wheeler* v. *Wirral Estates, Ltd.* (2), it was held that, although Crown premises are not subject to the Rent Restrictions Acts, the rent which was fixed by and paid to the Crown when the house was first let was the standard rent to be taken as applicable to the house after it passed from the ownership of the Crown into other hands. In *Signy* v. *Abbey National Building Society* (3) this court held that, where the house was first let unfurnished, the rent which was then paid was not to be taken as the standard rent.

What then is the position, so far as authority is concerned? This court cannot, I think, have decided *Signy's* case (3) on the basis that you do not take the furnished rent because the Acts do not apply to the letting of furnished houses, because it had already decided that you do take a rent payable to the Crown although it was accepted that the Acts do not apply to Crown property. As it seems to me, the basis of the decision in *Signy's* case (3) is that a furnished letting is not the type of letting which is contemplated by the definition—not so much because furnished lettings are excluded from the Acts as because such a letting necessarily contains an element increasing the rent which is not included in the normal rent of unfurnished premises with which the Acts are concerned. In other words, the basis of a furnished letting is not the basis which the Acts are clearly contemplating in this definition. If I am right in saying that that is the ratio of the decision in the *Signy* case (3), applying it to this case, it seems to me that it can be said with equal force here that the basis on which a rent under the Housing (Rural Workers) Act, 1926, is arrived at is not the normal basis and not the basis which the Rent Restrictions Acts are contemplating when they lay down how the standard rent is to be arrived at. It is unnecessary to recapitulate in detail the restrictions or the conditions which affect the rent under the Act of 1926. No provision is made in it for any interest or annual return on the grant. It must not exceed the amount of the normal agricultural rent as fixed by the local authority, with an addition of three per cent. of the amount which the owner has himself spent. Just as the inclusion of furniture is an extraneous factor which operates by way of increasing the rent, it seems to me that to apply this Act of 1926 depresses the rent, and, therefore, does not make it the rent with which the definition in s. 12 of the Rent Act, 1920, as amended, deals. It cannot be said that any element either by way of raising or depressing the rent which would ordinarily be arrived at enters into the decision with regard to Crown property. The fact that the Crown owns property does not lead to the rent being other than what would normally be arrived at as between landlord and tenant. It, therefore, seems to me that this case falls within the decision given in *Signy's* case (3) and I agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Jaques & Co.*, agents for *Ellis, Davies & Co.*, Caernarvon (for the landlord) ; *Whitfield, Byrne & Deane*, agents for *Carter, Vincent & Co.*, Caernarvon (for the tenant.

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JACK CLARK (RAINHAM) LTD *v.* CLARK.

[COURT OF APPEAL (Morton and Tucker, L.JJ.), November 12, 1946.]

Practice—Stay of proceedings—Action based on felony—Facts alleged in pleadings consistent with misdemeanour.

In exercising its inherent jurisdiction to stay or dismiss proceedings on the ground that the action is based on a felony and the defendant has not been prosecuted, the court must look at the reality of the matter and all the facts of the case which are properly brought to its notice and not merely regard the writ and statement of claim which it is sought to strike out. The court should only act in a clear case where public justice manifestly requires the plaintiff to prosecute or bring the matter before the public prosecutor, and must be slow to stay an action unless the court is satisfied that the crime on which the action is based is a felony and nothing else. The matter must be very clear for the court to stop the proceedings *in limine.*

Carlisle v. *Orr,* [1917] 2 I.R. 534 approved.

[AS TO INHERENT JURISDICTION OF COURT TO STAY PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 26, p. 69 ; and FOR CASES, see DIGEST, Practice, pp. 977-979, Nos. 5101-5110.]

Cases referred to :

(1) *Smith* v. *Selwyn,* [1914] 3 K.B. 98 ; 83 L.J.K.B. 1339 ; 111 L.T. 195 ; Digest Practice 978, *5108.*

(2) *Carlisle* v. *Orr,* [1917] 2 I.R. 534.

APPEAL by defendant from an order of CROOM-JOHNSON, J., dated June 28, 1946. The facts are set out in the judgment of MORTON, L.J.

C. J. A. Doughty for the defendant.
Henry Harris for the plaintiffs.

MORTON, L.J. : The defendant, Mrs. Clark, applied to the master in chambers for an order to stay further proceedings in, or to dismiss, the action as being an abuse of the process of the court on the ground, as she alleged, that the writ and the statement of claim endorsed on it were based on a felony for which the defendant had not been prosecuted. The master ordered that all further proceedings in the action should be stayed until the defendant was prosecuted. On appeal from that decision, CROOM-JOHNSON, J., allowed the appeal and ordered that the master's order " be set aside without prejudice to the defendant's rights to plead if so advised and to contend at the trial that the action is not maintainable until she has been prosecuted in respect of the matters alleged."

The plaintiffs are Jack Clark (Rainham), Ltd., and the statement of claim begins :

> The plaintiffs' claim is for the return of the sum of £1,000 wrongfully taken and wrongfully converted by the defendant.

So far that might be an allegation of a taking by the defendant which amounted to larceny within the definition in the Larceny Act, 1916, s. 1, or it might be an allegation of a fraudulent conversion by the defendant within s. 20 of the same Act. Particulars are given as follows:

> (1) The plaintiffs are a private limited company carrying on the business of farmers and fruit growers and their registered office is at Miers Court, Rainham, in the county of Kent. (2) The plaintiffs through their managing director, Jack Clark, kept in a wardrobe in the bedroom on the first floor at the said premises in a container the sum of £1,000 0*s.* 0*d.* in £1 treasury notes, the property of the said company. (3) On or about Mar. 15, 1946, the defendant, without the knowledge or authority of the said Jack Clark, entered into the said room and wrongfully removed the said container with the said £1,000 0*s.* 0*d.* (4) The plaintiffs have repeatedly since Mar. 22, 1946, through their managing director, the said Jack Clark, requested the defendant to return to them the said sum of £1,000 0*s.* 0*d.* The defendant has refused to return the said money to the plaintiffs or their managing director or at all on the ground that she wishes to keep the same for the future education of her two children.

It is to be observed that in that statement of claim there is no statement whether the defendant is or is not a director of the plaintiff company.

The law in regard to staying proceedings on the grounds put forward by the defendant in this action was very clearly stated in this court in *Smith* v. *Selwyn* (1) I need only quote two short passages from the judgments delivered in that case. Kennedy, L.J., said ([1914] 3 K.B. 98 at p. 103):

> This, however, is certain, that the court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff.

Swinfen Eady, L.J., said (*ibid* at p. 105):

> It is well established that, according to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution.

If it were clear in the present case that the action is founded on an allegation of a felony committed by the defendant, for my part I should have had no hesitation in allowing this appeal and restoring the order of the master, and I think there is much force in the argument of counsel for the defendant that, looking at the statement of claim alone, it is consistent with an allegation of felony, but I think the court must look at the reality of the matter and at all the circumstances of the case.

There was in this case an application for judgment under R.S.C. Ord. 14 and the defendant herself put on oath that she is the wife of Jack Clark who kept this money in his bedroom and is also a director of the plaintiff company. On these facts, it would at once become at least a matter of doubt whether the action was really founded on the felony of larceny or whether it was founded on the misdemeanour of fraudulent conversion. It would be wrong to exclude from our consideration the fact that the applicant has herself made these statements on oath in other proceedings in this action. In these circumstances, whatever might have been the result if the court could look only at the statement of claim, I think that the judge took the right course in leaving the matter to be raised at the trial.

In my judgment, the matter was very well put by the Court of Appeal in Ireland in *Carlisle* v. *Orr* (2) when Gibson, J., said ([1917] 2 Ir. Rep. 534 at p. 538):

> The court, in applying this age-worn rule which still abides with us, should only act in a clear case where public justice manifestly requires the plaintiff to prosecute or bring the matter before the public prosecutor.

Again, O'Connor, M.R., said (*ibid.* at p. 550):

> We ought, therefore, to be slow to put a stay on an action on the ground that a felony is charged unless we are satisfied that the claim is one for felony and nothing else. Moreover, the remedy of staying proceedings is the most drastic one available for getting rid of an action; and it lies upon the defendant to show conclusively that the case which the plaintiff makes is one of felony, and cannot be anything else.

In the present case I am by no means satisfied that the action is really based upon an allegation of felony and nothing else, and in my view this appeal should be dismissed.

TUCKER, L.J.: This application to stay the present proceedings is based on a rule founded on public policy, namely, that a plaintiff should not be entitled to his civil remedy against a defendant when his cause of action is founded on a felony committed by the defendant for which that defendant has not been prosecuted. It is difficult to see why in these days there should be this distinction for this purpose, or it may be for any other, between felonies and misdemeanours, but the distinction exists and has to be regarded. It is a very drastic step to stay an action at this early stage, and I think it should only be done when the statement of claim discloses beyond a shadow of doubt that the action is one founded on felony.

In the present case the facts set out in the statement of claim do not use the word "fraud" or "fraudulently." They do not use the word "larceny." They do not use the word "theft." That occurs to me to be curious if it can be said that beyond a peradventure of doubt the claim is one founded on felony. It is a significant fact that as a matter of pleading—and we are looking at this as a matter of pleading—many of the necessary ingredients of larceny are not specifically alleged. It is always to be remembered that it is within the power of the judge, and it is his duty, at the trial to stop the action proceeding if he is satisfied on the facts as proved that the action is founded on felony, but to stop the action *in limine* the pleading must be very clear in its terms. I do not think this pleading is so clear, and, furthermore, I think that, as the jurisdiction of this court is being invoked to stop an action on the ground that it is an abuse of the process of the court, it is right and proper for the court which is asked to take that action to have regard to any matters properly brought to its notice which are relevant to the question which it has to decide. I think it is a very relevant consideration that the defendant herself, in an affidavit under R.S.C. Ord. 14 sworn in these proceedings, which the judge was perfectly entitled to consider, has stated that she was a director of this company. That, at once, raises the question whether the facts disclosed in the statement of claim may not amount merely to a misdemeanour under the Larceny Act, 1916, s. 20. For these reasons I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Wedlake, Letts & Birds* (for the defendant); *C. Grobel, Son & Co.* (for the plaintiffs).

[*Reported by* RONALD ZIAR, ESQ., *Barrister-at-Law*].

JOHN LANCASTER RADIATORS, LTD. *v.* GENERAL MOTOR RADIATOR CO., LTD. AND OTHERS.

[COURT OF APPEAL (Morton and Tucker, L.JJ.), November 11, 1946.]

Practice—Pleading—Striking out pleading—Defence—General denial of every allegation of fact in statement of claim—Each allegation not set out separately and denied specifically—Effective denial of every allegation—R.S.C. Ord. 19, r. 27.

In an action in which the plaintiffs alleged that the defendants had wrongfully and maliciously conspired to defraud and injure the plaintiffs in their business, the statement of claim set out (*inter alia*) several acts alleged to have been done by the defendants in furtherance of the conspiracy. The defence contained a clear and comprehensive denial of the alleged conspiracy, a general denial of all the acts alleged to have been done in furtherance thereof, and a denial of every item of damage. It further stated: "The defendants . . . deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied *seriatim*." The defence did not, however, set out, and deal specifically with, each allegation. The plaintiffs appealed to have the defence struck out under R.S.C. Ord. 19, r. 27, on the ground that it tended to prejudice, embarrass and delay the fair trial of the action:—

HELD: it was obligatory on a defendant to deny one by one each allegation in a statement of claim, and, as the defendants had denied every allegation of fact in the statement of claim, it could not be said that the defence tended to prejudice, embarrass or delay the fair trial of the action. (*Adkins* v. *North Metropolitan Tramways Co.* (1) applied.) Whether the defendants had denied unnecessarily allegations which were not really in dispute, and thereby increased the costs of the action, was a matter for the trial judge.

[AS TO DENIAL OF ALLEGATIONS OF FACT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 247-249, paras. 412, 413 ; and FOR CASES, see DIGEST, Pleading and Practice, pp. 42-44, Nos. 341-363, and pp. 45-48, Nos. 372-387.

FOR R.S.C., ORD. 19, r. 17, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 329, 330, and Supplement.]

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Cases referred to :

(1) *Adkins* v. *North Metropolitan Tramways Co.* (1893), 63 L.J.Q.B. 361 ; Digest, Pleading, 44, *360*.

(2) *Thorp* v. *Holdsworth* (1876), 3 Ch.D. 637 ; 45 L.J. Char. 406 ; 3 Ch. Pr.Cas. 87 ; Digest, Pleading, 40, *322*.

INTERLOCUTORY APPEAL by defendants from an order of ROMER, J., dated July 23, 1946. The facts appear in the judgment of MORTON, L.J. B

Robert Fortune for the defendants.

J. F. Bowyer for the plaintiffs.

MORTON, L.J. : In this case the judge has struck out the defence delivered by the defendants on Mar. 29, 1946, on the ground that it tends to prejudice, embarrass and delay the fair trial of the action. The statement of claim is a fairly lengthy one, and the paragraph which appears to me to contain the gist C of the action is para. 4, which is as follows :

> In or about Sept. 1945, the defendants wrongfully and maliciously conspired and combined amongst themselves to defraud and wrongfully to injure the plaintiff company in its said business in manner hereinafter appearing.

Para. 5 states :

> Each of the defendants other than the defendant company was at the time of the D said conspiracy and had previously thereto been employed by the plaintiff company and continued so to be employed until the dates hereinafter specified.

There are six individual defendants in addition to the defendant company. Then in para. 6 there are set out a number of acts and things which the defendants or some, or one, of them are, or is, alleged to have done in pursuance of the said conspiracy. In para. 7 it is alleged :

> Each of the acts specified in the preceding paragraph hereof was done by the person E or persons therein alleged [other than one person mentioned] on behalf of himself or themselves and his or their co-conspirators in furtherance of the said conspiracy.

Then various other matters are set out as resulting from the alleged conspiracy, and there is an allegation of damage and particulars of special damage are given.

The defence is brief, and I will read the whole of it. Para. 1 says :

> None of the defendants has conspired or combined to defraud or to injure the F plaintiff company as alleged or at all.

That seems to be a clearly phrased and comprehensive denial of para. 4, which alleges the conspiracy. Then ;

> (2) None of the defendants has been guilty of any of the acts complained of or of any wrongful act towards the plaintiff company as alleged or at all or in any circumstances rendering any of the other defendants liable therefor as alleged or at all. (3) The plaintiff company has not suffered the alleged or any damage ; alternatively G the alleged damage is not the result of any act or default of the defendants or any of them or of anyone for whose acts the defendants or any of them are responsible. (4) Save in so far as the same is expressly admitted herein the defendants and each of them deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied *seriatim*.

That, as it seems to me, amounts to a denial of every single allegation of fact made in the statement of claim. H

R.S.C. Ord. 19, r. 27, is the rule under which the judge struck out the defence. It provides :

> The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action . . .

The next rule to which we have been referred is R.S.C., Ord. 19, r. 17, which reads :

> It shall not be sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

There is a note in the ANNUAL PRACTICE, 1945, p. 384, with which I agree:

> It is not necessary for the pleader to copy out each allegation which he denies.

In this connection we were referred to *Adkins* v. *North Metropolitan Tramways Co.* (1).

R.S.C., Ord. 19, r. 19 is as follows:

> When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

Apart from authority, my impression of this defence would have been as follows. I strongly suspect that, of the numerous allegations of fact set out in the statement of claim, there may be some as to which there is no real controversy, and to that extent the defendants might have limited the issues or admitted some of the allegations of fact, but this court at the present moment, has no knowledge about that. The defendants have chosen to plead in a manner which alleges, in effect, that the statement of claim and every allegation of fact in it is incorrect from beginning to end. We do not know whether that is so or not. No doubt, when the matter comes to a hearing, if the court thinks that the statement of defence has involved the plaintiffs in unnecessary expense, the court will know how to deal with the matter by way of costs, but I am unable, on the material before us, which consists simply of the statement of claim and the defence, to say that this defence tends to prejudice, embarrass or delay the fair trial of the action. The plaintiffs are left in no doubt about what the attitude of the defendants is in regard to every single allegation in the statement of claim. They deny every one of them, and, for all we know, every one of them may be false.

I do not propose to express any view, unless and until the matter arises, on a defence consisting simply of one paragraph: "... The defendants and each of them deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied *seriatim*." In this case the defendants have gone further than that. They have started by answering in unambiguous terms what seems to be the point of substance in the statement of claim, *i.e.*, the alleged conspiracy. They go on, in para. 2, to deny all the acts which they are alleged to have done in pursuance of the alleged conspiracy, and, in para. 3, to deny every item of damage and to raise a further defence that the alleged damage, if it has been suffered, is not the result of any act or default of theirs. Thus, the plaintiffs know that it is for them to prove every allegation in the statement of claim. It is, of course, open to them, if they think fit, to serve a notice to admit facts on the defendants, or any of them, or to make use of interrogatories, but that is entirely a matter for them.

Although I strongly suspect that the defendants could well admit certain facts in the statement of claim, the court has no knowledge of that at this stage, and I cannot see that any useful purpose would be served if the defendants denied one by one each allegation in the statement of claim, setting out the allegation sufficiently fully to deny it specifically. It seems to me that such a defence would be extremely long in the present case and would give rise to a good deal of expense in printing. Nor has the court hitherto interpreted R.S.C., Ord. 19, r. 17, as making such a form of defence obligatory. I have already mentioned *Adkins* v. *North Metropolitan Tramways Co.* (1). In that case the plaintiff had brought an action against the defendant company for personal injuries and for damage to a pony and van through the alleged negligence of the defendant company. Paras. 2 and 3 of the statement of claim set out the plaintiff's version of the facts and of the damage suffered. The defence was: "The defendants deny each and all the several statements and allegations set out in para. 2 of the statement of claim." A denial in precisely similar terms followed in regard to para. 3. The judge having declined to strike out the defence, there was an appeal to the Divisional Court, consisting of HAWKINS, and LAWRANCE, JJ. HAWKINS, J., said (63 L.J.K.B. 361, at p. 362):

> The defence is no doubt not strictly in accordance with the form as required by the wording of the rules. Rule 17 does say that there must be a specific denial, or rather that "each party must deal specifically with each allegation of fact of which he does not admit the truth." But it is admitted here that the defence does intend specifically to deny each and every allegation of the statement of claim, and the defendants' counsel is ready to draw out each denial specifically if the plaintiff really requires him to do so.

Later HAWKINS, J., remarked (*ibid.*, at p. 363) that there was nothing practically to be gained by any lengthening of the defence. The court dismissed the appeal. Counsel for the plaintiffs relied on *Thorp* v. *Holdsworth* (2). That case was heard by JESSEL, M.R., and the defence was plainly evasive and obscure. JESSEL, M.R., made certain general observations on the rules which were then in force and were, in substance, in the same terms as the rules I have just read, but I do not think that in allowing this appeal and allowing this defence to stand we should be differing in any way from any of the observations of JESSEL, M.R., in that case. I find nothing evasive or obscure in the defence before us. The defendants having taken up the attitude that they deny every single allegation in the statement of claim, it seems to me that to compel them to set out these denials in a longer form would merely lead to unnecessary expense. In my view, this appeal should be allowed.

TUCKER, L.J.: I agree. I do not think that this defence offends against the rules of pleading. The plaintiffs' real complaint, I think, is that it unnecessarily denies a number of allegations in the plaintiffs' statement of claim which it is thought are not really in dispute. This is not the stage at which to pass judgment on that, and it may well be that, when this case comes to trial, the judge may think that the attitude taken up by the defendants has been, in substance, an abuse of the process of the court, or he may consider them to have been guilty of the kind of conduct which tends to bring litigation into disrepute—the kind of thing that the rules are designed prevent. If the judge should come to that conclusion, he will know how to deal with the matter with regard to costs. Moreover, if the result of the defence in this form is to produce an application for interrogatories, which may possibly run into three figures, those who have to deal with these matters will also know how to deal with that with regard to costs, if it has been brought about by unreasonable conduct on the part of the defendants. I think the future will be the time to judge this matter rather than the present moment.

Appeal allowed.

Solicitors: *Wedlake, Letts & Birds* (for the defendants); *J. N. Nabarro & Sons* (for the plaintiffs).

[*Reported by* RONALD ZIAR, ESQ., *Barrister-at-Law.*]

MACBRYAN *v.* BROOKE.

[COURT OF APPEAL (Morton and Tucker, L.JJ.), November 11, 1946.]

Practice—Subpoena ad testificandum—Issue of subpoena before pleadings closed or summons for directions issued—Application to set aside—R.S.C. Ord. XXXVII, r. 34A.

It is permissible to issue a *subpoena ad testificandum* before pleadings are closed and before a summons for directions is issued. Under Ord. XXXVII, r. 34A, a subpoena so issued remains effective until the trial of the action. It is, however, always open to the party served to take out a summons to set aside the service on the ground that in the circumstances it amounts to an abuse of the process of the court and is oppressive.

[AS TO ISSUE OF SUBPOENA AD TESTIFICANDUM, see HALSBURY, Hailsham Edn., Vol. 13, p. 733, para. 808; and FOR CASES, see DIGEST, Vol. 22, pp. 421-423, Nos. 4316-4319, 4321-4351.]

Case referred to :

(1) *London & Globe Finance Corpn.* v. *Kaufman* (1899), 69 L.J.Ch. 196 ; 48 W.R. 458 ; 16 T.L.R. 62 ; 22 Digest 421, *4319*.

Appeal by defendant from an order of Sellers, J., dated August 20, 1946. The facts appear in the judgment of Morton, L.J.

Gilbert Paull, K.C., and *W. J. K. Diplock* for the defendant.
Cecil Havers, K.C., and *James Stirling* for Sir Charles Brooke.

Morton, L.J. : In this case Sellers, J. dismissed an appeal from Master Horridge who had ordered that the writ of *subpoena ad testificandum* served on Sir Charles Brooke should be set aside.

The writ in the action, which was brought by the plaintiff, MacBryan, against the defendant, Mr. Anthony Brooke, was issued on May 17, 1946, the action being one for damages for libel. The statement of claim was delivered on June 28 setting out fully the alleged libels. On July 25, before any defence had been delivered, the *subpoena ad testificandum* was served on Sir Charles Brooke. on behalf of the defendant. This writ of subpoena is in the form which is set out on p. 1739 of the Annual Practice for 1945 (Form No. 1 in Appendix J.) with the difference that at the foot of the subpoena served there is this notice :

> Notice will be given to you of the day on which your attendance will be required.

The operative part of the subpoena reads as follows :

> We command you to attend at the Royal Courts of Justice, Strand, London, at the sittings of the King's Bench Division of our High Court of Justice to be holden on Monday, the 14th day of October, 1946, at the hour of 10.30 in the forenoon and so from day to day until the above cause is tried to give evidence on behalf of the defendant.

On July 30 a summons was taken out by Sir Charles to set aside the writ of subpoena. On August 7 the defence was delivered. The master heard the summons on August 8, and the judge heard it on appeal on August 20. In support of the application to set aside, the managing clerk of Sir Charles's solicitors stated, as was the fact at that time, that no defence had been delivered in the action, that no step had been taken to direct the place of trial, and that the approximate date was then unknown. No summons for directions had been taken out. Then there was an affidavit of Sir Charles stating that he had given no statement to the defendant or his solicitor in the action. In reply there was an affidavit of the managing clerk in the employment of the defendant's solicitors. His affidavit was sworn after the defence was delivered, and, after setting out the effect of the statement of claim and defence, he said :

> The defendant was advised by counsel in my presence that the said Sir Charles Vyner Brooke would be a material and indeed essential witness on some of the issues raised in this action, and the writ of *subpoena ad testificandum* served on Sir Charles Vyner Brooke on behalf of the defendant was served on him as a result of such advice.

Counsel for Sir Charles submits that the judge rightly exercised his discretion, since it was oppressive to Sir Charles to be served with this writ, ordering him to attend on October 14, and thereafter from day to day in the King's Bench Division at a time when no defence had been delivered, there had been no summons for directions, the place of trial had not even been fixed and there was no chance that the case could come on for hearing in the term which began on October 14. To serve the subpoena on him in these circumstances was, said counsel, an abuse of the process of the court. He relied on *London and Globe Finance Corporation* v. *Kaufman* (1). In that case North, J. said (69 L.J. Ch. 196 at p. 197) :

> I will not lay down any general rule as to when a subpoena should be served ; but in this case it was served at a time when it was wholly unnecessary, and at a time when the parties must have known, and did know, that the service could not possibly have any effect. The action could not under any conceivable circumstances be heard during the present sittings.

According to the report in 16 T.L.R. 62, at p. 63 :

> The applicants insisted that the subpoenas had been unreasonably served at an unreasonably early time and for a false date and in such manner as to hamper them in their movements in an offensive way.

It is then reported : that North, J.

> . . . read part of the evidence on the part of the plaintiffs which he said plainly showed

that the object of the plaintiffs in taking out and serving the writs at so early a time was to keep control over the witnesses, so that they should not go away without the leave of the plaintiffs, and if they wished to go away should only do so on terms.

Counsel for the defendant in this action, has rightly pointed out that since that case was decided by NORTH J. there has appeared in the Rules of the Supreme Court Ord. XXXVII, r. 34A, which provides :

> Any subpoena other than a subpoena issued from the Crown Office or in an action to be tried at assizes, shall remain in force from the date of issue until the trial of the action or matter in which it is issued.

Thus, it is not true to say in the present case that the service of the subpoena "could not possibly have any effect." Although the case cannot come on this sittings, the subpoena will remain in force, but I do not think NORTH J. relied only on the fact that the subpoena would be ineffective. I think he based his decision on all the circumstances of the case and, declining to lay down any general rule as to when a subpoena should be served, he thought that it was served unreasonably early and in circumstances which made the service amount to an abuse of the process of the court.

I have felt very considerable doubt in the present case, but I have arrived at the view that we should not interfere with the exercise by the judge of his discretion. I do not think that it is desirable to lay down today any general rule as to when a subpoena should be served. I am disposed to agree with the submission of counsel for the defendant that Sir Charles would not be subject to an attachment for disobeying the subpoena unless he had acted unreasonably in all the circumstances, but on the facts of this case I am not prepared to say that the judge exercised his discretion wrongly. I would add that no reason was put forward on behalf of the defendant why the writ of subpoena should have been served at so early a stage in the action.

TUCKER, J. : I agree. There can be no doubt that it is permissible to issue a *subpoena ad testificandum* before pleadings are closed and before summons for directions, and it is true that now, under the provisions of Ord. XXXVII, r. 34A, a subpoena so issued remains effective until the trial of the action, and if such a subpoena is issued at a very early stage it may necessarily remain in force for a very considerable period of time. In those circumstances it is always open to the party served to take out a summons to set aside the service, although that service is permissible under the rules, if it amounts in the circumstances to an abuse of the process of the court and is oppressive. I think the exercise of that supervisory jurisdiction in the day-to-day working of these things is essentially one for the masters in chambers and for the judge in chambers, and I can see nothing in this case to suggest that the judge applied any wrong principle with regard to the manner in which he exercised his jurisdiction. Nor can I see that the discretion which he exercised has resulted in injustice to anyone. For these reasons I do not think that this court should interfere with the order which he made.

Appeal dismissed with costs.

Solicitors : *William Charles Crocker* (for the defendant) ; *Torr & Co.* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. N. DODD AND F. L. DODD *v.* WILSON AND McWILLIAM, WILLINGTON MEDICALS LTD. (third party), PHYLAX SERUM LABORATORIES LTD. (fourth party).

[CHESTER MICHAELMAS ASSIZES (Hallett, J.), November 4, 1946.]

Contract—Implied condition—Performance of work and supply of materials—Materials unfit for purpose for which used—Veterinary surgeons—Contract to supply toxoid and administer it to cattle—Injury to cattle—Liability of veterinary surgeons, suppliers, and manufacturers.

The plaintiffs were farmers and breeders of cattle. The defendants were veterinary surgeons. The third party was a company which sold a serum or toxoid manufactured by the fourth party, called corynebacterium toxoid, a preparation which purported to be a preventative of summer mastitus among cattle. The method of administering the toxoid was by inoculation. The defendants were the veterinary surgeons whom the plaintiffs regularly employed and on whose skill and judgment they relied. In June, 1945, D., one of the plaintiffs consulted M., one of the veterinary surgeons, about the use of the toxoid on the plaintiffs' cattle. M. said that he had administered the toxoid to other herds and had had reasonably good results, that he would not guarantee that the toxoid would prevent or cure summer mastitis, but that it could do no harm. As a result, it was arranged that M. should procure the toxoid and inoculate the plaintiffs' cattle. In July, 1945, M. inoculated the plaintiffs' cattle with the toxoid and afterwards 60 of the inoculated cattle became sick. M. had obtained the toxoid from the third party who had got it from the fourth party.

HELD: (i) the cattle became sick because there was something wrong with the toxoid with which they had been inoculated;

(ii) M. had given no express warranty that the treatment would be harmless even if there was something wrong with the toxoid;

(iii) there was an implied condition in the contract entered into between the plaintiffs and the veterinary surgeons that the toxoid to be used for the inoculation would be reasonably fit for the purpose for which it was required and that condition had not been fulfilled;

(iv) the Sale of Goods Act, 1893, s. 14, applied to the relationship between the defendants and the third party and that between the third and fourth parties, and, since there had been a breach of the implied condition of fitness, the veterinary surgeons might have recourse against the third party and the third party against the fourth party for any damages which might be awarded against the veterinary surgeons.

[AS TO THE IMPLICATION OF TERMS IN CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-613, Nos. 5028-5066.]

Cases referred to:

(1) *McAlister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

(2) *Myers (G. H.) & Co.* v. *Brent Cross Service Co.*, [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96.

(3) *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd., & Wyrovoys Products, Ltd.*, [1940] 1 All E.R. 174; Digest Supp.

(4) *Lazarus* v. *Cairn Line of Steamships, Ltd.* (1912), 106 L.T. 378; 17 Com. Cas. 107; 12 Digest 611, *5051*.

(5) *Reigate* v. *Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest 611, *5052*.

(6) *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 34 Digest 166, *1296*.

ACTION for damages for breach of contract. Third and fourth parties brought in, as sellers and manufacturers respectively, under the Sale of Goods Act, 1893, s. 14. The facts are set out in the judgment.

Ralph Sutton, K.C., and *Francis Williams* for the plaintiffs.

Edmund Davies, K.C., and *Fenton Atkinson* for the defendants.

Gerrard, K.C., and *Walter Jones* for the third party.
V. R. Aronson and *J. Amphlett* for the fourth party.

Hallett, J.: The plaintiffs carry on business in partnership as dairy farmers and stockbreeders at Buerton Hall Farm and Lower Lightwood Green Farm in the county of Chester. In July, 1945, they were the owners of a valuable herd of pedigree and non-pedigree cows and heifers. The defendants practise in partnership as veterinary surgeons. They were at all material times the veterinary surgeons regularly employed by the plaintiffs.

The herd at Lower Lightwood Green Farm was a tuberculin tested herd and the herd at Buerton Hall Farm was being brought up to that standard. As a result, the defendants had had particularly good opportunities of examining the cattle comprised in the herd, and the evidence is that before July 9, 1945, it was in excellent condition. The third parties, Willington Medicals, Ltd., describe themselves on a catalogue which is before me as medical and veterinary manufacturing chemists, and in the introduction to the catalogue they certainly produce the impression that they themselves compound or manufacture the various preparations which they offer for sale, but Mr. Gould, their managing director, has told me that they do not, in fact, undertake the compounding and manufacture of sera or vaccines and that the catalogue in question is ten years old. It is common ground that the particular preparation with which I am concerned in this case was manufactured by the fourth parties, whose name is Phylax Serum Laboratories, Ltd., was by them supplied to the third parties, and was by the third parties in turn supplied to the defendants, who undoubtedly believed that the third parties were the actual manufacturers of the preparation. The preparation is a toxoid called corynebacterium toxoid, and is designed for the treatment of cows against summer mastitis. I do not desire to go into the scientific aspects of the matter more than is necessary to render my judgment intelligible, but it may be helpful if I say something about the nature of such a toxoid. I understand that the bacteria which cause a certain disease are produced as a culture, that the toxin from those bacteria is then treated with an appropriate chemical in the appropriate strength and at the appropriate temperature and for the appropriate length of time, and that by such treatment there is produced what is called a toxoid. The toxin is neutralised or rendered atoxic by the treatment which it receives. The toxoid, when injected into the animal, stimulates or causes the production of anti-bodies, which, so to speak, fight against the bacteria of the disease, and, therefore, may have a preventative effect, or, if the animal has already contracted the disease, a curative effect.

During one of the routine calls which Mr. Gould made on the defendants, the question of summer mastitis arose. Mr. McWilliam, the junior partner, was anxious to give the new preparation a trial. Mr. Wilson, the senior partner, was less enthusiastic, but eventually he said: "I don't suppose it will do any harm, if it doesn't do any good." Mr. Gould replied that, of course, the preparation was perfectly harmless. So, the defendants obtained from the third parties, who in turn got it from the fourth parties, a consignment of this toxoid. In June, 1945, the first plaintiff, Mr. Robert Norman Dodd, went to see Mr. McWilliam, and asked him whether he could recommend any preventative treatment for summer mastitis. Mr. McWilliam said that he had inoculated two herds and had had fairly good results. Mr. Dodd asked Mr. McWilliam if Mr. McWilliam recommended the treatment for the plaintiffs' herd, and Mr. McWilliam replied that he would not guarantee that the preparation would either prevent or cure mastitis, but, in any event, it could do no harm. Thereupon Mr. Dodd told Mr. McWilliam to arrange to inoculate the plaintiffs' herd, his words, so far as he can remember them, being: "Will you get the stuff and come and do them as soon as you can?" Ultimately it was arranged that Mr. McWilliam should go to the two farms of the plaintiffs for that purpose on July 9. On that date Mr. McWilliam arrived at Buerton Hall Farm and inoculated 10 tuberculin-tested cows, 28 heifers and 10 other cows. He then went on to Lower Lightwood Green Farm and there he inoculated 30 more cattle of which 12 were heifers and 18 were cows. Between half and three-quarters of an hour after Mr. McWilliam had done his work at Buerton Hall Farm it was noticed by the herdsman that some of the cattle had become ill and were grunting and perspiring. Again half an hour to three-quarters of an hour after the injection, the herdsman at Lower Lightwood Green Farm saw that the cows were in a bad state—grunting and panting. Some of them passed blood, and ultimately some of them suffered from diarrhoea. The result of this outbreak of sickness was extremely serious.

What caused this outbreak of sickness? One thing seems to be quite clear and is, I think, agreed by all the scientific witnesses who have been called before me, and that is that the cause of the sickness which befell these 60 animals—30 at the one farm and 30 at the other—was the inoculation.

[His Lordship reviewed the evidence and continued :—] I am convinced that the symptoms which were observed in the cattle were caused by something wrong in the toxoid and not by something wrong in the cattle.

In those circumstances I turn to consider what are the legal results. First, I can clear the ground by saying that, as between the defendants and the third party, and again as between the third party and the fourth party, it is admitted that the provisions of s. 14 of the Sale of Goods Act, 1893, apply. It is, therefore, further admitted that, if this toxoid was not reasonably fit for the purpose for which it was required, namely, the purpose of inoculating cattle, the defendants can have recourse to the third party for compensation in respect of any damage caused to them by the unfitness, and equally the third parties can have recourse to the fourth party. The dispute of law is with regard to the position of the plaintiffs as against the defendants.

The plaintiffs rest their claim against the defendants upon an alleged express warranty, or, alternatively, an alleged implied warranty. There is nothing in the statement of claim to support a claim based on negligence and counsel for the plaintiffs expressly disclaimed any intention of making on behalf of his clients any allegations of negligence against the defendants. There is, therefore, no question of such a claim as was discussed in the well-known case of *Donoghue and Stevenson* (1). I may add that the third party and the fourth party also have disclaimed any suggestions of negligence against the defendants, who as professional men have the satisfaction of knowing that no one concerned in this case has made the slightest imputation with regard to anything which they did in the matters which have been the subject of this investigation.

As regards an express warranty, having regard to the relationship between the parties and the circumstances generally, I entertain great doubt whether the words used by Mr. McWilliam to Mr. Dodd can be construed as involving any promise at all. When Mr. McWilliam was cross-examined he said :

> We advised Dodd to make use of this treatment. I did say I could not guarantee it would prevent or cure, but I could say that it would do no harm. I meant I could take it on myself to say that it would do no harm.

Then Mr. Sutton asked : "Was that part of your advice ?" and the witness's answer was : "Yes." That seems to me to put the conversation in the proper light. I think that the conversation was one in which the veterinary surgeon gave advice to his client, and I feel very grave doubt indeed whether what he said was intended to have any contractual effect. The test whether a statement has contractual effect is whether, on the evidence, it appears to have been so intended, but even if I were satisfied that this statement was intended to have contractual effect, I most certainly do not take the view that it amounted to a promise that the treatment would not harm the cattle even if the toxoid used for the purpose of the inoculation were improperly prepared. It would be far too strong to hold that Mr. McWilliam, by saying what he did say, was expressly promising that. Accordingly, in my view, the claim by the plaintiffs against the defendants, in so far as it is based on express warranty, fails. I have not dealt with this aspect of the matter more fully, however, because it becomes irrelevant if I come to the conclusion that the claim based upon an implied condition ought to succeed.

Counsel for the third party has contended that, if I decide the question of implied condition in favour of the plaintiffs, I shall be making new law. I do not agree, but I do agree that no authority which has been cited to me is precisely applicable to the facts of this case. Only two cases have been cited which need my attention. One of them is *Myers* v. *Brent Cross Service Co.* (2), and the other is *Watson* v. *Buckley* (3). The judgment in the latter case was delivered by Stable, J., at Manchester Assizes, and the greater part of it was devoted to aspects of the matter other than the point which I am now considering. I am glad to find that my brother's conclusion is the same as that at which I intend to arrive, but there is not very much discussion or explanation of this particular point in that case.

It is agreed that, as the contract between the plaintiffs and the defendants was not a contract of sale, s. 14 of the Sale of Goods Act, 1893, has no application. It is to be observed, however, that what s. 14 does is to exclude in the case of a contract of sale any implied warranty or condition as to the quality or fitness for any particular purpose of the goods save in so far as such implied warranty or condition is expressly provided by the section. When, therefore, one says that a particular contract is not a contract of sale and that the provisions of s. 14 do not apply, one is not saying that the implied warranty or condition mentioned in s. 14 is, therefore, not applicable. One has to go back to the position as it exists apart from the statutory provisions, and without going too deeply into the history of the matter I think it is common ground that in the case of a sale of goods there was established at common law an implied warranty or condition as to quality or fitness before ever there was a s. 14 of the Sale of Goods Act.

Sometimes views differ as to what is the true basis of an implied condition. If I may take for an example the doctrine of frustration, I think an examination of the cases will show that in some judgments of great authority the view was taken, before the Law Reform (Frustrated Contracts) Act, 1943, that the doctrine of frustration depended on an agreement between the parties which the court could discern and assume to have been not expressed merely because the parties thought it unnecessary to express it. If that be the basis on which a condition is to be implied, one has to bear in mind, of course, the test laid down by Scrutton, J., in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (4), and *Reigate* v. *Union Manufacturing Co.* (5). The other basis on which an implied condition is sometimes justified is that it is implied as a matter of law because the courts think it right to imply it from considerations of justice. That is an explanation of the doctrine of frustration which found favour in certain judgments and which, I think, has found favour with the Legislature inasmuch as they have passed the Law Reform (Frustrated Contracts) Act, 1943. I mention this because exploring here, as I am to some extent, new ground, I think it helps me to look at the matter from both points of view. I, therefore, ask myself whether, supposing, when Mr. Dodd was discussing the matter with Mr. McWilliam, Mr. Dodd had said to Mr. McWilliam: "Will you undertake that this stuff which you are going to put into my cows will be perfectly safe?" Mr. McWilliam would have said: "Of course, that goes without saying." I think he certainly would have done so. He was the person who was going to get the stuff and he alone was the person who knew where it was coming from. He knew whether the third parties were a reliable firm. He was the person who would have a remedy against those third parties if, in colloquial language, they "let him down."

There is the other way of considering the matter. As I understand it, if Mr. McWilliam had recommended to the plaintiffs this toxoid, had supplied sufficient of it to inoculate the 60 cows, and had charged the plaintiffs for it, but had left the administration of it to be carried out by the plaintiffs themselves, he would unquestionably have been liable if the stuff had proved not to be reasonably fit for the purpose for which it was required, or, to put it more shortly, if it, as I think it did, poisoned the cows. Here there can be no doubt that the plaintiffs did make known to the defendants the purpose for which the goods were required so as to show that they relied on the skill and judgment of the defendants. If, therefore, there had been a contract of sale, there could have been no question but that the defendants would have come under the liability mentioned in s. 14 of the Sale of Goods Act.

Again, if the defendants had rendered a bill in respect of the contract which they had made, charging for the cost of the toxoid used in one item and charging for their services in injecting that toxoid in another item, it seems to me that counsel would have had very great difficulty in arguing that they escaped from a liability corresponding to that imposed on sellers under the Sale of Goods Act. What counsel is driven to argue is that, if, in addition to recommending the use of this toxoid and supplying six bottles for use, the veterinary surgeons themselves inject it, that has the result of lessening their liability to the clients. I can see no reason why it should. It seems to me that justice certainly does not require that, by taking on themselves the administration of the substance in addition to recommending and supplying it, the defendants thereby in some way succeed in lessening their liability. It might, of course, increase their liability if their method of administration were improper, which no-one suggests in this case, but how can it lessen it ?

Finally, before I leave the law I look at *Myers* v. *Brent Cross Service Co.* (2). I do not think that that case is directly applicable here, but there are certain passages in it on which counsel for the plaintiffs relies, and I think I might usefully refer to one or two of them. First, there is a passage cited by Lord du Parcq (as he now is) from the earlier case of *Francis* v. *Cockerell* ([1934] 1 K.B. 46, at p. 51), in which Kelly, C.B. said :

> I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied.

Regarding that Lord du Parcq said (*ibid.*) :

> Now it is to be observed there that the Chief Baron is applying to a contract which was not a contract technically for the sale of goods at all, words which we are all accustomed to hear applied to a contract for the sale of goods.

Kelly, C.B., continuing, said :

> That I hold to be a general proposition of law applicable to all contracts of this nature and character.

The argument of counsel for the third party would seem to be that to the Chief Baron's proposition there must be added an exception so as to make it read :— " I do not hesitate to say that I am clearly of opinion as a general proposition of law that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract," etc. : " unless he not only supplies the article, but applies it to the particular use and purpose himself." I can see no reason for that addition or that exception, and, indeed, I am somewhat strengthened in my view when I find that during the argument of counsel for the defendants in *Myers* v. *Brent Cross Service Co.* (2) Lord du Parcq remarked [1943] 1 K.B. at p. 49 : " The distinction, if you are right, appears very artificial."

I have, therefore, come to the conclusion that in this case it was an implied condition of the contract between the plaintiffs and the defendants that the substance to be used for the inoculation should be reasonably fit for the purpose for which it was required, namely, that of inoculating the plaintiffs' cattle against summer mastitis. I come to the conclusion, further, that on the evidence that condition has not been fulfilled, and that, accordingly, the plaintiffs can recover damages against the defendants, and the defendants in turn can recover from the third party what they have to pay, with, no doubt, certain costs, and similarly the third party can recover from the fourth party.

[His Lordship then dealt with the question of damages and entered judgment for the plaintiffs against the defendants for £3,341 18*s*. 6d., with costs, judgment for the defendants against the third party and for the third party against the fourth party for the same sum being also given. Costs were awarded between the parties according to R.S.C., Ord. 16 A.]

Solicitors : *Bellyse & Eric Smith*, Audlem (Cheshire) (for the plaintiffs); *James Chapman & Co.*, Manchester (for the defendants) ; *A. W. Mawer & Co.*, Manchester (for the third party) ; *Adler & Perowne* (for the fourth party).

[*Reported by* M. D. Chorlton, Esq., *Barrister-at-Law.*]

MORRISON STEAMSHIP CO., LTD. *v.* OWNERS OF CARGO LATELY LADEN ON S.S. GREYSTOKE CASTLE.

[House of Lords (Viscount Simon, Lord Roche, Lord Porter, Lord Simonds and Lord Uthwatt), May 28, 29, 30, 31, June 4, 5, November 22, 1946.]

Shipping—Collision—General average expenditure—General average contribution paid by cargo owners to carrying ship—Right of cargo owners to recover contribution from owners of offending ship—Right of carrying ship to claim from offending ship whole amount of general average expenditure.

As the result of a collision between the Cheldale and the Greystoke Castle on Feb. 17, 1940, the latter ship had to put into port to effect repairs and incurred general average expenditure. In a collision action both ships were held to blame, in the proportion the Cheldale a quarter and the Greystoke Castle three quarters. By the terms of the bills of lading, the owners of cargo in the Greystoke Castle were bound to make their full contribution to general average expenditure even though the collision was due partly to the fault of the Greystoke Castle, and, further, they were precluded from claiming against the Greystoke Castle, for the damage suffered by them as a result of the collision. On May 22, 1942, a sum of over £18,000 was agreed, between the owners of the two vessels, as the Greystoke Castle's claimable disbursements and a quarter of this sum was deducted from the Cheldale's claim against the limitation fund. The cargo owners had already, on Feb. 16, 1942, paid their contribution towards the general average expenditure of the Greystoke Castle, and they had no part in, or notice of, this agreement. The question to be determined was whether the cargo owners had a direct right of action against the Cheldale in respect of their contribution to general average expenditure. A subsidiary question arose, whether the owners of the Greystoke Castle, in their claim to recover general average expenditure from the Cheldale, could only claim the net sum arrived at by deducting the cargo owners' contribution. On the main question it was contended by the owners of the Cheldale (*a*) that contribution made to general average expenditure did not constitute a loss directly flowing from the act of the negligent ship and was too remote to be recoverable as damages, and further, that an expense occasioned after the collision in connection with a contract was not actionable; (*b*) that the cargo owners were in a similar position to underwriters and the doctrine of *Simpson* v. *Thompson* (7), negativing the right of underwriters to any direct cause of action, applied to them :—

Held : (i) by Lord Roche, Lord Porter, and Lord Uthwatt, Viscount Simon and Lord Simonds dissenting, that the owners of cargo in the Greystoke Castle had a direct right of action against the Cheldale in respect of their contribution to general average expenditure, because (*a*) contribution made to general average expenditure was a loss directly flowing from the negligent act of the wrong-doing ship, and was not too remote to be recoverable as damages ; (*b*) the position of cargo owners was not analogous to that of insurers and the principle of subrogation did not apply. *The Marpessa* (3) discussed and criticised.

(ii) the owners of the Greystoke Castle were entitled to claim against the Cheldale in respect of the whole of their general average expenditure, notwithstanding the liability of the cargo owners for their share. If, however, a cargo owner had an independent right of claim, and asserted it in competition with the shipowner's claim (and in time), his claim would prevail.

Decision of the Court of Appeal, sub. nom. Owners of Cargo on the Greystoke Castle v. *Owners of the Cheldale* ([1945] 1 All E.R. 177) *affirmed on question* (i).

[As to General Average, see HALSBURY, Hailsham Edn., Vol. 30, pp. 592-604, paras. 750-763 ; and for Cases, see DIGEST, Vol. 41, pp. 592-606, Nos. 4157-4338.]

Cases referred to :

(1) *Stoomvaart Maatschappij Nederland* v. *Peninsular and Oriental Steam Navigation Co. (The Khedive)* (1882), 7 App. Cas 795 ; 52 L.J.P. 1 ; 47 L.T. 198 ; 41 Digest 924, *8135*.

(2) *The Winkfield*, [1902] P. 42 ; 71 L.J.P. 21 ; 85 L.T. 668 ; 1 Digest 141, *483*.

(3) *The Marpessa*, [1891] P. 403 ; 61 L.J.P. 9 ; 66 L.T. 356 ; 41 Digest 810, *6723*.

(4) *The Minnetonka*, [1905] P. 206; 74 L.J.P. 97; 93 L.T. 581; 41 Digest 810, *6725*.
(5) *The Sucarseco* (1935), 51 Lloyd, L.R. 238.
(6) *The Toward* (1899), Shipping Gazette, May 8, 1899.
(7) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279; 38 L.T. 1; 29 Digest 290, *2355*.
(8) *La Societe Anonyme de Remorquage a Helice* v. *Bennetts*, [1911] 1 K.B. 243; 80 L.J.K.B. 228; 41 Digest 803, *6636*.
(9) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; *revsg.* (1870), L.R. 5 Q.B. 516; Ex. Ch.; and *restg.* (1866), L.R. 2 Q.B. 99; 39 Digest 560, *1677*.
(10) *The Gratitudine* (1801), 3 Ch. Rob. 240; 165 E.R. 450; 41 Digest 504, *3333*.
(11) *Birkley* v. *Presgrave* (1801), 1 East 220; 102 E.R. 86; 41 Digest 594, *4177*.
(12) *Burton* v. *English* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 41 Digest 596, *4218*.
(13) *The Mary Thomas*, [1894] P. 108; 71 L.T. 104; *sub nom. The Mary Thomas, Mary Thomas S.S Co., Ltd.* v. *Globe Marine Insurance Co., Ltd.*, 63 L.J.P. 49; 29 Digest 235, *1888*.
(14) *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; 41 Com. Cas. 350; Digest Supp.; *revsg. S.C.* 151 L.T. 249.
(15) *Chellew* v. *Royal Commission on Sugar Supply*, [1922] 1 K.B. 12; 91 L.J.K.B. 58; 126 L.T. 103; 41 Digest 603, *4303*; *affg.*, [1921] 2 K.B. 627.
(16) *Watson* v. *Marine Insurance Co.* (1810), 7 Johns N.Y. 57
(17) *Anderson* v. *Ocean S.S. Co.* [1884], 10 App. Cas. 107; 54 L.J.Q.B. 192; 52 L.T. 441; *revsg.*, S.C. *sub nom. Ocean S.S. Co.* v. *Anderson* (1883), 13 Q.B.D. 651; 41 Digest 601, *4281*.
(18) *The Johannis Vatis* (*No.* 2), [1922] P. 213; 91 L.J.P. 196; 127 L.T. 494; 41 Digest 813, *6742*.
(19) *The Kate*, [1899] P. 165; 68 L.J.P. 41; 80 L.T. 423; 41 Digest 809, *6706*.
(20) *The Racine*, [1906] P. 273; 75 L.J.P. 83; 95 L.T. 597; 41 Digest 809, *6707*.
(21) *The Philadelphia*, [1917] P. 101; 86 L.J.P. 112; 116 L.T. 794; 41 Digest 809, *6708*.
(22) *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 41 Digest 802, *6627*.
(23) *Re Polemis & Furness, Withy & Co., Ltd*, [1921] 3 K.B. 560; *sub nom. Polemis* v. *Furness, Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 41 Digest 419, *2620*.
(24) *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday* (*Samuel*) *& Co.*, [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; *affg. S.C. sub. nom Sanday & Co.* v. *British & Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; 29 Digest 276, *2236*.
(25) *The Milan* (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 590; 41 Digest 692, *5221*.
(26) *The Tongariro* (*Cargo Owners*) v. *Drumlanrig* (*Owners*), *The Drumlanrig*, [1911] A.C. 16; 80 L.J.P. 9; *sub nom. Tongariro* (*Cargo Owners*) v. *Astral Shipping Co.*, 103 L.T. 773; 41 Digest 786, *6473*.
(27) *Gordon* v. *Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 43 Digest 496, *354*.
(28) *Manders* v. *Williams* (1849), 4 Exch. 339; 18 L.J.Ex. 437; 13 L.T.O.S. 325; 39 Digest 508, *1258*.
(29) *Nicolls* v. *Bastard* (1835), 2 Cr. M. & R. 659; 1 Gale, 295; *sub. nom. Nicholls* v. *Bastard*, Tyr. & Gr. 156; 5 L.J.Ex. 7; 3 Digest 111, *352*.
(30) *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd. & Schmidt*, [1914] A.C. 197; 83 L.J.P.C. 122; 110 L.T. 321; 3 Digest 105, *310*.
(31) *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P.J.O. 791; 36 Digest 122, *814*.
(32) *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. Div. 234; 56 L.J.Ch. 707; 56 L.T. 220; 29 Digest 383, *3069*.
(33) *Johnson* v. *Wild* (1890), 44 Ch. D. 146; 59 L.J.Ch. 322; 62 L.T. 537; 26 Digest 244, *1903*.
(34) *Ruabon S.S. Co.* v. *London Assurance*, [1900] A.C. 6; 69 L.J.Q.B. 86; 81 L.T. 585; 29 Digest 245, *1981*.

APPEAL by the defendants, the owners of S.S. Cheldale, from a decision of the Court of Appeal (SCOTT, MACKINNON and DU PARCQ, L.JJ.), dated Dec. 20, 1944, and reported *sub nom. Owners of Cargo on the Greystoke Castle* v. *Owners of the Cheldale*, [1945] 1 All E.R. 177. The facts appear in the opinions delivered by LORD PORTER and LORD SIMONDS.

Sir William McNair, K.C., and *Ashton W. Roskill* for the appellants.
Sir Robert Aske, K.C., and *A. J. Hodgson* for the respondents.

The House took time for consideration.

Nov. 22. **Viscount Simon**: My Lords, this appeal involves a difficult question of principle relating to general average expenditure—a question on which this House has not hitherto pronounced and on which previous decisions in the English courts appear to be in conflict. I have had the great advantage of reading and studying the opinions prepared by my four colleagues who sat with me to hear the appeal. These opinions, as will shortly transpire, are not unanimous, but three out of the four lead to the conclusion that the appeal should be dismissed, and this, therefore, will be the decision of the House. My own reflections have led me to the minority view expressed by my noble and learned friend, Lord Simonds, whose reasoning and conclusion I would adopt. Without seeking to duplicate the argument, I add these observations.

I understand that your Lordships are at one in rejecting the view of Scott, L.J., that when the Greystoke Castle makes its claim to recover general average expenditure from the Cheldale, which is partly to blame for the collision, the Greystoke Castle can only recover the net sum arrived at by deducting the cargo-owner's contribution. I agree with the rest of Your Lordships in this view. This being so, it follows that, if the respondents' contention is accepted, there are two possible claimants against the Cheldale to recover the amount of the cargo-owner's contribution. This, to say the least of it, may introduce complications. MacKinnon, L.J., seeks to avoid these by saying that the two claims ought to be dealt with together, when the court will see to it that nothing is paid twice over and that the right claimant gets the money, but the claims are not necessarily heard at the same time—and were not in the present case. Indeed, it is quite possible that the two claims might be dealt with in different jurisdictions, for one of the claimants might serve process on the Cheldale when in a foreign port. It is not entirely clear to me how the competing claims would be handled even if they came before the same court, though, no doubt, means of doing justice would be found. It is further to be observed that, if the respondents' view is right, a claim brought by one of the claimants alone could not be wisely compromised without bringing the other claimants before the court. The court, one would suppose, ought to have all competing claimants before it. I venture also to think that some confusion may result from treating the cargo-owner's direct claim in respect of his contribution to general average expenditure as analogous to his claim when his goods are damaged by negligence. In the latter case there is an invasion of his proprietary right, and questions of the claims of bailor and bailee may arise. In the former case neither ownership nor possession is involved, and the question is merely as to the means of getting back a money payment made to a third party.

What I have said does not, of course, prove that the cargo-owner cannot make a direct claim—for that I rely on and adopt Lord Simonds' argument—but it does go to indicate some of the considerations to be weighed before deciding that that argument is wrong.

Lord Roche: My Lords, this appeal raises questions of some nicety and difficulty, but, in spite of the admirable argument addressed to the House by counsel for the appellants, I am of opinion that the result arrived at in the courts below is correct and that the appeal should be dismissed.

I omit any detailed account of the facts of this case, as they are so fully set out by my noble and learned friend Lord Porter, whose opinion I have had an opportunity of reading. There is, therefore, on the facts little I need add or repeat. The claim of the respondents, owners of cargo laden on the Greystoke Castle is, so far as it is in dispute, a claim to be paid direct by the owners of the Cheldale (as having been held one quarter to blame for the collision) one quarter of the amount they have paid in general average in respect of port of refuge expenses incurred by reason of the collision. The appellants contend that no such claim can be asserted by the respondents and that they have only to deal in respect of port of refuge expenses with the shipowners who owned the Greystoke Castle. If that is correct, then, by reason of limitation of liability and the rules governing cross-liabilities laid down in *The Khedive* (1), the sum to be effectively collected from the appellants under this head is less than the quarter afore-mentioned by over £1,000. Except, however, as explaining why there is a dispute, this money difference is immaterial for the decision of the questions of principle involved.

One other fact may be stated to eliminate a topic considerably discussed in the courts below. The owners of the Greystoke Castle included in their claim the whole of the port of refuge expenses and there was an agreement with the appellants allowing this claim with certain adjustments, but meanwhile the respondents had both asserted their independent claim against the appellants and had, in fact, paid their share of the port of refuge expenses to their shipowners, the owners of the Greystoke Castle. Accordingly, after the judgment of LORD MERRIMAN, P., sustaining the respondents' claim, the figure agreed between the respective shipowners was reduced to give effect to the judgment, and there is no question whatever of the appellants being required to pay twice by reason of the assertion of rival claims on them for the same amounts. This leads me to mention and dispose of a question arising out of certain reasons assigned by SCOTT, L.J., for his judgment, somewhat severely restricting the right of shipowners to assert a claim in cases such as the present. I do not myself agree with those reasons or regard them as necessary to support a judgment in favour of the respondents. I cannot doubt that, on the principles recognised in *The Winkfield* (2), the shipowner in a proper case can claim the whole of the port of refuge expenses on behalf of himself and of owners of cargo and freight, but equally I do not doubt that, if he who has the general property, *i.e.*, the cargo owner, has an independent right to claim and asserts that claim in competition with the shipowner's claim and asserts it in time, his claim must prevail: see the authorities discussed in SALMOND ON TORTS, 10th ed., pp. 307, 308.

I come now to the real matters of contention in the case. Before the registrar and LORD MERRIMAN, P., the question debated seems to have been solely whether the decision in *The Marpessa* (3) was correct, or, alternatively, was so venerable that it should be followed. That decision rests on reasons as to causation. In *The Marpessa* (3) the damages claimed were held to be due to what was described as " the relationship of ship to cargo " and not to the collision. This reasoning is, in my judgment, erroneous. I should be content to adopt the judgment of LORD MERRIMAN, P., in this case as expressing my reasons for this opinion. I agree with him also in thinking that the decision of the Court of Appeal in *The Minnetonka* (4) is inconsistent with *The Marpessa* (3). In my judgment, the reasoning of the Court of Appeal in *The Minnetonka* (4) is right and that of JEUNE, J., in *The Marpessa* (3) is wrong. This matter is admirably put by HUGHES, C.J., (51 Lloyd, L.R. 238, at p. 241), in giving the judgment of the Supreme Court of the U.S.A. in *The Sucarseco* (5) :

> The nature of these expenditures [general average] and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause.

It was said for the appellants that the law of the U.S.A. as to general average was in some respects different from the law of England and this is, no doubt, true, though the differences seem immaterial to anything which arises in the present action and, as regards our present topic, the decision under consideration was not concerned with the law of general average so much as with the laws of cause and effect, and in that matter the reasoning of the Supreme Court is as valid in this jurisdiction as in its own. With regard to the contention that the principle of *The Marpessa* (3) was securely entrenched by reason of its date, no doubt, it has been restated in text books and on occasions may have been followed, but no decision approving it was cited and it was disregarded by the Court of Appeal in *The Minnetonka* (4) and quite clearly by GORELL BARNES, J., in *The Toward* (6).

There remains for consideration the contention on behalf of the appellants that the respondents had no direct right of suit because it was said that : (*a*) their cargo sustained no material or physical damage and an expense occasioned to them after the collision in connection with a contract was not actionable ; (*b*) they were really in the same position as underwriters and the doctrine of *Simpson* v. *Thomson* (7), negativing the right of underwriters to any direct cause of action against a wrongdoer, applied to the case of the respondents. As to reason (*a*) the latter branch of this contention appears to me to be largely a repetition of the argument based on *The Marpessa* (3) and the supposed remoteness of the expense as a result from the collision. As to the first branch of this contention, I would observe that, in my judgment, if the expense is occasioned by the collision and if it is the expense in whole or in part of the cargo owners—a matter to which I shall direct your Lordship's attention when dealing with contention (*b*)—if, I say, these things be so, then no authority was cited to support the proposition that whether by land or by sea physical or material damage is necessary to support a cause of action in a case like this. I do not regard *La Societe Anonyme de Remorquage* v. *Bennetts* (8) which was cited, as any such authority. If it was correctly decided, as to which I express no opinion, I think it must depend on a view that one vessel (A) does not owe to the tug which is towing vessel (B) any duty not negligently to collide with (B). On the other hand, if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B, and if lorry A is negligently driven and damages lorry B so severely that, while no damage is done to the goods in it, the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way and the consequent expense is (by reason of his contract or otherwise) the expense of the owner of the goods, then, in my judgment, the owner of the goods has a direct cause of action to recover such expense. No authority to the contrary was cited, and I know of none relating to land transport. As regards the sea, *The Minnetonka* (4), *The Toward* (6) and in the United States *The Sucarseco* (5) are authorities completely opposed to this contention of the appellants.

I have used the phrase: "If the expense is the expense of the cargo owners," and this hypothesis raises the central point in the appellants' contention. The contention rests on the proposition that a cargo owner is, in a case like the present, in no other or different category from that of an insurer, and, accordingly, on the principle laid down in *Simpson* v. *Thomson* (7), cannot sue in his own right. An examination of the history of general average and of the leading authorities on the subject, in my judgment, negative this contention and show that the cargo owner's obligation is, from the occurrence of the general average act, a direct obligation to share the expenses incurred by reason of the common danger and acts done to meet it. He is, in my view, a principal in the transaction—a neutral word which I use advertently for the time being. It is very necessary to bear in mind that undue attention to the question how the money is raised to finance the transaction or whose credit is pledged to effect it may obscure the fact that, although A may be the principal, and the sole principal, to a contract, he may, nevertheless, in and about the transaction carried out by means of such contract, be an agent for B, C and D exclusively or for them jointly with himself. This position is illustrated in the well-known advice of BLACKBURN, J., to this House in *Ireland* v. *Livingston* (9) (L.R. 5 H.L. 395, at pp. 408, 409). When such a position arises, as, in my opinion, it arose in the present case, the agent has both the responsibilities of an agent and also his rights. Perhaps the most important of such rights is in due course to be put in funds by his principals, who must pay to him the whole or their share of the expenses incurred on the common account.

Another contention put in the forefront of the argument for the appellants was that the shipowner incurred the expenses of necessity to earn his freight under the contract of affreightment and in no other capacity. An examination of the history of the matter and of the authorities, in my judgment, negatives this contention also, and shows that the shipowner through the master has imposed on him other and super-added duties, causing him to act as agent for all the persons whose interests are endangered.

I pass to the authorities. Apart from text books by writers of authority such as LOWNDES' LAW OF GENERAL AVERAGE, 5th ed., pp. 19-52, and *passim*, the main authorities to be regarded are these. *The Gratitudine* (10) is a rich mine of information on the history and law of general average. LORD STOWELL (then SIR WILLIAM SCOTT) heard the case. The Gratitudine had put into a port of refuge, discharged cargo in order to execute repairs, and to pay the expenses the master borrowed money on a bottomry bond on ship, cargo and freight. It was contended that the master had not a right to hypothecate the cargo for repairs to the ship. The substance of the judgment of SIR WILLIAM SCOTT is that the master's duties are not limited to safe custody and conveyance, but in cases of necessity "the character of agent and supercargo is forced upon him." For that reason the master may sacrifice cargo, may pledge it or sell it to raise funds, or may bind it in ransom. The reason assigned is that even repairs to ship may be done for the common benefit of both ship and cargo, and the expense may, therefore, be met by borrowing upon or selling cargo if that is the feasible and appropriate course. The whole gist of the judgment, as I see it, is that all those who benefit must share the expense of procuring the benefit, and that this principle holds, notwithstanding the variety in the methods of finance and in the nature of the contracts adopted and made to meet the expense incurred by reason of the general average act.

Birkley v. *Presgrave* (11) contains the famous pronouncement of Lawrence, J. (1 East 220, at p. 228):

> All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested.

The case decided that the defendants' proportion of a debt so incurred was recoverable from them at common law and not only in equity.

Brett, M.R., in *Burton* v. *English* (12) stated the position thus (L.R. 12 Q.B.D. 218, at p. 220):

> How does such a claim [for general average] arise? In theory it arises from an act done by the master of the ship, not as the servant of the shipowner, but as the servant of the cargo owner [it was a case of jettison], a relation which is imposed upon him by the necessity of the case.

So also Bowen, L.J. (*ibid*, at p. 223). The view of a judge very learned in the maritime law, Gorell Barnes, J., appears both in *The Toward* (6) and more at length in *The Mary Thomas* (13). In the latter case ([1894] P. 108, at p. 117) he says:

> . . . . the position is this: that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say, "We must spend some money to get out of this difficulty and that we must share in proportion to the benefit to be derived from it."

And again (*ibid*, at p. 118) the judge says:

> . . . the operation of saving is taken for the benefit of both the ship and cargo . . . and therefore the captain who at this time . . . acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested and all who are interested must contribute to it . . .

The conclusion in the case under decision was that underwriters of the ship were only liable for the shipowner's share and not for the whole expenditure. In this judgment the Court of Appeal concurred.

In *The Toward* (6) Gorell Barnes, J., had to deal with competing claims of the shipowner and of cargo owners who had paid to the shipowner general average expenses. The registrar, following *The Marpessa* (3), had disallowed the cargo owners' claim, but the judge took the other view and said:

> If any of the moneys claimed by the shipowners against the wrongdoer were in respect of matters which *were incurred on behalf of both parties* and for which the shipowner has been reimbursed by the cargo owners, his claim should be based on his real loss so that the cargo owners' claim will also be based on their real loss.

The decision in *Tate & Lyle* v. *Hain S.S. Co.* (14) disposes of various contentions raised by the appellants such as that liability for general average contribution only arises and a lien only attaches at the port of destination. In the Court of Appeal Greer, L.J., stated the matter thus (151 L.T. 249, at p. 256):

> . . . . the law has been frequently stated by judges and jurists of authority in commercial matters in words which lead me to conclude that both the liability and the lien come into existence as soon as the sacrifice has been made or the expenses have been incurred, but that the liability and the lien are subject to be defeated by the non-arrival of the cargo at the port of destination.

The question of lien is further dealt with (*ibid*, at pp. 256, 257) and the conclusion is reached that the lien has to be, and is, exercised, not on behalf of the ship only, but on behalf of all concerned who are entitled to be paid a contribution or share by others concerned in the venture and who are benefited by what was done or expended. These statements by Greer, L.J., were expressly approved in your Lordships House: see *per* Lord Atkin ([1936] 2 All E.R. 597 at p. 602).

Two observations may be made arising out of the above cases: (i) That the principles of general average and their application have become so well established that all who engage in ventures on the sea must, as I think, be taken to contemplate their application as natural and, indeed, inevitable. (ii) That, although general average is not a mystery, it is a system with elements peculiar to itself derived and developed from very ancient sources and incorporated with its peculiarities into the maritime law of England, and, in my judgment, it is a mistake to assume that it can be expected in all respects to conform to the rules which are applied to transactions on dry land.

There remains to consider the authority of the Supreme Court of the U.S.A. in *The Sucarseco* (5), which I have mentioned above in connection with the first point in the present case. It arose on facts closely resembling the facts in the present case. The Chief Justice thus continues the quotation set out by me above (51 Lloyd L.R. 238, at p. 241):

> The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision. The right does not stand on subrogation . . .

To meet the impact of this case it was again said that the law of the United States as to general average is not identical with the English law. That statement is true, but, unless the dissimilarities affect the present question, and of that I have seen no evidence, the potency of the argument in the judgment is quite undiminished. I believe the principles enunciated therein to be as correct in English as in American law and it is to be observed that the English cases, *e.g.*, *The Gratitudine* (10) and *Burton* v. *English* (12) were discussed and vouched as authorities for the conclusions arrived at.

Therefore, my conclusion is that the authorities establish the principle, which I hold to be correct, that the obligation of the cargo owners is to share the expenses incurred in the general average act and that they are *ab initio* responsible for their proper share, though the responsibility may be divested or diminished by the subsequent chances of the voyage. The expenses, accordingly, are in due proportion their expenses and they are not in a position equivalent, or even analogous, to that of an insurer and the principle of subrogation has no application. For these reasons, my Lords, I am for dismissing the appeal.

Lord Porter: My Lords, this case raises three questions: (i) Can innocent cargo owners ever recover from a wrongdoing ship owned by a third party the general average contribution which they have paid to the carrying ship? (ii) Is such damage caused by, or, to use the common phrase, does it flow from, the tortious act of the wrongdoing ship? (iii) Is it in any case too remote? Obviously the principles to be applied in the case of questions (ii) and (iii) merge into one another, but the first question raises a different and more radical point.

The facts of the case are somewhat complicated. The appellants are the owners of S.S. Cheldale, the respondents are owners of the cargo laden on board the Greystoke Castle. The latter vessel, when on a voyage from far eastern ports to New York *via* Capetown, was in collision on Feb. 17, 1940, with the former ship. The Cheldale sank and there was some loss of life, and the Greystoke Castle put into Durban as a general average act, arriving there on the day after the collision. There some cargo was discharged in order that she might be dry docked and repaired, and she was detained in so discharging, repairing and reloading until Mar. 25. She then proceeded to New York arriving on Apr. 19 and later finished her discharge at Baltimore by May 2. The bills of lading under which the cargo of the Greystoke Castle was being carried followed the provisions of the Carriage of Goods by Sea Act, 1924, contained the clause exempting the ship from liability for the master's negligence, and provided that general average should be payable according to York-Antwerp Rules, 1924, and, as to matters not therein provided for, according to the usages of the Port of

New York. Admittedly the York-Antwerp Rules impose a liability to contribute in general average which differs somewhat from that which would be imposed without them, and r. D provides that rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure. The owners of the Greystoke Castle were, therefore, entitled to contribution from the respondents in respect of the general average expenditure incurred at Durban, and on Nov. 29, 1941, a general average statement and adjustment was prepared by average adjusters in New York (admittedly the proper place of adjustment), which showed that the proportion of that expenditure recoverable from cargo was $22,802.05.

Meanwhile, on Feb. 23, 1940, the appellants started proceedings on behalf of themselves and the master and crew against the Greystoke Castle whose owners counterclaimed for her damage. In these proceedings LANGTON, J., on Nov. 27, 1940, held both vessels to blame, the Greystoke Castle as to three quarters and the Cheldale as to one quarter. Thereupon on Feb. 4, 1941, the owners of the Greystoke Castle started a limitation action and on May 7, LANGTON, J., granted a decree of limitation. The owners of that ship then paid into court the whole of their £8 a ton liability, *viz.*, £45,956 16*s.* 10*d.*. On July 24, 1941, the respondents issued a writ in the present action claiming damages sustained through the collision, and on Aug. 8, the appellants admitted liability for 25 per cent. of the damage subject to a reference to the registrar to assess the amount. In the collision action and subsequently in the limitation action the owners of the Greystoke Castle claimed £19,001 18*s.*, a sum which included the whole of the damage and disbursenents due to the collision including the sum which under the average adjustment she was entitled to recover from her cargo owners. On May 22, 1942, by agreement between the owners of the two vessels, it was agreed that this sum should be reduced to £18,061 3*s.* 3*d.* and that the appellants' liability was one quarter, *viz.*, £4,515 5*s.* 10*d.* Meanwhile, the cargo owners on Feb. 16, 1942, paid their contribution towards the general average expenditure of the Greystoke Castle and followed this payment up by a detailed claim on Sept. 29, 1942, in the present action, for loss and damage to cargo and reimbursement of the sums paid as general average contribution. On June 8, 1943, the registrar dealt with the claims against the limitation fund as follows :

	£	s.	d.
(1) Claim of the Cheldale her master and crew (three quarters of gross claim)	49,265	13	3
Less claim of Greystoke Castle as above (*i.e.*, one quarter of £18,061 3*s.* 3*d.*)	4,515	5	10
	44,750	7	5
(2) Cheldale Cargo (United Africa Co.)	146,090	4	8
(3) Cheldale Cargo (C. B. Olivant)	12,713	3	1
	203,553	15	2

On this basis the limitation fund which had increased by the addition of interest to £47,688 6*s.* was allocated as follows :—

	£	s.	d.
(1) Cheldale (net claim)	10,479	13	1
(2) Cheldale Cargo (United Africa Co.)	34,211	9	1
(3) Cheldale Cargo (C. B. Oliphant)	2,977	3	10
	47,668	6	0

On June 9, 1943, the respondents put in a fuller and amended claim in the present action, amounting to £8,827 5*s.* 11*d.* for direct loss of or damage to cargo and £4,654 19*s.* 9*d.* for general average contribution, and claimed to be entitled to recover one quarter of each of these two sums. Admittedly, the wrong-doing ship is directly liable to the owners of cargo lost or damaged as a result of a collision with the carrying ship. The former claim has, accordingly, been satisfied and no question arises as to it. The present dispute is as to the right of the owners of cargo laden on the Greystoke Castle to recover from the Cheldale their general average contribution to that ship.

The further facts can be briefly stated. On Jan. 25, 1944, the registrar reported that on principle the respondents were entitled to recover from the Cheldale the sums which they had paid to the owners of the Greystoke Castle as contribution in general average, but gave liberty to either party to apply for a further hearing in order to have it determined whether any, and if so, which, of the items included in the claim were recoverable under this ruling. This report was confirmed by the judgment of Lord Merriman, P., on June 15, 1944. The respondents, the plaintiffs in those proceedings, were not the only cargo owners concerned and their claim was for 25 per cent. of £12,536 14*s.* 2*d.*, but this sum included the damage to cargo about which there was and is no dispute. The actual amount at issue is £1,163 14*s.* 11*d.* As a result of the judgment of Lord Merriman, P., it was agreed between the appellants' solicitors and the solicitors for the Cheldale's cargo that the sums payable to the Cheldale would be increased by £146 1*s.* 2*d.* and the cargo interests reduced correspondingly. This adjustment was made and the limitation fund was paid out on Aug. 1, 1944. From the President's judgment an appeal was taken to the Court of Appeal and was dismissed.

My Lords, in this state of facts it was recognised both by Lord Merriman, P., and by the Court of Appeal, that, if *The Marpessa* (3) was rightly decided, the appellants in this House must succeed. That case was, however, considered by the Court of Appeal to be in conflict with the later decision in *The Minnetonka* (4), and it is, undoubtedly, contrary to the decision in the United States of *The Sucarseco* (5). *The Minnetonka* (4) dealt with the question what damage is caused by a tortious act and whether general average contribution is too remote to be recoverable at the suit of those who have paid their quota from a ship which by its negligence has occasioned the expenditure. In *The Sucarseco* (5) the same question was considered, but a further point was also discussed, *viz.*, whether those who contribute to general average expenditure have a direct or only a derivative claim against a ship which negligently collides with the carrying vessel—and the conclusion was reached that it was direct and not merely derivative. Before your Lordships' House this more far-reaching question was fully argued, the appellants contending that general average contribution paid by cargo to carrying ship is never directly recoverable at the suit of the owners of the cargo from a ship which has negligently collided with her, while the respondents maintained that it could be so recovered.

To answer this question it is agreed by both parties to the action that the complications introduced into the present case by the limitation of the Greystoke's liability may be disregarded, and that the broad question to be decided is whether the injured ship acts for itself in incurring the general average expenditure and is alone responsible for payment, and, though it can recover a due proportion from the contributing interests, yet does so by way of indemnity on the same principle as that on which it would recover a loss from its insurers, or whether it acts throughout on behalf of the interests concerned so that they can sue the offending vessel for the contributions which they are legally compellable to make. Scott, L.J., took the view that the ship's real loss was the general average expenditure to which she has been put less the amount which she had recovered by general average contribution and that she could recover no more from a wrong-doing vessel. He said ([1945] 1 All E.R. 177, at p. 179):

> . . . . it is only the real loss incurred by the innocent ship which is recoverable by her. To the extent to which the ship interest is entitled to reimbursement by contributions from the freight interest and the cargo interest, the wrong-doer is entitled to say to the innocent ship: "I have by my tort caused you only your net loss."

Such a view regards the contributories as the only persons who have suffered damage in respect of the contributions they have made and assumes that they can recover from the wrong-doing vessel. My Lords, I know no authority for this proposition and I do not accede to it, but I think the same result might be arrived at by regarding the expenditure as made for those who share in the joint adventure, and, therefore, recoverable by the ship which incurred it or by any one of the interested parties to the extent to which the liability was incurred in his interest even though the ship alone made herself responsible for payment of the sum expended to those to whom it was incurred.

The proposition is set out in the American case of *The Sucarseco* (5) in these words (51 Lloyd L.R. 238, at p. 241):

> The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause. The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure, and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision.

The case was decided in 1935 in the Supreme Court and the opinion of the judges was delivered by HUGHES, C.J. If this judgment is right by English law as it is in American, the appeal must fail. It was, I think, this view on which the judgment of MACKINNON, L.J., in the present case was based when he suggested that the claims of ship and cargo-owner should properly have been brought in the same proceedings so that overlapping of claims might be avoided. His method of approach assumes, as I understand it, that the shipowner may claim the whole of his expenses against the wrong-doing ship, but only on condition that he agrees expressly or impliedly to forego his right to contribution in general average. The implication is, I think, that each interest is entitled to claim the whole of its own expenditure against the wrong-doer only if it has the assent of the other interested parties or if it waives its claim against them for contribution in general average. Unless it adopts one of these two courses it can claim its own proportion only. I know of no authority for this conclusion, nor can I find that the point has ever been decided. Ultimately, the question is: Was the expenditure incurred on behalf of the various interests or merely for their benefit. If the master or owners in incurring it were acting as agents for all the interests, presumably each interest can claim its share. If, however, the shipowner was acting on his own behalf, but with a right of indemnity against the other interests, then, whatever the rights and obligations of the various interests *inter se*, the only party who could sue the wrong-doing ship would be that which had incurred the expenditure. The inquiry involves a consideration of the relationship between the wrong-doing ship and the various persons interested in the adventure and an analysis of the principles to be found in the cases dealing with the subject.

In the case of a general average sacrifice the owner of the thing sacrificed suffers a physical loss and has a direct claim on the wrong-doing ship. Examples are a jettison of cargo and the cutting away of a mast. In the case of general average expenditure, however, there is no physical loss, but the liability is incurred and the expenditure met in the first instance by the ship. Crew's wages and pilotage fees when the ship puts into a port of refuge are instances of such expenditure and the cost of discharging cargo in order to repair the ship, of reloading and of warehousing it in the meantime is also arranged for and paid by the ship in the first instance, wherever the ultimate liability may rest. No doubt, it can be said that, whoever may make arrangements for the storing of cargo, the warehouseman has a lien for his charges and to that extent the liability may fall on the cargo-owner, but it is the duty of the shipowner to complete the voyage and his remedy against the cargo-owner is not for the full cost of warehousing, but only for the cargo-owner's contribution in general average. Nor do I think that the respondents advance their case by pointing to cases of sale of part, or the hypothecation of the whole, of the cargo as instances where the shipowner acts as agent for the cargo-owner. No doubt, he does act as agent of necessity for the cargo in such cases, as indeed he does in cases of jettison, but each is a direct loss imposed upon the interest concerned in the nature of a sacrifice of part of the interest in order that the adventure may be completed.

This I understand to be the view of SIR WILLIAM SCOTT in *The Gratitudine* (10). He said (3 Ch. Rob. 240, at pp. 257, 258):

> . . . it has been contended, that the master has no right to bind the owners of the cargo . . . upon this ground, that . . . he is not the agent of the proprietors of the cargo, and therefore cannot bind it . . . This position . . . is, I think, not tenable . . . for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in case of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him . . . It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorised

agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate port . . .

Sir William Scott illustrated his point by a comparison with the cases of jettison, ransom and the sale of perishable cargo when driven into port and proceeded (*ibid,* at p. 260) :

> In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed.

In each, indeed, there is either a physical loss of cargo or a direct charge imposed upon it.

A little later Sir William Scott said (*ibid,* at p. 261) :

> . . . it appears to me that the fallacy of the argument, that the master cannot bind the cargo for the repairs of the ship, lies in supposing, that whatever is done for the repairs of the ship, is in no degree and under no circumstances done for the benefit, or with a prospect of a benefit to the cargo ; whereas, the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

But here Sir William Scott is, to my mind, only asserting that there is a general average act done for the common benefit, not that in case of sacrifice the master is acting as agent for ship and cargo alike.

Similar observations were made in *Burton* v. *English* (12). Thus Brett, M.R., said (12 Q.B.D. 218, at p. 220) :

> In theory it [*i.e.*, the right to contribution] arises from an act done by the master of the ship, not as the servant of the shipowner, but as the servant of the cargo owner, a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the cargo owner for the benefit of the ship and cargo, and not from any act done by the shipowner at all.

Again Bowen, L.J., said (*ibid,* at p. 223) :

> This claim for average contribution at all events, is part of the law of the sea, and it certainly arises in consequences of an act done by the captain as agent not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest.

These cases however deal with sacrifice and not with expenditure. In the case of expenditure it is claimed that the balance of authority is in favour of the view that the cargo interests can sue the wrongdoer direct because the expenditure is incurred by the master on their behalf and as their agent. It is true that *The Marpessa* (3) decided that a shipowner could not recover his general average contribution to cargo, but the ground of that decision, it is maintained, is that the contribution is not damage caused by the collision but by the relationship of ship to cargo and it is further maintained the decision itself is wrong. It does not deal with the question on whose behalf the expenditure was originally made. On the other hand, it is said that in *The Minnetonka* (4) and in *The Toward* (6) (decided by Gorell Barnes, J., in 1899) the plaintiffs, who had made general average contribution, were held entitled to recover against a wrong-doing ship, and that these cases are direct authorities in favour of the respondents' contention.

In *The Toward* (6) there existed, as there exists in this present case, a deficiency in the limitation fund, but it was immaterial who was paid and the shipowner did not contest the claim of the cargo interests. In *The Minnetonka* (4) the Admiralty had chartered a collier which in the course of her voyage was damaged in collision with another ship and both were partially liable for the collision. Rather than risk deterioriation to the cargo and incur the expense of making a general average contribution in order that she might be repaired and the voyage continued, the Admiralty paid a sum of money to the collier as a substituted expense, and then claimed their proper proportion of this sum against the wrong-doing ship. The decision of the case, it is true, seems to have turned on the question whether the compromise was a reasonable one or not. No part of the sum in dispute was either claimed by or paid to the carrying ship. *The Marpessa* (3) was mentioned and does not appear to have been overruled. It had, apparently, been cited as authority for the contention that the sum paid by the Admiralty, having been paid under a compromise, was not the direct consequence of the collision. Apart from the question of causation of the damage or its remoteness, no question as to the right of the Admiralty to sue the wrong-doer direct seems to have been raised, but Sir Richard Henn Collins, M.R., did say ([1905] P. 206, at p. 215) :

> . . . when we have once disposed of the fact that this sum did not come and ought not to come into discussion between the Minnetonka and the Uskmoor [the two ships concerned] it entirely disposes of the suggestion that it was unreasonable to make a settlement without regard to subsequent litigation.

That the sum in question had not come into discussion or been the subject of a claim between the two ships was, undoubtedly, true, but whether or not it ought to have been included does not appear to have been discussed. The case, however, does seem to be in conflict with *The Marpessa* (3) and, at any rate, to assume that, apart from any question of the effect of incorporating the York-Antwerp Rules in the contract of carriage, cargo owners are entitled to claim direct on a wrong-doing ship for the amount of their contribution to general average expenditure as damage flowing from the collision. Moreover it, like *The Toward* (6) is an instance of a suit in which, in fact, a contributing interest recovered directly from the wrong-doing ship.

On the other hand, Mr. Mackinnon, K.C., as he then was, sitting as arbitrator in the dispute subsequently decided in *Chellew* v. *Royal Commission on Sugar Supply* (15) said in the Case submitted to the court ([1921] 2 K.B. 627, at p. 632) :

> . . . in so far as these arguments deal with the master's supposed authority to bind the cargo by incurring general average expenditure, I think they rest on a fallacy. If a master requests, or allows, salvors to render salvage assistance, he no doubt incurs a liability for and on behalf of the cargo ; the salvors have a direct claim against the cargo and its owners. If a shipowner pays cargo's proportion of salvage he must reclaim it from cargo owners, not as contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of, and as agent for, the person directly liable. But if the master pays port charges or crew's wages at a port of refuge, that is a liability incurred by him only for his owner. In deciding the extent of the owner's right to contribution to that liability from others it does not seem of service to import considerations as to the master's authority to incur direct liabilities for those others.

This view is, I think, at variance with that which he has expressed in the present case, and, for the reasons hereafter given, I prefer his later opinion. Sankey, J. appears to have approved of this statement ([1921] 2 K.B. 627, at p. 639). In the Court of Appeal, however, Scrutton, L.J., was non-committal ([1922] 1 K.B. 12, at p. 20). In his view a distinction might have to be drawn between cases decided under York-Antwerp Rules and those governed by the law of the sea and in taking this view he was to some extent influenced by the judgment of Gorell Barnes, J., in *The Mary Thomas* (13).

In that case a ship, which was guilty of negligent navigation but by English law was entitled to receive contribution in general average because her bills of lading relieved her from liability for negligence, had incurred general average expenditure, and a general average statement had been prepared at Rotterdam. That statement apportioned the general average to the various interests concerned and the underwriters on ship paid the ship's proportion, but the shipowners failed to recover the cargo's contribution because, in spite of the negligence clause, the cargo under Dutch law was freed from liability to contribute by reason of the ship's negligence. The shipowners then sued the underwriters on ship in this country for certain of the expenses attributed by the statement to general average, but failed to recover on the ground that all parties were bound by the statement and the shipowner could not rip it up and claim that some of the expenditure so attributed would in this country be charged to the ship. The decision itself is not directly material to the question in issue before your Lordships, but Gorell Barnes, J., after conceding that, in the case of a general average sacrifice, the whole loss in respect of the thing sacrificed could be recovered by the party whose property it was, said ([1894] P. 108, at p. 118) :

> But it seems to me that this proposition . . . is wholly inapplicable to the case of

> expenditure, and I think it can almost be demonstrated to be wrong in such a case; because the operation of saving is taken for the benefit of both the ship and the cargo . . . and therefore the captain who at this time, under ordinary circumstances, acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested, and all who are interested must contribute to it, and therefore the shipowner ought only to contribute so much, and then the underwriters, who have indemnified, have got to recoup him what he has paid . . .

He added (*ibid.*, at p. 121):

> Therefore I hold that the plaintiffs cannot, either by virtue of any principle, or by virtue of any authority, claim to recover from the underwriters of the ship the whole amount of the expenses incurred in saving the ship and the cargo and can only recover the portion properly due to the ship.

A contrary view appears at one time to have been taken in America in *Watson* v. *Marine Insurance Co* (16) where it was held that underwriters on ship were liable in the first instance for the whole expense of general average expenditure and might recover a proportional reimbursement from the other interests, but PHILLIPS, in THE LAW OF INSURANCE, 5th ed. (1867), s. 1742, note 5, says:

> . . . . I do not see why they are so. It does not appear why the underwriters on the cargo may not as well be liable in the first instance for the whole expense, as those on the ship. Each set should be liable on their own subject only.

It is plain that by English law in the case of general average expenditure an assured can only recover from his underwriter the proportion of loss which falls on him, whereas in the case of general average sacrifice he can recover his whole loss: see Marine Insurance Act, 1906, s. 66. Nor does it make any difference that the master of the ship has made his owner liable for the expenditure incurred: see *Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (17). The reason for this rule may be that, though the underwriters on ship undertake to reimburse the ship's loss including expenditure to avert a loss, they do not undertake to reimburse the shipowner for averting the loss of the property of others, but it gives point to the argument that the wrong-doing ship is not liable to the vessel which she has injured in respect of that portion of general average expenditure which falls upon cargo, or, at any rate, is only liable on the principle enunciated in *The Winkfield* (2). It may similarly be alleged that the expenditure was not incurred for the ship alone but for all the interests concerned, and that the wrong-doing vessel, when sued by the other, is entitled to say: "I am under a duty to reimburse you for the expense to which you yourself have been put in averting your own loss, but not that expenditure which is incurred to avert loss to the cargo, though as bailee of the cargo you may sue for its loss or the expense to which it has been put."

It is true that, in the case of physical loss, a bailee can sue for the value of the property entrusted to his care where that property is lost or injured by the tortious act of a third party: see *The Winkfield* (2). And so a shipowner can sue for loss or damage to cargo entrusted to his care: see *The Johannis Vatis* (18). But in that case he is trustee for the owner of the property to the extent to which he recovers and must pay the whole over to that owner. The grounds on which the bailee may recover are, I think, the fact that he is in possession, and that a bailor who entrusts property to a bailee has sufficient confidence in him to make it reasonable that the bailee should recover for any loss of the property and hold the damages he recovers on the same terms as he held the property entrusted to his care. *The Winkfield* (2) also contains this statement of SIR RICHARD HENN COLLINS, M.R. ([1902] P. 42, at p. 61):

> The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor.

And STIRLING and MATHEW, L.JJ., concurred in his opinion. The same conclusion was arrived at in *The Johannis Vatis* (18).

In this state of the authorities your Lordships have to determine, in the first place, whether the respondents can sue the wrong-doing ship on the ground that the expenditure was incurred by the master or owners on their behalf and as their agent. Crew's wages, pilotage fees and cost of feeding the crew are, no doubt, primarily ship's liability, and it does not seem possible to assert that all the interests concerned are directly liable to pay the crew or pilot once a general average act has been done and general average expenditure is incurred. It is more consistent with the realities of the case to hold that the shipowner is directly liable to pay those whom he employs, but, nevertheless, in incurring the debt and making the payment, he is acting not only for the ship but also on behalf of all the interests concerned. Nor is there any difficulty in the conception that a man may act between two parties as principal towards one and yet as agent for another. As BLACKBURN, J., said (L.R. 5 H.L. 395, at pp. 408, 409) in ***Ireland*** v. ***Livingston*** (9) in advising your Lordships' House:

> The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to the person building a house and the owner of the house . . . My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs [*i.e.*, the commission agents] there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties.

So in the present case, in my view, the owners of the Greystoke Castle pledged their own credit as principals to answer for the general average expenditure, but yet acted as agents for the contributories including the respondents in incurring the expense. The expense being thus incurred for the respondents, they can claim against the wrong-doer to make good their loss which to the extent of one quarter flows from the wrongful act of S.S. Cheldale, none the less though the respondents' liability was to reimburse the owners of the Greystoke Castle, who incurred the expense on their behalf, and not to pay those who did the work necessary to enable that ship to proceed on her voyage.

Counsel for the appellants, however, contended that the cargo owner's only right was to stand in the shoes of the ship incurring this expenditure and not to sue direct, and, therefore, that he had no more right of direct recovery in his own name against a wrong-doer than had an underwriter who had paid the loss of the injured ship: see *Simpson* v. *Thompson* (7). In his submission, the liability to contribute in general average does not constitute a loss directly flowing from the negligent act of the wrongdoing ship and is, in any case, too remote to be recoverable as damages.

The Marpessa (3) decides that it is not a direct loss, *The Sucarseco* (5) that in American law, it is. *The Minnetonka* (4) and *The Toward* (6) seem to take for granted that *The Marpessa* (3) is wrong, and both may be used to support the argument that the owner of ship and cargo which is obliged to contribute in general average can sue the wrongdoer for the proportion which he has had to pay. I am not sure that I follow the reason why it is suggested that the decision in *The Marpessa* (3) makes general average contribution too remote to be recoverable as damages. It is true that the wrong-doing ship had no part in creating the relation between the injured ship and the cargo carried by her, nor in the liability thereby incurred, but by the law of the sea the relationship exists and the obligation is imposed, whether it be regarded as arising from implied contract or legal obligation. In *The Kate* (19), *The Racine* (20), and *The Philadelphia* (21), and in your Lordships' House in *The Argentino* (22), damages at least taking into consideration the loss of a contract have been awarded. Nor has the decision in *Re Polemis & Furness, Withy* (23) affected any change in this principle. One method of ascertaining the damages in an action of tort is to ask what loss would a reasonable man anticipate as a result of the wrongful act. To this the *Polemis* case (23) added a further liability, *viz.*, damage consisting of the direct physical consequences of the tortious act, whether they would reasonably be anticipated or not. It has not narrowed the liability which was previously held to exist. It is said, indeed, that the position of the appellants in the present case is stronger than was that of the defendants in *The Marpessa* (3), inasmuch as in the latter the ordinary law of the sea was that applicable, whereas in the former there is a special contract to which the appellants were not parties and by the terms of which they are in no way affected. This argument would, I think, have force if the special contract contained any unusual terms, but in the present instance the contract contains nothing exceptional. Indeed, if a shipowner were asked to say under what terms he would expect a ship with which his vessel collides to be carrying cargo, I cannot but think that he would reply: "Terms governed by the provisions of the Carriage of Goods by Sea Act, 1924, and the York-Antwerp Rules or similar provisions." If, then, I am right in considering that what would reasonably be expected to result from the wrongful act is one measure of the damages recoverable in tort, my opinion is that a wrongdoer would expect that the cargo owner might have to contribute in general average and that the calculation of the amount of the contribution would be based on the existence of a contract (i) freeing the carrying ship from liability towards the cargo in case of negligence and (ii) embodying the York-Antwerp Rules. A

It may, however, be said that this is an answer to the contention that the damage is too remote, but does not deal with the allegation that it does not flow from the tortious act but from the contractual relationship between the ship and its cargo. Counsel for the appellants put this contention in the words: "Liability or damage arising from a contract with a third party gives no ground for a claim for damages in an action for negligence against a wrongdoer unless the liability or damage arose from physical injury to the plaintiff's person or to B property owned by or in the possession of the plaintiff." For this contention there may be much to be said where the person or thing injured was not engaged, as is cargo when being carried in a ship, on a joint adventure. I do not, however, think it applies to such carriage. It is true that general average is not affected by insurance law, but the outlook on the mutual obligation entered into by ship and cargo owners resulting in the undertaking of a common adventure may be C illustrated by the fact that, whereas in non-marine cases there is no loss unless the thing insured in injured, in marine insurance cases the loss of the adventure constitutes a loss for which underwriters are liable though the cargo itself be safe. For this well-known principle it is enough to quote *British & Foreign Marine Insurance Co.* v. *Sanday* (24). Moreover, underwriters on cargo must pay the sums contributed by cargo towards general average expenditure as a loss under the policy. When, therefore, a ship is insured against collision, such D contributions are held, at any rate so far as underwriters are concerned, to be a loss directly caused by that peril.

A further example of the fact that, because of their close connection, ship and cargo are dealt with on the same principle is to be found in the fact that innocent cargo carried on a ship which shares the blame for a collision can recover against the other ship not its whole damages but only that proportion which the carrying ship can recover against the other. In *The Milan* (25) this result is said to be a E rule of the sea and in no way dependent on principles similar to those which would be followed in accident cases on land, and that case was followed and approved in your Lordships' House in *The Drumlanrig* (26). In such cases there is no question of imputing to the cargo the fault of the carrying ship. The principle adopted is, I think, founded on the fact that sea carriage is a joint adventure, carried on originally often far from home in time and distance, and F one, therefore, in which those on the spot must be left to do the best they can in the interest of all. In the case of carriage of goods by sea a general average act is one undertaken to preserve the various interests engaged in the joint adventure and to enable it to be carried to a successful conclusion. Expenditure so incurred is in that sense incurred to preserve those interests, *viz.*, the ship's safety and carrying capacity, the cargo's preservation and safe arrival, and the earning of the freight. In such a case damages which would not normally include those G resulting from the loss of the benefit of a contract with a third party, where the claimant has not suffered in his person or property, may well—and, I think, do—extend to those arising from the obligation to contribute to general average expenditure incurred for the purpose of preserving the interests engaged in the joint adventure and enabling that adventure to be brought to a successful conclusion. Such a view receives support from and explains the attitude adopted in *The Minnetonka* (4) and *The Toward* (6) and the expressions used in *The Mary* H *Thomas* (13) and it is consistent with the contention that contribution to general average expenditure may be a loss flowing from the tortious act of a wrongdoer, though payment of the expenditure falls in the first instance upon one of the interests concerned only, and though, in paying it, that interest may be acting on its own behalf and not as agent for the other parties concerned.

There remains one further difficulty. I have said that, in my view the injured ship might sue not only for her own direct loss but also for any damage to the cargo of which she was bailee and, similarly, might sue as bailee for the expense to which she was put in incurring general average expenditure, even though that expense was incurred in the general interest of all those concerned in the adventure. Furthermore, in *The Winkfield* (2) Sir Richard Henn Collins, M.R., said ([1902] P. 12, at pp. 60, 61) :

> As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he [*i.e.*, the owner of the carrying ship] is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be enquired into, and as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor.

If this be right, a question must arise as to who should recover where both parties have brought actions which are in existence at the same time. That both may sue for loss of or damage to the property, at any rate where the bailee is a carrier, is stated in terms in *Gordon* v. *Harper* (27) *per* Grose, J. (7 Term Rep. 9, at p. 12). Moreover, in *Manders* v. *Williams* (28) Parke, B., said (4 Exch. 339, at p. 344) :

> No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer ; the latter by virtue of his possession, the former by reason of his property.

Parke, B., however, qualified this statement by saying, as was said by Sir Richard Henn Collins, M.R., in *The Winkfield* (2) that an action by one is a bar to an action by the other : see *Nicolls* v. *Bastard* (29).

The whole question was reconsidered in *Eastern Construction Co. Ltd.* v. *National Trust Co. Ltd. and Schmidt* (30) where it was said that if the bailee sues he ought to claim and be awarded full damages, for then no further action can be brought by the bailor, but this last case was an action for the conversion of timber and was not complicated by cross-claims or limitation of liability. A question bearing some analogy to the present case, however, was discussed in *The Johannis Vatis* (18). In that case two ships came into collision and before the issue of a writ an undertaking was given on behalf of the one which was later held solely to blame to put in bail to the amount of £100,000. A writ was then issued on behalf of the owners of the other ship and cargo against the wrongdoer and in the course of that litigation the owners of the various parcels of cargo, represented by their underwriters, were asked to join in the proceedings. Some assented and some did not. Later, it turned out that the bail was insufficient to meet all claims and the shipowners contended that, having sued as owners of the ship and bailees of the cargo, they were entitled to receive the whole of the bail, pay themselves the amount of their own damages as shipowners in priority to all other claimants, and that the non-assenting cargo owners had no right to share in the fund. On those contentions the Court of Appeal held that though, as bailees of the cargo, the shipowners were entitled to recover the full value of the damage to cargo, they must account to all the owners of the damaged parcels of cargo for their share, and that it was the duty of the court to see that all persons having a claim on the bail, including the non-assenting cargo owners, shared in the distribution. The dispute arose because the fund to be distributed was less than the total damage suffered, and, therefore, had to be apportioned among the various interests, and it had to be determined what interests were entitled to a share in the fund. That difficulty does not arise in the present case. The Cheldale has not limited her liability.

The issue is a different one. It is contended that where two parties are entitled to sue for the same damage, and the shipowner has obtained judgment for the damage to his ship including his general average expenditure from a wrongdoing ship and that damage has been paid or set off against sums which his own vessel owes to the wrongdoer, the wrong-doing ship is entitled to say : " I have already paid the damage and, on the principles laid down in *The Winkfield* (2), my liabilities as wrongdoer are discharged." I think there is more than one answer to this contention. It might prevail if the owners of cargo had lain by and allowed the shipowner to claim on their behalf, so that the wrong-doing ship had, without notice of the separate claim of the cargo owners for general average contribution, paid the full damage to the owners of the other ship. What remedy in such a case the cargo owners would have against the carrying ship I do not stay to consider, but in the present case the action between the two ships never came to trial. It was settled between them on the basis that the sum payable to the Greystoke Castle included the whole of her general average expenditure. Moreover, the cargo owners issued a writ on July 24, 1941, claiming, *inter alia*, their share of general average expenditure and paid their contribution on Feb. 16, 1942, whereas the registrar did not deal with the claims on the limitation fund until June 8, 1943, and though his assessment included an agreed sum in respect of the whole general average expenditure of the Greystoke Castle, that assessment has never been confirmed. Indeed, as a result of the decision of Lord Merriman, P., in the present case, which imposes a liability on the Cheldale for the cargo's proportion of general average expenditure, the sum payable to the Greystoke Castle has been increased and that payable to the cargo owners reduced so that the cargo owners' proportion of general average expenditure is not now included in the settlement between the two ships, though this position would be reversed if your Lordships thought that the President's judgment was wrong. In these circumstances, it cannot be said that the owners of the Cheldale have already paid the general average contribution claimed in this action, and, therefore, are excused for that reason from paying it in this action. It is still unpaid. If, then, I am right in thinking that the respondents have a direct claim for this contribution in general average which they have made, there is nothing to preclude them from making their claim in this action. I would dismiss the appeal.

Lord Simonds: My Lords, the facts relevant to the question of principle which is raised in this appeal are few and not in dispute.

On Feb. 17, 1940, SS. Cheldale, owned by the appellants, came into collision with SS. Greystoke Castle. In subsequent proceedings both ships were held to blame, in the proportions the Cheldale one fourth and the Greystoke Castle three fourths. In a limitation action begun by the Greystoke Castle on Feb. 4, 1941, it was decreed on Apr. 7, 1941, that she was entitled to limit her liability and on Apr. 8, 1941, her owners paid into court the whole amount of her £8 per ton liability amounting to £45,956 16*s.* 10*d.* with interest. The Greystoke Castle was at the time of the collision on a voyage from Japan to New York, and in consequence of it put into Durban as a port of refuge to effect repairs so as to be able to complete her voyage. In so doing she incurred general average expenditure amounting to $33,177.27. An average adjustment as between ship, freight and cargo made at New York (the proper place for adjustment) showed that the proportion of that expenditure recoverable from cargo as a general average contribution was $22,802.05. The bills of lading covering the cargo in the Greystoke Castle contained the following clause:

> General average shall be payable according to York-Antwerp Rules, 1924, and as to matters not therein provided for according to the usages of the Port of New York.

Hence it follows that the owners of cargo laden on the Greystoke Castle (whom I will in future refer to as "the respondents") were bound to make their full contribution to general average expenditure notwithstanding that the collision was due in three fourth parts to the fault of the Greystoke Castle. Moreover, they were precluded by the negligence clause in the bills of lading from claiming against the Greystoke Castle for the damage suffered by them as a result of the collision, but the fault was in one fourth part due to the Cheldale. Therefore, the respondents on July 24, 1941, issued a writ against the appellants claiming as cargo owners damages arising out of the collision, and on Aug. 8, 1941, the appellants admitted liability for one quarter of the respondents' claim subject to a reference to the registrar to assess the amount. This brings me to the question which now falls for decision. Are the respondents entitled to recover not only in respect of the physical damage to their cargo, which the appellants admit, but also in respect of their contribution to general average expenditure, which the appellants do not admit? This question has been answered in the affirmative by the registrar and by Lord Merriman, P., and by the Court of Appeal. One further fact must be noted. In the limitation action to which I have referred, the owners of the Greystoke Castle claimed for disbursements amounting to £19,001 18*s.*, for which they were counterclaiming in the collision action, and on May 22, 1942, it was agreed between them and the appellants that the disbursements claimable amounted to £18,061 3*s.* 3*d.* and that the appellants' liability was one quarter thereof, namely £4,515 5*s.* 10*d.* This sum was, accordingly, deducted from the claim of the appellants and of the master and crew of the Cheldale against the limitation fund.

My Lords, it appears to me that the question to be here decided is one that in principle must arise wherever a cargo owner is called on to contribute to general average expenditure incurred by a carrying ship by reason of a collision for which she has not been wholly to blame, and that the decision must be the same whether or not the issue is complicated by the apportionment of liability and the institution of a limitation action. That the question should to this day be considered an open one can only be explained by the fact that in a business community such A questions are settled in a business-like way between the insurance and other interests involved, but it is unfortunate that the parties are not in agreement as to what the practice has been in the half century that has passed since *The Marpessa* (3) was decided. In that case JEUNE, J., rejected a claim by a carrying ship to recover as damages from the wrong-doing ship the balance of general average contribution due from ship and freight to cargo, holding that the loss sustained by the ship by having to make that contribution was not caused by the B collision. JEUNE, J., said ([1891] P. 403, at p. 409) :

> . . . . it is the relation between ship and cargo out of which the obligation to make general average contribution arises and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution.

This direct decision on the point at issue has never been in terms overruled, though I share the view expressed in the courts below that it is difficult to C reconcile with it the decision of the Court of Appeal in *The Minnetonka* (4) and, perhaps, that of GORELL BARNES, J., in *The Toward* (6), but, however this may be, there is, I think, no authority one way or the other binding this House, nor any such long and established course of practice as should influence its decision. LORD MERRIMAN, P., thought the decision in *The Marpessa* (3) wrong. It appeared to him (60 T.L.R. 442, at p. 443) :

> D . . . well nigh impossible at the present time to argue that the liability of cargo to pay general average contribution towards special expenditure by the carrying ship, even though that ship herself was held to be negligent, was not a consequence which might be reasonably expected in the ordinary course of things to flow from the wrongdoing of the other ship.

In other words, the general average contribution was the consequence, and not too remote consequence, of a tortious act. In the Court of Appeal, SCOTT, E L.J., took the same view, but supported it ([1945] 1 All E.R. 177, at p. 180) by an argument, which, with great deference, I think untenable, that only the net out-of-pocket loss (by which he means the net loss after recovering general average contribution) can be recovered by the carrying ship from the wrong-doing ship. This argument appears to me to be inconsistent with the decision in *The Winkfield* (2) which I regard as unassailable. MACKINNON, L.J., came to the same F conclusion. He did not place the same limit on the right of recovery by the carrying ship, but, realising that the same head of damage might on this view be claimed by both ship and cargo and that the wrongdoer could not be called on to meet it twice, he indicated methods of procedure by which this result might be averted. DU PARCQ, L.J., concurred.

My Lords, in the face of this consensus of opinion it is with much hesitation that I express a contrary view, but, after a long consideration of the far-ranging G arguments of counsel, I see no valid answer to the contentions put forward by counsel for the appellants. The first and, as I think, decisive matter is to determine the true nature of the general average contribution made by the respondents. It was a contribution made by the respondents towards the expenditure incurred by the ship arising out of a general average act. That expenditure, details of which appear in the general average statement and adjustment, was incurred by the ship and I cannot accept the view that any primary liability was imposed H on the respondents in respect of the items of goods supplied or services rendered which appear in the statement. The master of the ship is, no doubt, in such an event, an agent of necessity for all interests concerned. That is why he can, if the situation demands it, even hypothecate or sell the cargo for the common benefit, and that is why all interests must contribute. The master is the servant of all interests. He acts for all, he is the agent for all, but he is not in respect of general average expenditure the agent for the cargo owner in the sense that the latter is his principal and, as such, liable for the whole or an aliquot part of the debt due for goods or services. For the whole of such expenditure the ship is liable and the whole of it (subject to any just exceptions) the ship can recover from the wrongdoer. More than once in the course of the argument I invited counsel for the respondents to refer to any case in which the primary liability of the cargo owner as principal of the master who incurred such general average expenditure had been upheld, but he was unable to do so. It seems to me clear that the master is the agent of the ship in respect of such expenditure, though what he does he does for the sake of all concerned. If it were not so, it would be necessary to consider whether the master was the agent for all interests, in the sense that they were all jointly or severally liable for all expenditure or in the sense that they were severally liable for an aliquot portion to be subsequently ascertained of such expenditure. This is not an adventure upon which I should care to embark. It would probably surprise the man who supplied goods to the master, or rendered services to him, to learn that there was any such question. Nor can I easily reconcile such a possibility with the question which was debated in *Chellew* v. *Royal Commission on the Sugar Supply* (15). There the question was whether for the purpose of contribution the value of the cargo should be taken at the termination of the adventure, and it was held that it should be so taken when the contract of affreightment was governed by York-Antwerp Rules, whatever might be the result under the common law. It followed in that case, since the cargo was of no value at the relevant date, that the cargo owner had to contribute nothing. Was he, nevertheless, as the undisclosed principal of the master, liable to the supplier of goods or renderer of services for all or some part of his claim ?

I conclude then that in this case the obligation and the only obligation of the respondents was to their carrying ship. The nature of that obligation is not in doubt. It has been expounded at length in *The Gratitudine* (10) and more recently in *Burton* v. *English* (12). In the present case it may in a sense be regarded as contractual, since the bills of lading themselves prescribe the conditions of general average payment, but, whether it be regarded as contractual or as an obligation imposed by the general law independently of contract, the result is, in my opinion, the same. For the question is still the same, *viz.*: Is the loss, which the fulfilment of the obligation imposes, a loss which the law recognises as flowing from the act of the wrongdoer ?

My Lords, it is, as I have said before, necessary to disembarrass this question of the complexity which arises from apportionment of blame and limitation of liability. It is further necessary to ignore the fact that here the respondents, or some of them, had claims for physical damage. I will disregard them and assume that I am dealing with a claim for no other damage than that which is involved in the obligation to make a general average contribution. In simple terms, A., the ship, has suffered damage which is recoverable against the wrongdoer. B. is bound to contribute to A.'s loss. Can B. recover the amount of his contribution from the wrongdoer ? It will be observed that, to simplify the problem, I have ignored a point, which may yet be of significance, that A. has included in the expenditure, in respect of which contribution is claimed, items which were agreed to be irrecoverable from the wrongdoer, but, taking the problem in the simple form that I have stated, I do not see how, on the ordinary principles of the law of damages, B. can recover from the wrongdoer. The principle that I would invoke is nowhere better stated than in *Simpson* v. *Thomson* (7). In that case two ships, the property of the same owner, had collided. The underwriters paid the insurance effected on the lost ship and then claimed to rank *pari passu* with the owners of cargo destroyed in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage, but since the owner of an innocent ship could have no claim against himself as the owner of the offending ship, it was clear that the underwriters could not succeed unless they could establish that they had an independent cause of action in tort against the wrongdoer. In other words, was the loss which they incurred by reason of their obligation to the innocent ship damage which was at law recoverable from the offending ship ? It was held not to be recoverable and Lord Penzance thus referred (3 App. Cas. 279, at p. 289) to the principle involved in the underwriters' contention :

> The principle involved seems to me to be this, that, where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous,

or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

LORD PENZANCE then pointed out that, if this principle were sound, it would follow that, if by the negligence of a wrongdoer goods were destroyed which the owner of them had bound himself by contract to supply to a third party, this person, as well as the owner, had a right of action for any loss inflicted on him by their destruction. After further illustrations, designed to show what would be involved in a decision in favour of the underwriters, he rejected (*ibid.*, at p. 290) the claim on the ground that:

> . . . no precedent or authority has been found . . . for an action against the wrongdoer except in the name, and therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured.

This case was lightly dismissed by the counsel for the respondents on the ground that general average contribution had nothing to do with insurance. That did not meet the point. The insurer has no independent claim in respect of a wrong suffered by the assured, though he may be subrogated to his right and sue in his name with all the consequences that ensue from subrogation, and this is so notwithstanding that the wrongdoer might well assume, as in the case of a collision between two motor cars, that not only the owner of the innocent car but also its insurer would suffer loss. The reason why he cannot recover is not because it could not be reasonably foreseen that he, or at least some insurer, would suffer, but because his loss is of a kind which the law does not regard as recoverable. So, too, with general average contribution. The loss arises from the obligation, whether contractual or imposed by the general law, to indemnify another from loss sustained by him. The contributor has no property in, or possession of, the damaged ship. In respect of that damage he has no independent right; in respect of his own loss he can have no action against the wrongdoer. It is irrelevant that the latter might reasonably have foreseen that, if his negligence caused a collision, owners of cargo on the injured ship would probably be called on to make a general average contribution.

I will give only one example of the application of this principle which is, in truth, fundamental. In *La Societe Anonyme de Remorquage* v. *Bennetts* (8) the facts were that a steam tug belonging to the plaintiffs was engaged under a towage contract in towing a ship when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision with and sank the tow. No damage was caused to the tug or her equipment by the collision, yet the tug suffered loss by reason of the fact that she was unable to complete her towage contract and earn her remuneration. This loss she sought to recover from the defendant. It was the consequence of the collision: it was perhaps a consequence which might be foreseen by one who negligently runs down a tow. Yet it was held by HAMILTON, J., to be irrecoverable. He said ([1911] 1 K.B. 243, at p. 248):

> In order to give the plaintiffs a cause of action arising out of that breach [the breach of the duty of care in navigation] they must show not only an *injuria*, namely, the breach of the defendant's obligation, but also *damnum* to themselves in the sense of damage recognised by law.

Then he pointed out that, though "as a direct consequence of the collision" the plaintiffs suffered loss, yet, since all that had occurred was that, in the course of performing a profitable contract, an event happened which rendered the contract no further performable and therefore less profitable to them, that loss was not recoverable from the wrongdoer. For it appeared to him that the case fell within the authority of *Cattle* v. *Stockton Waterworks Co.* (31) and the general statement of law by LORD PENZANCE in *Simpson* v. *Thomsom* (7) which I have already cited. In *La Societe Anonyme de Remorquage* v. *Bennetts* (8) there was a contract of towage, in the case before the House a contract of affreightment. In the one case damage to the tow and the contract made unprofitable to the tug, in the other damage to the carrying ship and burden imposed on the cargo. In neither case is there any damage recoverable whether by tug or cargo.

My Lords, I share the apprehension expressed by LORD PENZANCE in *Simpson* v. *Thomson* (7) that a decision in favour of the respondents might have far-reaching and unforeseen consequences, and am tempted to give one more illustration. A and B embark on a joint adventure on the Great North Road. It is an adventure which cannot be successfully prosecuted unless both of them remain sound in wind and limb. Before it has ended, A is incapacitated by the tortious act of X. The adventure is abandoned and B suffers a loss. No one, I suppose, would contend that B had a right of action against X. I carry it one stage further. A and B, knowing the hazards of their adventure, agree that, if either of them suffer injury, the other will contribute to his loss. Again, A is injured by the tortious act of X. B accordingly pays A his stipulated contribution. Again, B has no cause of action of X. This, my Lords, I take to be unquestionably the law of the land, and I cannot assent to the view that the law of the sea is otherwise. I do not ignore that the law of the sea has many special characteristics, but I do not get any help from the use of such expressions as "joint adventure," "common venture" or "community of interest," which are not terms of art unless they import some notion of partnership or co-ownership. The primary fact is that the cargo owner has made a contract of affreightment with the shipowner. To the relation so created the law adds many incidents, most of which may themselves be varied or abrogated by the contract. Let the proper weight be given to each of the factors which have been so exhaustively described in the opinions of my noble and learned friends, to the character of the master as agent of necessity, to the rights and duties of the parties in respect of general average sacrifice or expenditure, to the special features of marine insurance, to the limitation which may be imposed on the cargo owner's right of recovery against a wrong-doing ship, and any and every other incident in the relation of ship and cargo. Yet, whether I look at them individually or in the aggregate, I find nothing which would justify me in holding that the cargo owner can recover damages from the wrong-doing ship, not because his cargo has suffered damage, but because he had been placed under an obligation to make a general average contribution. It is convenient and not inapt to say that ship and cargo are engaged in a joint adventure, but to do so leads to no conclusion. Nor, as it appears to me, is the problem to be solved by saying that in respect of general average expenditure the master acts as agent for all parties. I have shown that he does not act as agent in the ordinary sense of the word, which surely imports in any transaction a threefold relation of A the principle, B the agent and C with whom B on behalf of A contracts. I am content to assume that there may be cases in which B, though he does not contract with C as agent for A—so that there is no privity between C and A—yet is, in a certain sense, the agent for A, as, for instance, in the case of a so-called commission agent: see *Ireland* v. *Livingston* (9), but, with deference, I do not see how this helps. The cargo owner makes his general average contribution because he is under a contractual or other obligation to do so, not because the master of the ship is his agent or stands in any other relation to him. Therefore, I would maintain the decision in *The Marpessa* (3) holding that the damage suffered by the cargo owner in respect of general average contribution is damage which the law does not recognise as flowing from the offending act.

Two further observations I must make. It was urged by counsel for the respondents that a decision in favour of the appellants would be inconsistent with the authority of such cases as *The Argentino* (22). This is a misunderstanding. It is beyond doubt that, where a ship or other chattel has been damaged, its earning capacity is an element in measuring the recoverable damages and that earning capacity may be determined by the contracts that have been made. In that sense a loss of contract is relevant, but it is not the loss of contract which is itself the cause of action. Finally, it was urged that the courts of the United States have not followed the decisions in *The Marpessa* (3) and that a divergence in the maritime law of two countries so closely joined together should, if possible, be avoided. I agree. But in other, and perhaps more important, respects there has been a divergence and I see no justification for making a breach in an important principle of the common law to maintain harmony on this point. I would allow this appeal.

Lord Uthwatt: My Lords, the facts have already been stated and the relevant authorities dealt with and I do not propose to go over that ground again. I will only state as shortly as may be the conclusions at which I have arrived as a result of a consideration of the case and the authorities.

I have no doubt that in proceedings properly constituted the carrying ship can, apart from the intervention made in due time by the cargo owners, on the principle laid down in *The Winkfield* (2) recover from the colliding ship the whole of the port of refuge expenses in so far as they enter into collision damages. It is no defence to the claim that those expenses were attributable to general average acts on the part of the carrying ship, subjecting cargo and freight to a liability to make contribution, but if it be the law that cargo, by virtue of its liability to contribute to such general average expenses as enter into the computation of the collision damages, has a right of action against the colliding ship, and if, in fact, cargo makes its claim in due time, then, in my opinion, that claim over-rides any claim embracing the same subject-matter made by the carrying ship. The reality of the situation dictates the choice to be made. As between cargo and the carrying ship, cargo is to bear some part of the expenses and there would appear to be no reason why, as between cargo and carrying ship, cargo should in respect of any claim for their recovery recede into the background. Again, the circumstance that both ships were at fault in the matter of the collision, or that a decree of limitation of liability has been made as respects both or either of them, and the fact that cross-liabilities between the ships are settled on the principle laid down in *The Khedive* (1), do not, in my opinion, raise any equity in favour of the ship against which the claim of cargo is made for departure from the choice which I have stated.

In the particular case before your Lordships cargo made its claim in due time. The writ by cargo was issued some two years before the registrar dealt with the claims on the limitation fund provided by the carrying ship, the Greystoke Castle. If the subsequent course of events be relevant, it may be observed that cargo, before the claims were dealt with, paid its general average contribution to the Greystoke Castle and that the assessment made by the registrar in the limitation proceedings has never been confirmed. Neither the unconfirmed assessment made in proceedings to which cargo was not a party, nor the distribution of the limitation fund (in which cargo was not interested) made on the basis of the assessment by agreement between the parties interested, can in the circumstances be a bar to the maintenance of cargo's claim. To this, indeed, it may be added that, on the figures involved, acceptance by the Cheldale of cargo's present claim would have increased the amount payable out of the limitation fund to the Cheldale. There clearly has not been any payment by the Cheldale to the Greystoke Castle in respect of the sum now claimed by cargo. Payment adds to the recipients' funds. It does not diminish them. It is, therefore, not necessary to consider what is the position between cargo and the carrying ship when accounts between the two ships have been duly and finally settled. The nice questions as to the accountability of the carrying ship to cargo raised by the method of settling cross-liabilities between the ships and by any share of limitation of liability may well be left to be dealt with when they arise.

The point at issue has been stated in the form: "Can cargo owners recover against the colliding ship the general average contribution to the carrying ship in respect of port of refuge expenses?" That method of statement, though convenient, diverts attention from the real question which clearly appears from the terms of the registrar's report, namely, whether the cargo owners are entitled to recover such part of the collision damages as under their obligation to contribute to general average in respect of port of refuge expenses falls to be borne by them. The total amount recoverable from the colliding ship is not affected. The question is, who can recover it? General average sacrifice is not in question, and the position of any additional expenses appearing in the general average contribution which do not enter into collision damages is not involved in the appeal.

My Lords, under the law of the sea there is recognised a community between the ship and cargo that does not obtain between carrier and customer on land. This is shown by two well-settled principles. First, if a collision causing damage to cargo occur, and the carrying ship and the other vessel are both in fault, cargo could under the old law recover only a moiety of the damage and under statute can now only recover a due proportion determined by the degree of blame. That conception finds no place in land carriage, where there would be joint liability for the whole. Secondly, the liability to contribute to general average expenditure is part of the law of the sea. The principle involved in general average contribution is peculiar to the law of the sea and extends only to sea risks : *Falcke* v. *Scottish Imperial Insurance Co.* (32). The law of the sea apart, neither at law nor in equity can contribution be obtained on the ground that loss incurred by one person has delivered another from a common danger (see *Johnson* v. *Wild* (33)), or that expenditure incurred by one person has incidentally benefited another (*Ruabon S.S. Co.* v. *London Assurance* (34)). Agency is not implied from the circumstances and there is no equity to claim relief. The sufferer both at law and equity must look to gratitude and not to the courts for his recompense.

Under the law of the sea, therefore, ship and cargo are linked together in the fortunes of the voyage and, in a loose sense, there is in some respects a compulsory partnership between ship and cargo in respect to the venture of sea carriage. The Marine Insurance Act, 1906, s. 66, aptly refers to the matter as " the common adventure." A breach of the duty to take care involving only damage to the ship may therefore be, and in my opinion is, a breach of duty owed to cargo.

The recognition of this community of interest between ship and cargo does not help the cargo owners' claim in these proceedings if, in truth, general average acts involving general average expenditure are merely acts done for the sake of all and not acts done on behalf of all. If they be only the former, the obligation is to give partial indemnity to the ship and a direct claim by the contributor against the wrong-doing ship is not permissible : see *Simpson* v. *Thompson* (7). If they be the latter, the expense entering into the collision damage to the ship, to which, consequent on interest in the venture, cargo is put by reason of an act done on its behalf, appears to me to be a direct loss incurred by the cargo as the result of a breach of duty to take care owed to the persons interested in the venture.

There are many cases in which the nature of general average acts involving expenditure has been stated, but in none of these has it been expressly decided whether they are acts done for the sake of all or acts done on behalf of all. My noble and learned friends LORD ROCHE and LORD PORTER have dealt with many of the relevant authorities, and a consideration of those authorities and the language used in other cases—not, I agree, directed to the specific point—leads me to the conclusion that the acts are in law done on behalf of all in the sense that they are done by the actor as agent for all. The acceptance of this view relates the consequences of the general average act to a definite and intelligent principle.

On this matter I would add my two observations. First, the circumstance that the shipowner pledges only his own credit in the contract involving the expenditure is in no way inconsistent with the assertion that in respect of the general average act he is the agent of all concerned. The transaction is one thing : the method of finance is another and is only machinery. Secondly, the liability to contribute arises in the doing of the act (see *Tate & Lyle* v. *Hain S.S. Co.* (14)), and the circumstance that the liability is defeated by non-arrival of the cargo at the port of destination is, to my mind, irrelevant in arriving at a conclusion whether or not the actor was acting as agent of all.

Holding these views as to the relation between ship and cargo and the nature of a general average expenditure, I am of the opinion that cargo liable to contribute to general average has a direct claim against the colliding ship. There are only two other matters to which I need refer in this connection. In the particular case it was a provision of the bills of lading that general average should be paid according to York-Antwerp Rules, 1924, and, as to matters not therein provided for, according to the usages of the port of New York. Under these rules the circumstances in which liability to general average is to attach and the extent of the liability differ somewhat from the provisions of the general maritime law. In my opinion, the incorporation of these rules raises no new question of principle. For the purpose in hand, the rules merely define the extent of the interest of cargo in the venture in which ship and cargo are jointly engaged. Why should not they define their interest as they please ? The *quantum* of the colliding ship's liability is not affected. Secondly, it is possible that acceptance of the position that the several persons interested in cargo have independent rights of action, on the basis I have stated, may lead to multiplicity of suits. That objection is irrelevant in determining the law, but in practice the habit of insurance and the common sense of commercial people reduce the probability of many suits to a vanishing point, but, however this may be, courts of equity had an excellent rule under which a point was not determined unless all persons interested in that point were before the court. As I understand the procedural rules now in force, there is no reason why in an appropriate case all parties interested should not in some capacity be brought before the court. There is no real risk of multiplicity of suits. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Botterell & Roche,* agents for *Ingledew, Mather & Dickinson,* Newcastle-on-Tyne (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON ESQ., *Barrister-at-Law*].

MINISTER OF PENSIONS *v.* CHENNELL.

[KING'S BENCH DIVISION (Denning J.), October 23, November 28, 1946.]

Emergency Legislation—Personal injury—"War injury"—Test of causation—Enemy unexploded incendiary bomb ignited and exploded by boy's tampering—Injury to child standing by—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *ss.* 1, 8 (1).

An unexploded incendiary bomb, dropped from an enemy aircraft on Feb. 23, 1944, was picked up two days later by a boy who took it home. On Mar. 1, 1944, the boy removed the bomb to a public thoroughfare, tampered with it, and caused it to ignite and explode, as a result of which the respondent, a schoolgirl who was in the thoroughfare at the time, was injured:

HELD: (i) in pension cases foreseeability was irrelevant and the award of a pension depended on causation and causation alone.

(ii) when the discharge of a missile or other event was the immediate or precipitating cause of an injury, it was a "war injury" notwithstanding that there was some other antecedent or concurrent cause co-operating to produce it.

(iii) where there was a cause intervening between the discharge of the missile and the injury, it was still a "war injury" unless the discharge of the missile was so remote as not to be a cause at all.

(iv) even if the intervening cause was the negligent or wrongful act of the injured person or a third party, the injury might still be a "war injury."

(v) when an intervening or extraneous event was so powerful a cause that the dropping of the bomb ceased to be a cause at all, but was only part of the circumstances in, or on, which the cause operated, the injury was not a "war injury."

(vi) in this case the dropping of the bomb by the enemy was a cause of the injury, and the boys' interference was not so powerful an intervening cause as to supersede it. The injury was, therefore, a "war injury" within the meaning of the definition in the Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), s. 8 (1).

Greenfield v. *London & North Eastern Ry. Co.* (21), *questioned.*

[**EDITORIAL NOTE.** In the course of his judgment, DENNING, J., criticises two cases—*Greenfield* v. *London & North-Eastern Rly. Co.* (21) and *Re Polemis and Furness, Withy & Co.* (8). The former case has been the subject of discussion in later cases, but it is interesting to observe that *Re Polemis* (8) was recently referred to by LORD PORTER in *Morrison Steamship Co.* v. *Greystoke Castle (Cargo Owners) ante*, p. 696), without disapproval.

[FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, ss. 1, 8 (c), see HALSBURY'S STATUTES, Vol. 32, pp. 1061, 1065.]

Cases referred to:

(1) *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; Digest Supp.

(2) *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108; 105 L.J.P.C. 18; 154 L.T. 89; Digest Supp.
(3) *Palsgref Case* (1928), 248 New York Appeals 339.
(4) *McAlister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
(5) *Hay (or Bourhill)* v. *Young*, [1942] All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; Digest Supp.
(6) *Aldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E.R. 522; [1940] 1 K.B. 507; 109 L.J.K.B. 323; 162 L.T. 71; Digest Supp.
(7) *Woods* v. *Duncan and others, Duncan and another* v. *Hambrook and others. Duncan and another* v. *Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420; [1946] A.C. 401; 174 L.T. 286.
(8) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub. nom. Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest 29, *151*.
(9) *Richards* v. *Minister of Pensions.* (unrep.)
(10) *Haynes* v. *Harwood*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; Digest Supp.
(11) *The Oropesa*, [1943] P. 32; 112 L.J.P. 91; 168 L.T. 364; *sub. nom. Lord* v. *Pacific Steam Navigation Co., Ltd., The Oropesa*, [1943] 1 All E.R. 211.
(12) *Taylor* v. *Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; Digest Supp.
(13) *Adams* v. *Naylor*, [1946] 2 All E.R. 241; [1946] A.C. 543; 115 L.J.K.B. 356; 175 L.T. 97.
(14) *The Margaret* (1881) 6 P.D. 76; 50 L.J.P. 67; 44 L.T. 291; 41 Digest 697, *5287*.
(15 *Smith* v. *Davey, Paxman & Co (Colchester), Ltd.*, [1943] 1 All E.R. 286; 36 B.W.C.C. 60; Digest Supp.
(16) *Pope* v. *St. Helens Theatre, Ltd.*, [1946] 2 All E.R. 440; 62 T.L.R. 588.
(17) *Buckner* v. *Ashby & Horner, Ltd.*, [1941] 1 K.B. 321, 337; 110 L.J.K.B. 460; 105 J.P. 220; Digest Supp.
(18) *W.* v. *Minister of Pensions*, [1946] 2 All E.R. 501.
(19) *The San Onofre*, [1922] P. 243; 92 L.J.P. 17; 127 L.T. 540; 41 Digest 712, *5485*.
(20) *Liesbosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub. nom. The Edison*, 149 L.T. 49; Digest Supp.
(21) *Greenfield* v. *London & North Eastern Ry. Co.*, [1944] 2 All E.R. 438; [1945] K.B. 89; 114 L.J.K.B. 252; 171 L.T. 337; Digest Supp.

Appeal from a decision of a pensions appeal tribunal. The respondent, a young schoolgirl, was injured by the explosion of an unexploded enemy incendiary bomb with which some boys were tampering. Her claim for compensation under the Personal Injuries (Emergency Provisions) Act, 1939, s. 1, was rejected by the Minister of Pensions, but, on appeal, a pensions appeal tribunal found that her injury was a war injury. The Minister now appealed to the High Court. The facts appear fully in the judgment.

H. L. Parker for the Minister of Pensions.

G. H. Crispin for the respondent.

Cur. adv. vult.

Nov. 28. Denning, J., read the following judgment. An enemy aircraft in the early hours of Feb. 23, 1944, dropped explosive incendiary bombs on Chertsey. One of those unexploded bombs was picked up by a boy two days later and taken home by him. This boy and another boy on the evening of Mar. 1 removed the bomb to a public thoroughfare, they tampered with the bomb, and it ignited and exploded. The respondent, a schoolgirl who was in the thoroughfare at the time, was injured by the explosion and had a finger blown off. She claims that her injury was a war injury within the Act and Scheme and gives her a claim to compensation. The claim was rejected by the Minister but, on appeal to the tribunal, the tribunal found that it was a war injury. The Minister appeals to me.

The question in the case is whether the physical injury was "caused by" the discharge of the bomb by the enemy. It involves a consideration of the problem of causation, a problem which continually occurs in all branches of the law. I have had occasion to consider it under the Royal Warrant for Pensions when the question is whether an injury or disease is "attributable to" war service. It has occurred in insurance cases when the question is whether the loss is a "consequence of" warlike operations. It has arisen in cases on the remoteness of damage. The subject has been variously treated in the various branches of the law. I have the responsibility of deciding it finally in pensions cases, and the principles which I am about to lay down are applicable both under the Personal Injuries Scheme and the Royal Warrant.

Much depends on the right approach. The best way is to start with the injury and inquire what are the causes of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be "the" cause of the injury in the sense either of the sole cause or of the effective and predominant cause. In many cases where there is a combination of causes, it is impossible to single out one cause as distinct from others, and any attempt to achieve that impossible task would lead to difficulties as the insurance cases amply show. All that is necessary is that the discharge of the missile should be properly speaking "a" cause of the injury, just as, in claims for breach of contract to provide a seaworthy ship, all that is necessary is that the unseaworthiness should be a cause of the damage—*Smith Hogg & Co.* v. *Black Sea & Baltic General Insurance Co.* (1)—or, in cases of one damage caused by two separate torts, each tortfeasor is liable for the whole damage, as in *North Western Utilities* v. *London Guarantee* (2).

Another way of approach is to start with the discharge of the missile or other event and ask what are the consequences of it, but some care is required in this approach lest one is confused by analogies with cases of breaches of contract or of negligence, when it is not as a rule sufficient simply for the damage or injury to be caused by the wrongful act. The defendant in such cases is not necessarily responsible for all consequences, that is, for all damage or injury of which the wrongful act is the cause, but only for certain consequences. Responsibility primarily depends in those cases on whether the damage or injury is of such a kind (irrespective of its degree or extent) as the defendant might reasonably be expected to be able to foresee. Foreseeabilty is, as a rule, vital in cases of contract and also in cases of negligence, whether it be foreseeability in respect of the person injured as in the *Palsgref Case* (3) (discussed by Professor Goodhart in his Essays, p. 129), *Donoghue* v. *Stevenson* (4), and *Hay (or Bourhill)* v. *Young* (5), or in respect of intervening causes as in *Aldham* v. *United Dairies* (6) and *Woods* v. *Duncan* (7). It is doubtful whether *In Re Polemis* (8) can survive these decisions. If it does, it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind. In pension cases, however, foreseeability is irrelevant. It does not matter what the enemy who discharged the missile might reasonably have expected to occur or what the War Department (who accepted the man for service) might reasonably have expected to happen. The award of a pension depends on causation and causation alone. Once the test of foreseeability is rejected, the test of causation is to be found by recognising that causes are different from the circumstances in or on which they operate. The line between the two depends on the facts of each case. I will give some illustrations:

One: When the discharge of the missile or other event is the immediate or precipitating cause of the injury, it is a "war injury" notwithstanding that there was some other antecedent or concurrent cause also operating. For instance, if a man refused to obey orders to take shelter on an air-raid warning, and was in consequence hit by a bomb, his own conduct would be a cause of his injury, but the impact of the bomb would also be a cause and the injury would be a "war injury." So, also, in cases under the Royal Warrant when a man sustains a hernia by reason of an accident on service which was not of such severity as to have caused the hernia had there not been an inherent weakness predisposing him to rupture, the accident in service is the immediate or precipitating cause. The inherent weakness is the antecedent or concurrent cause, but, nevertheless, the proper finding is that the rupture is "attributable to" war service: *Richards* v. *Minister of Pensions* (9). A parallel exists in cases of tort: *In Re Polemis* (8).

Two: Where there is a cause intervening between the discharge of the missile and the injury, it is still a "war injury" unless the discharge of the missile is so remote as not to be a cause at all. For instance, if an unexploded bomb is taken up by a bomb disposal squad and explodes as it is being taken away along an uneven road, the injuries to the members of the squad and bystanders are all caused by the dropping of the bomb notwithstanding the intervening cause. A parallel exists in tort: *Haynes* v. *Harwood* (10), *The Oropesa* (11). If the bomb is removed to a remote place and there exploded, and the noise of the explosion frightens a horse some miles away and the horse treads on the carter's toe, the injury is a "war injury" because the original dropping of the bomb by the enemy was a cause of the injury, notwithstanding the numerous intervening causes and notwithstanding that the injury was one which could not reasonably be foreseen. So, also, if a house is damaged by the blast of a bomb, and a workman engaged on the repair of it is injured by the collapse of a floor, the injury is "caused by" the impact of the bomb, notwithstanding the intervening action of the workman in walking on the dangerous floor and his voluntary acceptance of the risk involved in it (*Taylor* v. *Sims* (12)).

Three: Even if the intervening cause is the negligence or wrongful act of the injured person or a third party, the injury may be still a "war injury." For instance, if a bomb explodes as it is being taken away, either by miscalculation or error of judgment on the part of the bomb disposal squad, or by their negligence or the negligence of some other user of the highway, the injuries sustained by members of the squad or by bystanders are all caused by the original dropping of the bomb as well as by the intervening cause. If a boy trespasses on war department land and is injured by a minefield, the injury is still caused by the use of an explosive in combating the enemy as well as by the other intervening wrongful act of the boy: *Adams* v. *Naylor* (13). A parallel exists in cases of unseaworthiness: *Smith Hogg & Co.* v. *Black Sea & Baltic General Insurance Co.* (1), and in tort (*The Margaret* (14)).

Four: When an intervening or extraneous event is so powerful a cause that the dropping of the bomb ceases to be a cause at all, but is only part of the circumstances in or on which the cause operates, the injury is not a "war injury." For instance, if an enemy cannon-shell, after passing through various hands comes into the possession of a workman who out of curiosity saws it at his bench and it explodes, the "cause" of the injury is the man's own conduct. The original firing of the shell by the enemy is not a cause of the injury, but only part of the history: *Smith* v. *Davey, Paxman & Co.*(15). So, also, if a theatre is damaged by the blast of a bomb, and five years later a customer is injured by the fall of a ceiling which is traceable to the damage, the "causes" of the injury are the failure of the proprietor to see that the theatre was safe and his invitation of the public to it in its existing condition. The dropping of the bomb is again not a "cause" but only part of the history: *Pope* v. *St. Helens Theatre* (16). That case shows that in a train of physical events the latest event is not necessarily "caused by" the first event. A parallel exists in cases of tort: *Buckner* v. *Ashby & Horner, Ltd* (17). Another instance is when, while a soldier is on service, his wife goes off with another man and in consequence the soldier is reduced to a chronic anxiety state. The disease is then attributable not to war service but to the wife's personality and conduct: *W.* v. *Minister of Pensions* (18). It may be that, if the soldier had not been separated from his wife by war service, she would not have been unfaithful and he would not have suffered, but that does not mean that the war service is a "cause" of the disease, and that is so even though on an average wives are more likely to be unfaithful when they are separated from their husbands than when they are not. Persons may be more likely to be involved in an accident in a London street than in a country road, but the cause of an injury in any particular case is not the visit to London but the negligence of some one or other. Instances can be found in cases of tort of an intervening cause (*The San Onofre* (19)), or an extraneous event (*The Edison* (20)), being so powerful a cause as to reduce the rest to part of the circumstances in which the cause operates.

The only case which is inconsistent with the principles I have stated is *Greenfield* v. *London and North Eastern Railway* (21). In that case the enemy dropped a bomb at ten minutes past nine on a railway line. It made a crater and dislocated communications. A signalman, after telephoning his superior officer, directed a train driver to proceed at caution. He did so and at a quarter to ten the engine fell into the crater and the driver was killed. The railway company admitted negligence in directing the driver to proceed and the Court of Appeal held that it was not a "war injury." Their decision seems to proceed on the basis that, unless the impact of the bomb was the immediate and precipitating cause of the injury, it could not be a "war injury," or, at any rate, that, if the neglect of a third person intervened, that sufficed. They seem to have approached the statute in the same way as the Court of Appeal did in *Adams* v. *Naylor* (13), namely, that it was not the intention of the legislature to take away the right of the injured party to sue a wrongdoer, that is, in *Greenfield's* case (21), the railway company. Since that time *Adams* v. *Naylor* (13) has reached the House of Lords. LORD SIMON has made it clear that that approach of the Court of Appeal to the statute was wrong. He said ([1946] 2 All E.R. 241, at p. 243) that that view "fails to take sufficiently into consideration that the primary object of the Act is not to take away rights of compensation but to make provision for compensation under a scheme which would cover large numbers of civilians who would otherwise not be compensated at all." In *Adams* v. *Naylor* (13) the House of Lords held that the injury was "caused by" the use of the mine, notwithstanding the intervention of a wrongful act by the person injured. After that decision it cannot be suggested that an intervening wrongful act, or *a fortiori* a negligent act of the injured party or a third party, is by itself sufficient to defeat the claim to a pension. It seems to me that *Greenfield's* case (21), although not expressly overruled, cannot stand with the decision in the House of Lords in *Adams* v. *Naylor* (13), and I am, therefore, not bound to follow it.

Relieved of *Greenfield's* case (21), and applying the principles that I have stated, I am of opinion that in this case the dropping of the bomb by the enemy was a cause of the injury and that the boys' interference was not so powerful an intervening cause as to supersede it. The injury was, therefore, "caused by" the dropping of the bomb by the enemy. I hold that the tribunal came to a correct conclusion in point of law and I dismiss the appeal.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the Minister); *Culross & Co.* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

MURGATROYD v. TRESARDEN.

plained and Applied. CROWHURST MAIDMENT. [1952] 2 All E.R. 808.

(Scott, Bucknill and Somervell, L.JJ.), November 13, 14, 22, 1946.]

Landlord and Tenant—Rent restriction—Separate dwelling-houses—Controlled house consisting of two self-contained flats—Tenant of house at all times resident in lower flat—Upper flat sub-let—Acquirement of freehold of house by former sub-tenant of upper flat—Recovery of possession.

On being granted a tenancy of a house consisting of two self-contained flats with a common entrance and a common staircase, the defendant sub-let the upper flat to the plaintiff, he himself occupying the lower flat with his family. The plaintiff was ejected in September, 1945, under an order for possession obtained by the defendant. In February, 1946, the then landlord terminated the defendant's tenancy by notice to quit, but the defendant continued in occupation as a statutory tenant. In April, 1946, the plaintiff became freeholder and landlord of the house and brought proceedings in the county court to recover possession of the whole premises, or, alternatively, the upper flat. The county court judge made an order for possession of the upper flat.

HELD: for the purposes of the Rent Restrictions Acts the two self-contained flats were to be treated as separate dwelling-houses, and, as the defendant had never resided in the upper flat and there was no evidence that he intended to reside in it, the principle of *Skinner* v. *Geary* (1) applied, and the defendant was not entitled to the protection of the Acts in respect of that flat.

Qu.: whether the principle of *Skinner* v. *Geary* (1) applies where part of a house was temporarily sub-let, there being no real dividing off of one part from the other.

[As to Dwelling-houses within the Rent Restrictions Acts, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373; and for Cases, see DIGEST, Vol. 31, pp. 557-562, Nos. 7042-7091.]

Cases referred to:

(1) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.

(2) *Thompson* v. *Rolls*, [1926] 2 K.B. 426; 135 L.T. 446; 31 Digest 580, *7291*.

Appeal by the tenant from an order of His Honour Judge Alchin, made at Bow County Court, giving the landlord possession of the upper flat in premises occupied by the tenant. The facts are set out in the judgment of Somervell, L.J.

J. H. Bassett for the tenant (the defendant).

W. R. Rees-Davies for the landlord (the plaintiff).

Cur. adv. vult.

Nov. 22. Somervell, L.J., read the following judgment. The relevant facts, as admitted in the pleadings in this case, are as follows. The defendant became tenant of 197, Milton Avenue in 1941 at a weekly rent of 30*s*. He "thereupon granted a sub-tenancy of the upper flat thereof" to the plaintiff at a rental of 14*s*. per week. The defendant and his family have, since the beginning of the tenancy, occupied the lower flat of the said premises. It seems to me a necessary inference that the house consisted of two flats. The pleadings do not apply the epithet "self-contained" to the flats. No evidence was called. The judge's note of the plaintiff's counsel's opening contains a sentence: "Premises in two self-contained flats." The plaintiff's counsel told us that it was agreed at the hearing that the facts contained in his opening, which supplemented to some extent the facts as set out in the pleadings, were admitted. Counsel for the defendant was not present in the court below and his instructions were, I understood, not quite clear on this point, but, in any event, I think that the natural inference from the admitted facts in the claim is, as stated in the judge's note, that at all material dates the premises consisted of two self-contained flats with a common entrance and a common staircase.

The plaintiff, who was with his mother in the upper flat, was ejected on Sept. 21, 1945, under an order for possession obtained by the defendant. The plaintiff's furniture remained in the upper flat pending the finding by the plaintiff of other accommodation under an agreement between the parties, the plaintiff paying 2*s*. a day. On Feb. 21, 1946, the then landlord of the premises gave the defendant notice to quit and the defendant's tenancy was thereby determined, and, at the date of these proceedings, he was in possession as a statutory tenant.

On Apr. 30, 1946, the plaintiff became the freeholder and landlord of the premises, and on May 6 he brought these proceedings claiming possession of the whole premises or, alternatively, of the upper flat. The county court judge made an order for possession of the upper flat, but there is no note of his reasons. In these circumstances, it is convenient to consider the grounds on which the plaintiff's counsel sought to uphold the judge's order and the defendant's counter argument.

Counsel for the plaintiff submitted, in the first place, that these two self-contained flats were, for the purposes of the Rent Restrictions Acts, to be treated as separate dwelling-houses. The position was the same as if the defendant, under the original lease, had become tenant of two adjacent houses. On this view he relied on *Skinner* v. *Geary* (1). In that case the defendant was the lessee of a house which came within the Acts, but he did not himself live in it. Notice to quit was served. At the time of the proceedings the defendant was letting his sister live in the house, but the county court judge found that the "purpose of that occupation was not to preserve the house as a residence for the defendant." The Court of Appeal, affirming the county court judge, held that the plaintiff was entitled to possession. The majority of the court laid down that, the fundamental principle of the Acts being to protect a tenant who is residing in a house, a tenant to be entitled to the protection of the Acts must be in personal or actual occupation, or intending to return to it.

If, in the present case, the defendant had given evidence and established that when he ejected the plaintiff he intended to occupy both flats himself and had only been prevented from doing so by the presence of the plaintiff's furniture which he agreed to store, different issues would have arisen. He gave no such evidence, and I think the county court judge was entitled to draw the inference that, never having lived in the upper flat, he had no intention of doing so. The question is whether, as counsel for the plaintiff contends, the principle of *Skinner* A v. *Geary* (1) applies to two self-contained flats in one house. Counsel for the defendant, I think, agreed that, if one substituted two adjacent houses for the two flats, the principle would, on the other facts as agreed here, apply. He submitted, however, it should not apply to premises such as these. I feel myself in some difficulty owing to the paucity of evidence as to the structure of this house. If a part of a house was temporarily sub-let, there being no real dividing off of one part from another, I am, at any rate, not prepared to lay B down that the principle in *Skinner* v. *Geary* (1) would be applicable. The defendant here has, however, been content to let the case proceed on the basis that this house consisted of two separate flats. There is no evidence that it had ever been occupied as a single dwelling-house, though, presumably, it was originally so built. The natural meaning of the word "flat" is, I think, a separate self-contained dwelling, and I can see no reason why the principle, in C particular as laid down by SCRUTTON, L.J., in *Skinner* v. *Geary* (1), does not apply. The defendant has never resided in the upper flat, he has no intention of residing there, and he cannot, therefore, claim the protection of the Acts as against the landlord.

On this view it is unnecessary to consider the second and third arguments of counsel for the plaintiff. He submitted that the agreement for storing the furniture was a business user of the premises and this user took them out of the D protection of the Acts. I would not have been prepared to accept the view that the storage of the furniture for the plaintiff in the circumstances as set out was a business user. He contended further that he could claim possession of the whole house, offering the defendant the lower flat as alternative accommodation, and he relied on *Thompson* v. *Rolls* (2). This was admittedly not argued below, and, though it may be difficult to see the defendant's answer on the basis of *Thompson* v. *Rolls* (2), I do not think it is necessary to consider whether E it could properly be raised at this stage. For these reasons, the appeal will be dismissed with costs.

SCOTT, L.J.: I have had the advantage of reading the judgment of SOMERVELL, L.J., and agree with it. The parties having agreed the facts as stated in the pleadings and called no evidence, this court is precluded from going outside them. Their essential feature is that the "premises" consisted of two dwelling-F houses, whether they be given the name of "floors" or "flats," both of which names appear in the documents. After losing possession of the upper flat, the plaintiff bought the fee simple, that is, the reversion on the weekly tenancy of the defendant, which remained what it always had been, namely, a tenancy of both dwelling-houses. As the defendant was in residence in the lower one, his occupation was protected unless the landlord could satisfy the judge that he fulfilled one or other of the statutory conditions attaching to an order for posses-G sion of it. This he failed to do, but the defendant could not claim that statutory protection in respect of his tenancy of the upper flat because he was not residing in it. It seems to me to follow necessarily that the judge's order was right and that the appeal must be dismissed with costs.

BUCKNILL, L.J.: I agree.

Appeal dismissed with costs.

H Solicitors: *Kenneth Duthie & Co.* (for the tenant); *Daybell, Watts-Jones & Co.* (for the landlord).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WHITLEY *v.* WHITLEY (by her Guardian).

[Probate, Divorce and Admiralty Division (Barnard, J.), November 20, 22, 1946.]

Divorce—Incurable unsoundness of mind—Care and treatment for five years—Admission of respondent wife as temporary patient on application of husband—" Detention pursuant to order "—Matrimonial Causes Act, 1937 (*c.* 57), *ss.* 2 (*d*), 3 (*a*), (*b*).

On Dec. 6, 1936, on the application of a husband, supported by recommendations by two medical practitioners, his wife was admitted to a mental hospital as a temporary patient. On June 5, 1937, she was discharged therefrom relieved, but was readmitted as a voluntary patient and remained there ever since. It was established as a fact that the wife was incurably of unsound mind and that she had been under care and treatment for over five years :—

Held : although between Dec., 1936, and June, 1937, the wife had been properly detained as a temporary patient pursuant to the Mental Treatment Act, 1930, s. 5, she was not detained during that period in pursuance of an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, within s. 3 (*a*) of the Matrimonial Causes Act, 1937, and so her treatment as a voluntary patient did not follow " a period of such detention as aforesaid " within s. 3 (*b*), and, therefore, the husband was not entitled to a decree.

[For the Mental Treatment Act, 1930, s. 5, see HALSBURY, Hailsham Edn., Vol. 23, p. 157 ; and for the Matrimonial Causes Act, 1937, ss. 2, 3, see *ibid*, Vol. 30, pp. 336, 337.]

Cases referred to :

(1) *Benson* v. *Benson*, [1941] 2 All E.R. 335 ; [1941] P. 90 ; 110 L.J.P. 43 ; 165 L.T. 172 ; Digest Supp.

(2) *Murray* v. *Murray*, [1940] 4 All E.R. 250 ; [1941] P. 1 ; 110 L.J.P. 1 ; 164 L.T. 199 ; 104 J.P. 447 ; Digest Supp.

(3) *Crutchfield* v. *Crutchfield* (1946), 62 T.L.R. 661.

Petition by a husband for divorce on the ground that his wife was incurably of unsound mind and had been continuously under care and treatment for a period of five years immediately preceding the presentation of the petition. The facts are set out in the judgment.

D. Tolstoy for the husband.

A. Stuart Horner for the wife.

Cur. adv. vult.

Nov. 22. Barnard, J. : This is a case in which the husband, suing as a poor person, is asking the court to dissolve his marriage with his wife on the ground that she is incurably of unsound mind and has been continuously under care and treatment for a period of five years immediately preceding the presentation of his petition, and he asks the court to exercise its discretion in his favour, he having committed adultery. The wife, by the Official Solicitor, her guardian *ad litem*, has filed an answer to the petition in which she denies that she is incurably of unsound mind and also denies that she has been continuously under care and treatment for the necessary period of five years.

The parties were married on Feb. 8, 1936. There is only one child of the marriage, a boy born on July 22, 1936. The husband told me in his evidence that shortly after the birth of that child his wife became peculiar, that on Dec. 6, 1936, on his application she was admitted to the West Riding Mental Hospital, Wakefield, as a temporary patient, and that on June 5, 1937, which was six months after the date of her admission as a temporary patient, she was discharged therefrom relieved, but was re-admitted as a voluntary patient and has remained there ever since. I have had the evidence on affidavit of two medical men, one the medical superintendent of the West Riding Mental Hospital, and the other a Dr. Pearce, a psychiatrist and psychologist. The medical superintendent states in his affidavit that the wife, ever since Dec. 3, 1937, when he became the superintendent, has been continuously under his care and treatment, and he goes on to say that, in his opinion, in the light of present day medical knowledge her recovery is improbable. Dr. Pearce, who examined the wife in Feb., 1942, says that in his opinion she was suffering from schizophrenia and is incurable.

I am satisfied on that evidence that the wife is incurably of unsound mind. I also am equally satisfied that she has been under care and treatment for five years and longer, but the five years' care and treatment which is a necessary ingredient of this charge has been carefully defined by statute. Section 2 (*d*) of the Matrimonial Causes Act, 1937, provides that a petition for A divorce may be presented on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition." Paragraphs (*a*) and (*b*) of s. 3 define what is meant by "care and treatment" under that section. Section 3 (*a*) provides that a person of unsound mind shall be deemed to be under care and treatment "while he is detained in pursuance of any order or inquisition under the Lunacy and Mental B Treatment Acts, 1890 to 1930 . . ." The rest of the section is inapplicable. Section 3 (*b*) adds: "while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid."

Counsel for the husband has sought to persuade me that the application which the husband made in this case is an order under the Lunacy and Mental Treatment Acts, 1890 to 1930, and it must be borne in mind that this applica- C tion set in motion the machinery of the Lunacy and Mental Treatment Acts, 1890 to 1930. I think it is not unimportant to look at the actual form of application in this case. It is headed: "Form of application for reception of a temporary patient," and it goes on: "I, Horace Whitley,"—giving his address —"hereby request you to receive Mary Elizabeth Whitley as a temporary patient into the Wakefield Mental Hospital." As part of the form there are two D recommendations for the temporary treatment of Mary Elizabeth Whitley by two medical practitioners. I need not repeat what they say in their recommendations, but their joint recommendations conclude in this way: "the said Mary Elizabeth Whitley is suffering from mental illness, is likely to benefit by temporary treatment, and is for the time being incapable of expressing herself as willing or unwilling to receive such treatment . . . It is expedient with a view to the said Mary Elizabeth Whitley's recovery that she should be received E into the Wakefield Mental Hospital for a period not exceeding six months." In the course of his argument counsel referred me to a number of forms of orders used under the Lunacy Act, 1890, in some of which you will find used, not the word "order," but either the words: "I authorise you to receive the patient," or: "I direct you to receive the patient," and so on, but counsel was unable to refer me to any form of order in which the words were: "I request you to receive so and so as a patient."

F In considering this matter, it is not unimportant to consider how and why the Mental Treatment Act, 1930, came into being at all. The answer is fairly obvious. Until that Act was passed it was almost impossible for any person suffering from a mental disease or illness to receive care and treatment unless there was an order and certification, and the Act was passed to enable people, more especially if there was any chance of recovery, to receive such treatment without the stigma of an order and certification.

G It is, I think, clear, that under the Matrimonial Causes Act, 1937, no matter how long a respondent may remain a voluntary patient, be it ten, fifteen, or twenty years, unless care and treatment as a voluntary patient is preceded by an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, care and treatment as a voluntary patient *per se* cannot amount to care and treatment under the statute. Although the Mental Treatment Act, H 1930, in its main purpose was passed to deal with voluntary patients, there are one or two sections which apply to temporary patients. It is not unimportant to look at those. Section 5 deals with temporary treatment without certification, and s. 5 (1) is as follows:

> Subject to the provisions of this section, a person who is suffering from mental illness and is likely to benefit by temporary treatment but is for the time being incapable of expressing himself as willing or unwilling to receive such treatment may, on a written application duly made in accordance with the provisions of this section but without a reception order, be received as a temporary patient for the purpose of treatment.

Then follows the class of places to which a temporary patient can be sent. Sub-sections (2), (3), (4) and (5) deal with the recommendations signed by the medical practitioners which accompany the form of application, and sub-s. (6) provides :

> Where a person is received as a temporary patient under this section, notice of his reception together with a copy of the application on which he was received and of the recommendation accompanying the application shall, before the expiration of the second day after the day on which he was received, be sent, in the case of a patient received into an institution which has a visiting committee, by the clerk of the institution to the Board of Control and to the clerk of the visiting committee, and, in any other case, by the person in charge to the Board of Control and to the clerk to the visitors of licensed houses for the district in which the patient is. The Board of Control shall upon the signed request of any person who considers himself to be unjustly detained under such application or recommendation furnish to him or to his authorised representative free of cost a copy of such application or recommendation.

That sub-section is obviously there to protect a person who is being detained under this section. Sub-section (11) is important. It reads as follows :

> Subject to the provisions of this section a person received as a temporary patient may be detained for a period not exceeding six months but shall not be detained as such for any longer period.

By a proviso to sub-s. (12) :

> If a person who has been received as a temporary patient becomes capable of expressing himself as willing or unwilling to continue to receive treatment, he shall not thereafter be detained for more than twenty-eight days unless in the meantime he has again become incapable of so expressing himself.

By sub-s. (13) :

> Where it is anticipated that a person who is undergoing treatment as a temporary patient under this section will not recover within the period of six months, but his early recovery appears reasonably probable, that period may from time to time be extended for further periods of such length not exceeding three months as may be specified in directions given by the Board of Control upon the application of one of the persons mentioned in sub-s. (2) of this section, made in such form and accompanied by such evidence or recommendations as the Board may by rules made under s. three hundred and thirty-eight of the principal Act prescribe, provided that such further periods shall in no case exceed six months in all.

That means that when a temporary patient has been detained for a period of six months it is possible, if it is considered that further treatment is likely to lead to his recovery, to detain him, always provided that he is still unable to express his willingness or unwillingness to be detained, for two further periods, but he cannot be detained in all for a period longer than twelve months. At the end of twelve months one of two things must happen. In sub-s. (14) for the first time one comes on the word " order " :

> The Board of Control may at any time order—that (i) any person received as a temporary patient shall be discharged ; or (ii) that steps shall be taken to deal with him under the principal Act as a person of unsound mind.

That is to say, steps shall be taken to procure a reception order. If one looks at the Mental Treatment Act, 1930, it may fairly be said that it is impossible for anyone to be detained under that Act in pursuance of an order, but I do not think that it is possible to consider that Act by itself because, by s. 22, the Act is to be construed as one with the principal Act, that is the Lunacy Act, 1890, so that a reception order or an urgency order is an " order under the Lunacy and Mental Treatment Acts, 1890 to 1930."

Counsel for the husband relies to some extent on s. 5 (13) of the Mental Treatment Act, 1930. He referred to *Benson* v. *Benson* (1) where the respondent was received as a temporary patient into a mental hospital in Sept., 1933. On Mar. 1, 1934, the Board of Control directed, under s. 5 (13), that the period of treatment be extended for three months. Before the end of the three months the respondent was discharged relieved, but was admitted into another mental hospital as a voluntary patient. Lord Merriman, P., in his judgment, found that the direction of the Board of Control to detain the patient after the first six months expired was an order under the Lunacy and Mental Treatment Acts, but those are not the facts in this case. In this case no such direction was given, but counsel does rely to a certain extent on what the President said in the course of his judgment. Referring to the Mental Treatment Act, 1930, and to the discontinuance of the terms "asylum," "lunatic," etc., the President said ([1941] P. 90, at p. 94 ; [1941] 2 All E.R. 335, at p. 338) :

> I think it may fairly be said that, under the euphemisms which we are very wisely enjoined by s. 20, sub.s. (5), to employ for the future in the interests of patients there is the iron hand of compulsion, however effectually it may be concealed by the velvet glove . . . Without going into unnecessary detail, the effect of s. 1 is to substitute the volition of the patient for an order made by some authority, and to substitute the recommendation of a doctor for a certification.

For myself I think instead of using the word "substitution" I should have preferred the word "addition" or possibly the word "alternative." Order and certification remain in addition to volition, but because the President so expressed himself in the course of a long judgment and dealing with quite a different case from the present, it does not seem to me to follow that I have got to read the word "order" in substitution for the word "application" and the word "authorise," or, possibly, the word "direct," in substitution for the word "request."

I have been asked in this case to dissolve the marriage of a person who cannot by reason of mental illness come here to uphold the marriage, and I consider it is my duty to construe s. 2 (*d*) of the Matrimonial Causes Act, 1937, strictly. That was the view taken by the Court of Appeal in *Murray* v. *Murray* (2). The difficulty in that case was quite different from the one in the matter now before me. In 1935 a wife who had been certified was discharged relieved, but not recovered, from a mental hospital under s. 25 of the Lunacy Act for the purpose of her being detained at an institution technically called a "workhouse." To effect that transfer three things were necessary : a discharge from the mental hospital, the opinion of the medical officer of that institution and his certificate, and the certificate of the medical officer of the workhouse. For some reason or other the medical officer of the workhouse failed to supply a certificate, but LORD GREENE, M.R., in his judgment, said ([1941] P. 1, at p. 7) :

> This is a case of great hardship, and much though I sympathise with the present appellant, all I can do is to administer the law as enacted by Parliament, and according to the best of my understanding . . . The safeguards which the legislature has laid down in those Acts, in order to ensure that detention on the ground of lunacy or something short of lunacy shall only take place in proper cases, are strict, and unless they are strictly observed, the detention of an alleged lunatic is illegal. Accordingly, when the legislature laid down this stringent test, which must be satisfied before a person can be said to be under care and treatment, it is required that those measures shall be carried out according to the letter of the law. This case shows and other cases have shown that those measures under the Lunacy and Mental Treatment Acts in the case of pauper lunatics are very frequently—and I speak from some experience—not strictly carried out. Sometimes it happens through an oversight, and sometimes it happens through carelessness : sometimes it happens, as we are told in this class of case it has happened, through a misapprehension as to the legal obligation ; but I cannot doubt that there are many cases of pauper lunatics where, owing to some failure to put the proper machinery strictly into operation, a spouse will be deprived of the benefit of the Matrimonial Causes Act and will be unable, on what very often must be a highly technical ground, to obtain relief. In the present case we are told that there has been a certain view taken as to the requirements of the Acts in cases of this kind. That view, which I shall refer to presently, in my opinion, is a mistaken view. The fact that it has been taken and widely held must mean, if my opinion is right, that there are many, many cases where the Matrimonial Causes Act, for a technical reason and for no reason of substance, will fail to operate, and it may well be that the legislature will think it right to take that matter into consideration, if and when an amendment of that Act comes to be considered.

Counsel for the husband put forward what seemed at first sight to be a somewhat convincing argument in his client's favour. He contended that it would be very odd for the legislature to provide for care and treatment as a voluntary patient to count as a part of the five years' care and treatment, provided, of course, that it was preceded by an order, but to exclude care and treatment as a temporary patient, bearing in mind that a voluntary patient can express the wish to be treated and a temporary patient cannot. He urged that what precedes detention as a temporary patient must be treated as an order, but when I come to consider the circumstances in which a person becomes a temporary patient I cannot visualise how that could happen after a reception order and without any interval of time. For instance, if a person is detained under a reception order I can well understand the time coming when the patient so far recovers that the authorities think it proper to discharge the order, but the patient, for some reason or other, unwilling to face the world, elects to stay on as a voluntary patient. If, however, the patient is unable to express himself or herself, I cannot understand any authority discharging the order. I can understand a patient being discharged and then (the interval may only be a day) being admitted as a temporary patient on the application of some near relative, but in that case the continuity of the care and treatment would be broken and, therefore, the Act could not in any circumstances apply. It may be that there is a defect in the Act and the word "temporary" should have been included in s. 3 (*b*) as well as the word " voluntary," but I can only deal with the Act as I find it.

As I have already said, I consider it my duty to construe this Act strictly, and under no stretch of the imagination can I construe the word " application " as " order," or the word " request " as " authority." Undoubtedly, the wife was detained as a temporary patient pursuant to s. 5 of the Mental Treatment Act, 1930, and obviously she was properly detained, but, in my view, she was not detained in pursuance of any order under the Lunacy and Mental Treatment Acts, 1890 to 1930.

I do not think it necessary to refer to it in any detail, but in *Crutchfield* v. *Crutchfield* (3)*, Jones, J., found that the respondent was not detained under any order, but was detained legally for a short time pursuant to s. 20 of the Lunacy Act, 1890.

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*CRUTCHFIELD *v.* CRUTCHFIELD (BY HER GUARDIAN)

[Probate, Divorce and Admiralty Division (Jones, J.), August 14, 1946.]

Divorce—Incurable unsoundness of mind—Care and treatment for five years—Removal by relieving officer to mental home for two days—Subsequent admission to another mental institution as a voluntary patient—Whether detention pursuant to order—Lunacy Act, 1890 (*c.* 3), *s.* 20—*Matrimonial Causes Act,* 1937 (*c.* 57), *ss.* 2 (*d*), 3 (*a*), (*b*).

By virtue of the powers conferred on him by the Lunacy Act, 1890, s. 20, a relieving officer directed the removal of a married woman, admittedly of incurable unsound mind, to a mental hospital, where she was kept until she was taken away by her husband two days later and admitted as a voluntary patient at another mental institution :—

Held : the wife was not detained in the mental hospital in pursuance of an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, and the husband was, therefore, not entitled to a decree.

Petition by husband for divorce on the ground that his wife was incurably of unsound mind and had been continuously under care and treatment for a period of five years immediately preceding the presentation of the petition.

R. T. Barnard for the husband.
W. Harvey Moore for the wife.

Jones, J. : In my view, the wife, though admittedly incurably of unsound mind, has not been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Therefore, in my view, she has not been detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, as required by the Matrimonial Causes Act, 1937, s. 3. It is suggested, on behalf of the husband, that she was detained in pursuance of an order which a relieving officer purported to give in a form which bears the appearance of an authorised form stating the order of some constituted authority, but the only power that the relieving officer had was such power as was given him under the Lunacy Act, 1890, s. 20, and that was to remove the lunatic (the respondent in this case) to the hospital, and that he did because he thought it was necessary for the public safety or the lunatic's welfare ; and when he had removed her to the hospital, the superintendent of that hospital, in pursuance of the discharge of the duty imposed upon him by s. 20, received her there, and she was kept there for two days. After that time she became a voluntary patient in some other mental institution. It is suggested that what the relieving officer did was to give an order under which the medical superintendent acted. In my view, he had no power to give any order, and he did not give any order. He merely removed the patient to the hospital. Such duty as was imposed on the superintendent of the hospital was not imposed by any order or act of the relieving officer, but by the section itself. At the end of the section there occur the following words : " No person shall be so detained for more than three days, and before the expiration of that time, the constable, relieving officer, or overseer shall take such proceedings with regard to the alleged lunatic as are required by this Act."

It seems to me that, if the arguments of counsel for the husband were right in this case, s. 3 (*a*) of the Matrimonial Causes Act, 1937, would not be worded in the way it is. If his argument is right, the words : "order" and "inquisition" would be superfluous. The wording of the statute would be : "While he is detained under the Lunacy and Mental Treatment Acts." As I have already said, I think that the words "order" and "inquisition" have a very important meaning which it is my duty to construe strictly. Therefore, the husband has, in my view, failed to establish his case, and this petition must be dismissed.

Petition dismissed.

Solicitors : *D. Herbert Jones* (for the husband) ; *Official Solicitor* (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

The next step that the relieving officer, no doubt, would have taken if the patient had not been removed by her husband in two days' time from this hospital was to notify a justice of the peace who then would take the proper steps to have the patient certified. When that had been done, but not until those steps had been taken by the relieving officer and the justice of the peace, an order for the detention of this patient would come into existence. In my view, no such order was made in this case and, if the respondent was detained at this hospital—as to which I have some doubt—I am satisfied she was not detained under an order. I should be satisfied she was not detained there, but for the fact that the word "detained" is actually used by s. 20, and that, undoubtedly, creates a difficulty, but, although the word is used by s. 20, the proceeding which it is used to describe does not appear to me to amount so much to detention as to the placing of the patient in a place for a short period of time merely to safeguard him and to prevent him from coming to injury which might occur to him if he were left at liberty. In these circumstances I must hold that the husband has failed to make out his case, and the petition must be dismissed.

Petition dismissed with costs.

Solicitors : *J. A. Ramsey* (for the husband) ; *Official Solicitor* (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

ROBINSON *v.* DONOVAN.

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), November 19, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Premises required by landlord for own occupation—"Greater hardship"—Burden of proof—Discretion of judge—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1) *and* (3), *sched. I, para.* (*h*).

Under the proviso to para. (*h*) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the burden of proof is on a tenant to show that greater hardship would be caused by granting an order for recovery of possession than by refusing it. (*Sims* v. *Wilson* (2) followed). The intention of the proviso is to give the judge a discretion to take into account all the circumstances on both sides to which reference is made in para. (*h*) and to make up his mind whether the tenant has proved that, in spite of the accommodation being wanted by the landlord as a residence for himself, the hardship on the tenant would be so great that an order for recovery of possession ought not to be granted.

[AS TO RECOVERY OF POSSESSION OF PREMISES REQUIRED FOR OCCUPATION BY LANDLORD OR HIS FAMILY, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396 ; and FOR CASES, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Cases referred to :
(1) *Fowle* v. *Bell, ante* p. 668.
(2) *Sims* v. *Wilson, ante* p. 261.

APPEAL by the tenant from Blackpool County Court.

The landlord originally based his claim on s. 3 (1) and (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, but at the trial he obtained leave to amend his claim so as to get the benefit of para. (*h*) of sched. I to the Act. The county court judge made an order for possession, and the tenant appealed.

T. Heywood for the tenant.
H. Heathcote-Williams for the landlord.

SCOTT, L.J.: This is an appeal from the decision of a county court judge who granted to the landlord, who was the owner, an order for possession of her house. The tenant appeals. The claim was originally based on s. 3 (1) and (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which deals with the making of orders for possession where the court is satisfied that suitable alternative accommodation is available for the tenant, but at the trial the claim was amended by leave of the court, so as to enable the landlord to get the benefit of the provisions of sched. I to the Act which are as follows:

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for—(i) himself . . . Provided that an order or judgment shall not be made or given on any ground specified in para. (*h*) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

Under the Act the judge is the final arbiter whether those various conditions are satisfied, in so far as they are questions of fact. The question that arises on the issue of greater hardship under the words I have read is clearly one in which the burden of proof is on the tenant. That has been held by the Court of Appeal in *Fowle* v. *Bell* (1), and also in *Sims* v. *Wilson* (2), where MORTON, L.J., expressed that view in unequivocal terms, and SOMERVELL and ASQUITH, L.JJ., agreed with his judgment.

I asked the tenant's counsel what was the question of law on which he relied for the purposes of his appeal, and I think he was necessarily driven to the answer that there was no evidence in the court below to show that the greater hardship was where the judge held it to be. That answer in this case seems to me a misconception of the class of issue of fact that is raised by para. (*h*). The proviso to para. (*h*) of sched. I is intended to give to the county court judge a discretion which will enable him to take into account all the circumstances on both sides to which reference is made in the paragraph and to make up his mind whether it is a case in which the tenant proves that, in spite of the accommodation being wanted by the landlord for his or her own personal residence, yet the hardship on the tenant would be so great that he ought to refuse possession. In the present case the judge decided in favour of the landlord, and I can see no ground for saying that he did not arrive at his conclusion on the issue raised under para. (*h*) on ample evidence. If there was any evidence to support his decision we cannot interfere with it. It is most important in these cases that this court should not interfere with findings of fact where there is evidence to support them.

BUCKNILL, L.J.: I agree.

SOMERVELL, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. H. Milner & Son*, agents for *L. M. Lever & Co.*, Manchester (for the tenant); *Sharpe, Pritchard & Co.*, agents for *Jacob Parkinson & Co.*, Blackpool (for the landlord).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SOPHIAN *v.* A. J. CLIFFORD & SON (a firm)

[COURT OF APPEAL (Scott, Bucknill and Somervell L.JJ.), November 14, 1946.]

Bankruptcy—Judgment debt—Act of bankruptcy—Application by debtor that payment be by instalments—Order for instalments made without notice to creditors—Interference with creditor's right to proceed by bankruptcy petition —County Court Rules, Ord. 24, *r.* 19.

On Jan. 31, 1946, a debtor under a judgment in the county court was served with a bankruptcy notice with which he failed to comply by Feb. 8, thus committing an act of bankruptcy. On Feb. 8, also, the debtor took out a summons in the county court asking for an order that the debt should be payable by instalments. On Feb. 19 the summons was adjourned for one month to enable the judgment creditor to file a petition in bankruptcy, which he did not do within that time. On Mar. 21, the debtor renewed his application for an instalment order *ex parte*, and was granted an order for payment by instalments which did not come to the creditor's knowledge until May 2 when he filed the bankruptcy petition.

HELD : the judge was wrong, in the absence of, and without notice to, the creditor, in making the order for instalments, the effect of which was to stultify the right of the creditor to proceed by bankruptcy petition and must be set aside.

[AS TO ISSUE OF BANKRUPTCY NOTICE AND POSITION ON NON-COMPLIANCE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 32-45 ; and FOR CASES, see DIGEST, Vol. 4, p. 86 *et seq.*, Nos. 777, 791, 836, 843-5, 920, 923.]

APPEAL of plaintiff from an order of His Honour DEPUTY JUDGE MONIER-WILLIAMS, made at Bloomsbury County Court, and dated June 24, 1946. The facts appear in the judgment of SCOTT, L.J.

T. Humphrey Tilling for the plaintiff.

The defendants did not appear.

SCOTT, L.J. : This is a case in which the order of the deputy county court judge under appeal must have been made *per incuriam*. In an action in the Bloomsbury County Court, judgment was given against the defendants for a sum which, with costs, apart from those of the third party, amounted to £133 19*s*. 2*d*., and judgment for this amount was entered for the plaintiff on Mar. 5, 1945. By Jan., 1946, the defendants had only paid £12. On Jan. 27 a bankruptcy notice was issued against him for £121 19*s*. 2*d*., and on Jan. 31 it was served on him. He failed to comply with it by Feb. 8, thus committing an act of bankruptcy. On the same day the defendants took out a summons in the county court returnable on Feb. 19 asking for an order that the debt should be payable by instalments. On Feb. 19, the county court judge adjourned the summons for a month to enable the plaintiff to file a bankruptcy petition. The plaintiff did not file the petition within the month, and on Mar. 21 the defendant restored his application for an instalment order, but gave no notice of it to the plaintiff, nor did the plaintiff receive any notice from the court. On that day the judge made an order for payment of the judgment debt at the rate of £8 a month. That order obviously was inconsistent with the plaintiff's right, under the Bankruptcy Act, to proceed by way of bankruptcy notice and ask for a receiving order on its being disregarded. The plaintiff knew nothing about the judge's order until May 2 when he filed a bankruptcy petition. On May 31 the petition came before the bankruptcy registrar, and the plaintiff, as petitioning creditor, then informed the registrar of the order for £8 a month. Thereupon the registrar adjourned the hearing of the petition to give the plaintiff time to deal with the matter. On June 24 the plaintiff applied to the county court judge to have the order for payment by instalments set aside, and the judge refused to do so. In my view, the judge, having made the original order for payment of a lump sum, became bound thereafter not to make any order under the power conferred by the Rules of the County Court for payment by instalments without notice to the creditor, and, if the creditor appeared, not without hearing him on the debtor's application.

Order 24, r. 19, of the County Court Rules provides :

> If it appears to the court that the person liable under any judgment or order for payment by instalments is able to pay the sum ordered to be paid, either in one sum

> or by larger instalments than those ordered, the court may, on the application of the person entitled to enforce the judgment or order made on notice, order the amount unpaid to be paid in one sum, or by larger instalments than those previously ordered, and may, from time to time, vary such order.

It is clear from that provision that the county court judge had ample power to revise the order he had made for payment of this very substantial debt by instalments, but, for some reasons, he refused to make any alteration in that order. The appeal is from that refusal.

In my view, it is clear that the judge ought never, without hearing both sides, to have made the order of Mar. 21 altering the previous order for the immediate payment of a lump sum into an order for the payment of a series of small instalments over a period of time. He ought to have preserved for the plaintiff the right that he had under the law to proceed by bankruptcy petition. When the plaintiff asked for the instalments order to be rescinded, in my opinion, he was entitled to it *ex debito justitiae* having regard to the mistake that had been made by the court, and why the county court judge refused to rescind the order I do not understand. The right to proceed for payment by instalments in the county court is very valuable. It enables the plaintiff to get his money in the easiest way from the defendant, but where, on a judgment debt for a substantial amount, there has been a bankruptcy notice served on the debtor with a resulting act of bankruptcy, and the creditor proposes to file a petition in bankruptcy, he is entitled to exercise the right which the law provides. I can see no grounds either in justice or in discretion for the order which was made, and it must be reversed. The order must be set aside, leaving the judgment standing and the bankruptcy notice effective as it was originally when it was served. The appeal is allowed with costs.

Bucknill, L.J.: I agree that this order should be set aside. The court is in rather a difficult position because the debtor is not here and the creditor was not present when the order was made. Speaking for myself, I should have had some doubt whether it is for the debtor to apply to the court for an order to pay by instalments when an order has been made for payment of the full amount. I should have thought that, if the creditor were taking some steps to enforce the order, it was for the debtor to take action other than by such an application. However that may be, I do not think it is necessary to decide that to-day. It is clear there was a miscarriage of justice, and that a very important right of the creditor was stultified by this order of the county court judge, which was made in the absence of the creditor and without any notice that the application would be heard. I am also influenced by the fact that I am told that, if the debtor has got any merits which would justify suspension of the payment of the full amount and the making of an order for payment by instalments, he can raise that matter before the registrar in bankruptcy, who may postpone the receiving order to see how the debtor shapes.

Somervell, L.J.: I agree that the appeal should be allowed. It seems clear that the order must be set aside for the reasons that have been given. As the debtor is not here and there are other considerations which justify the conclusion to which the court has come, I do not propose to say anything about the interesting submission of counsel for the plaintiff that the county court judge had no jurisdiction to make the order which he did, apart from the fact that no notice was given by the judgment debtor to the creditor on restoration of the summons for payment by instalments. The question of jurisdiction can be considered if, on the facts in some other case, it is necessary to decide it. The trouble here has arisen from the fact that the plaintiff did not receive notice of the summons being restored by the defendant. There is no reason to suppose anybody acted improperly. The defendant's solicitor may have thought the court would give the plaintiff notice. If counsel is right in saying that there is some doubt about the matter under the rules, it might be considered whether it would be desirable to make it clear that the party restoring the application must give notice to the other side.

Appeal allowed with costs.

Solicitor: *Godfrey A. Elkin* (for the plaintiff).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

In the Estate of OATES, CALLOW *v.* SUTTON.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (Jones, J.), November 13, 1946.]

Wills—Alterations apparent in will—Interlineation—Whether made before execution of will—Evidence—Onus of proof—Testator's intention—Statements by testator before execution of will—Draft will.

In 1939 a testatrix made a will which was prepared by a solicitor. By this will she gave the residue of her " real and personal estate " to her two sisters, E. and C., or the survivor of them. In 1940 E. died, and in 1941 the testatrix executed another will which had been written out by herself. The contents of this were almost identical with those of the earlier will, except that another executrix was appointed in the place of E., and that the residue was given to C. instead of to E. and C. or the survivor of them. In the later will, however, the testatrix had written the two words " and personal " as an interlineation between the words " real " and " estate ". The executrix of the later will contended that the will should be admitted to probate with those words. A duplicate of the will of 1941, marked " copy," which had been written out by the testatrix herself and in which the words " and personal " were written in the same line as and between the words " real " and " estate " was put in evidence and the judge was satisfied that this document had been written before the document submitted as the will of 1941, and was, in fact, a draft of that will :—

HELD : (i) the onus was on the executrix to establish that the two words were written in before the will was executed.

(ii) the court was entitled to look at statements made by the testatrix before the execution of the will as evidence of her intention.

Doe d. Shallcross v. *Palmer* (1) *followed.*

(ii) it being quite clear from the will of 1939 and the draft of the will of 1941 that it was always the intention of the testatrix to give the whole of her residue to her sister C. in the events that had happened, the executrix had discharged the onus which was on her of establishing that the interlineation was made before the will was executed.

[AS TO VALIDITY OF ALTERATIONS IN WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 70-73, paras. 94-97 ; and FOR CASES, see DIGEST, Vol. 44, pp. 306, 307, Nos. 1369-1388, and pp. 308-315, Nos. 1394-1475.]

Cases referred to :

(1) *Doe d. Shallcross* v. *Palmer* (1851), 16 Q.B. 747 ; 20 L.J.Q.B. 367 ; 17 L.T.O.S. 252 ; 15 J.P. 689 ; 44 Digest 313, *1462*.

(2) *Birch* v. *Birch* (1848), 1 Rob. Eccl. 675 ; 6 Notes of Cases 581 ; 12 L.T.O.S. 334 ; 44 Digest 313, *1453*.

PROBATE ACTION to determine whether a will in which two words had been written by the testatrix as an interlineation should be admitted to probate with those two words. The plaintiff (the executrix of the will), sought to establish that those two words had been added by the testatrix before the execution of the will.

H. Ifor Lloyd for the plaintiff.

Leslie Brooks for the defendant.

JONES, J. : In 1939 the testatrix made a will which was prepared by Mr. Box, a solicitor. By this will she gave a number of legacies and left the residue of her estate to two of her sisters, Ella and Constance. Ella died in 1940, and in 1941 the testatrix executed another will, which she had written herself. The contents of that second will are, as counsel agree, almost exactly the same as the contents of the 1939 will. One substantial alteration was that one Miss Callow was appointed executrix in place of the sister Ella who had died, and the solicitor, Mr. Box, was also appointed an executor. The only other material alteration is that the testatrix gave the residue of her estate to her sister Constance instead of giving it to her sisters Constance and Ella, as she had done in the former will.

The point for my decision arises from the fact that, in making the will of 1941, the testatrix wrote two words " and personal " between two of the lines which she had written out, and the question is whether the will should be admitted to probate with those two words. The clause in question, with the addition of the two words " and personal ", is exactly the same as the corresponding clause in the will of 1939, but *prima facie*, as the words have been written in in that way, although there seems to be some doubt whether there is an actual presumption that they were written in after the execution of the will, there is, at any rate, an onus on the person who would benefit if the will be admitted to probate with those words, and, therefore, on the executrix in this case, to establish to the satisfaction of the court that they were written in before the will was executed.

There is no evidence to the effect that those words were seen in the will before it was executed. I can look at the statements which the testatrix made before the execution of the will, but I am not entitled to take into consideration the statements she made after the will was executed. The only evidence there is consists of statements made by her as to her intentions, and I have to be satisfied that I can accept those statements as evidence that these words were in the will before the will was executed. It appears to me that the authorities to which counsel for the plaintiff has referred justify me in taking the view that I am entitled to look at such statements as being evidence of this fact, and this proposition seems to be stated most clearly in the headnote to *Doe d. Shallcross* v. *Palmer* (1) :

> Alterations apparent on the face of a will are to be presumed to have been made after the will was executed, until evidence to the contrary is adduced. [Then the facts are set out]. *Held*, that it was necessary for the defendant to rebut the presumption of the alterations having been made after the will was executed by adducing some evidence of their having been made before. Also, that the declarations of the testator made before the execution of the will were admissible evidence from which a jury might draw that inference, since the alteration was made in furtherance of an intention shown to have existed before the execution of the will.

I feel, therefore, at liberty to consider what evidence there is of the intention of the testatrix with regard to her will, and it seems to be clear that her intention always was to give the residue of her estate to these two sisters in equal shares, if they survived her, and to give the whole of the residue to one of them if one pre-deceased her and the other survived her. That appears clearly to have been her intention from the fact that that is what she did in the will of 1939. Then one sister died. It was not necessary, except for the purpose of appointing a new executor or executrix, that she should have made a new will or codicil, but she thought it was. This time, instead of getting a solicitor to act for her, she got a will form and proceeded to make her own will. When she did so, she took advantage of the fact that she had before her the precedent of a will that had been prepared by Mr. Box, and it is fairly clear that, because she was going to make hardly any alteration to the will, she made her new will by copying out what Mr. Box had put in the preceding will with a few alterations. I am sure that, if she had wanted to make any substantial alteration in her will, she would have instructed Mr. Box, but, as she wanted to make only these slight alterations, it is not unreasonable to suppose that she thought she could do it quite well on this form. She had instructed Mr. Box to provide in the earlier will that the residue went to these two sisters or the survivor of them. One of of them had died, and it is reasonable to suppose that what she would want to do was to divert the whole of the residue to the survivor. If these words " and personal," which she has written between these two lines, are admitted to probate, she will have achieved that object. I have no doubt that that is what she intended to do, and I am satisfied by this evidence of her intention that that is, in fact, what she did do.

Counsel for the plaintiff has said that the testatrix was clearly a careful woman, and the evidence appears to justify this statement. She discussed the matter with her friend, Miss Callow, who was appointed executrix, and she told Miss Callow that she intended to leave the residue of the real and personal estate to her sister Madge, by which name her sister Constance was sometimes called. She wrote out the whole document. She did it very carefully and only made this one mistake. I have to consider whether I am satisfied that that is the reasonable view to take, and I am encouraged to think that I can take what must be the reasonable view from the observations of Sir Herbert Jenner Fust in *Birch* v. *Birch* (2). I am satisfied that what this testatrix did first was to make a draft. Maybe she intended it to be the actual will, but it did not quite fit into the form, and she marked it "Copy." I am satisfied it was prepared before the other document and was a draft of the will, and it is interesting to see that in it these words "and personal" are written in the same line as the words "real" and "estate" which precede and follow them. I think that what she did was to prepare this draft and make a copy of it, the copy being the document which was subsequently executed as a will, and, while doing that, she made the mistake of leaving out these two words. I think it reasonable to suppose that she probably noticed that mistake immediately and corrected it immediately. It is impossible looking at the document with a rather unskilled eye, to come to a conclusion other than that it was done at the same time. Being at liberty—as I think I am, on the authorities cited to me—to have regard to what she intended, I come to the conclusion that the presumption, if there is a presumption, that the interlineation was made after the will was executed has been rebutted. I put it in another way, namely, that the plaintiff has discharged the onus that is on her to satisfy me that the words "and personal" were written by the testatrix in this will before she executed it. In these circumstances, therefore, I shall pronounce that the will dated Apr. 14, 1941, with the words "and personal" appearing as an interlineation on the twenty-fifth line of the second page be admitted to probate.

Order accordingly.

Solicitors: *W. M. Box & Co.* (for the plaintiff); *Andrew, Purves, Sutton & Creery* (for the defendant).

[*Reported by* R. HENDRY WHITE, *Barrister-at-Law.*]

MARKHAM, F. D. *v.* MARKHAM, G. N.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Byrne, J.), October 23, 29, 1946.]

Summary Jurisdiction—Maintenance order—Revival—Husband and wife—Desertion by husband—Order for maintenance—Desertion condoned by resumption of cohabitation—Subsequent persistent cruelty—Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 7—*Criminal Justice Administration Act,* 1914 (*c.* 58), *s.* 30 (3)—*Money Payments (Justices Procedure) Act,* 1935 (*c.* 46), *s.* 9.

On May 21, 1941, a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, was made in favour of a wife on the ground of desertion, but she and her husband resumed cohabitation shortly afterwards. By a summons dated June 20, 1946, the wife applied to have the order revived and varied on the ground of her husband's persistent cruelty after the resumption of cohabitation.

HELD: (i) there was power under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, read with the Criminal Justice Administration Act, 1914, s. 30 (3), as amended by the Money Payments (Justices' Procedure) Act, 1935, s. 9, to "revive" a maintenance order made in favour of a wife under the Summary Jurisdiction (Married Women) Act, 1895, but "further evidence" was required where the substance, as opposed to the monetary part, of the order was being dealt with.

(ii) the order of May 21, 1941, ceased to have effect by reason of the condonation of the husband's previous misconduct by the resumption of cohabitation, but the husband's misconduct after resumption of cohabitation was "further evidence" to warrant revival of the order.

Pratt v. *Pratt* (8) *followed.*

[AS TO DISCHARGE AND VARIATION OF ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565-568, Nos. 6237-6256.

AS TO RESUMPTION OF COHABITATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 842, para. 1344; and FOR CASES, see DIGEST, Vol. 27, p. 565, No. 6241.]

Cases referred to:

(1) *Underwood* v. *Underwood,* [1945] 2 All E.R. 561; [1946] P. 84; 115 L.J.P. 49; 173 L.T. 274; 109 J.P. 248; Digest Supp.

(2) *R.* v. *Copestake Ex p. Wilkinson*, [1927] 1 K.B. 468; 96 L.J.K.B. 65; 136 L.T. 100; 90 J.P. 191; Digest Supp.
(3) *Timmins* v. *Timmins*, [1919] P. 75; 88 L.J.P. 78; 120 L.T. 544; 27 Digest 567, *6255*.
(4) *Johnson* v. *Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest 567, *6252*.
(5) *Colchester* v. *Peck*, [1926] 2 K.B. 366; 95 L.J.K.B. 1038; 135 L.T. 32; 90 J.P. 130; Digest Supp.
(6) *Abercrombie* v. *Abercrombie*, [1943] 2 All E.R. 465; 169 L.T. 340; 107 J.P. 200; Digest Supp.
(7) *Knott* v. *Knott*, [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; Digest Supp.
(8) *Pratt* v. *Pratt* (1927), 96 L.J.P. 123; 137 L.T. 491; Digest Supp.
(9) *Dodd* v. *Dodd*, [1920] 1 K.B. 71; 89 L.J.K.B. 224; 122 L.T. 190; 83 J.P. 287; 27 Digest 568, *6270*.

Appeal by the husband from an order of the Portsmouth City Justices, dated July 9, 1946. On May 21, 1941, the justices made an order for maintenance in favour of the wife on the ground of desertion by the husband. Cohabitation was resumed soon afterwards, and was continued up to the time of the issue by the wife of a summons seeking the revival and variation of the original order on the ground of the husband's persistent cruelty after the resumption of cohabitation. The justices made the order sought, and from this order the husband appealed.

A. Grant for the husband.
J. T. Moloney for the wife.

Lord Merriman, P.: This appeal by a husband from a decision of the Portsmouth City Justices raises an extremely difficult and important question.

By a summons dated June 20, 1946, the wife "complained" that she had had made in her favour a maintenance order dated May 21, 1941, and applied that it should be revived and varied on the ground of her husband's ill conduct amounting to persistent cruelty and desertion. On May 21, 1941, the wife had an order made in her favour on the ground of desertion. That order was never appealed from. We have no reason to doubt its propriety at the time, but it is common ground that within a comparatively short time after it the parties resumed cohabitation. It is also common ground that they were still cohabitating at the time when the wife took out the present summons. Without reviewing the evidence, I find it necessary to say no more than that, on a careful consideration of the evidence before them, the justices have come to the conclusion that the husband was guilty during this resumption of cohabitation of persistent cruelty.

Had this case been tried on the issue: "Aye or no, on a summons for persistent cruelty, was there evidence to justify the justices' finding?", I should feel myself impelled to say that there was sufficient evidence. I am not bound to express any opinion whether I think it is a strong case or a weak case. The justices saw the parties, they believed the wife, and they disbelieved the husband, and there is no question that the wife's evidence about the state of affairs since the resumption of cohabitation supported an allegation of a course of conduct calculated to break any woman's spirit. That being so, the justices were justified in finding that there was sufficient cruelty to cancel the condonation of the desertion which had admittedly occurred, and, indeed, had subsisted for the best part of five years.

That brings me to what I think is the real difficulty in this case—whether the whole of this procedure, and the order made by the justices, was or was not entirely misconceived. This appeal raises this question: What precisely is the meaning and application of the word "revival" in the Criminal Justice Administration Act, 1914, s. 30 (3), as applied to an order under the Summary Jurisdiction (Married Women) Acts, 1895, and onwards. I do not propose to give an elaborate review of the legislation involved. It is sufficient to say, first, that an order which a wife obtains under the Summary Jurisdiction (Married Women) Acts may, but not must, contain an order for the payment of money. If it does so, by s. 9 of the Act of 1895, that order is to be enforced as if it were an affiliation order. The Criminal Justice Administration Act, s. 30, deals in general terms with orders for the periodical payment of money made by courts of summary jurisdiction. Whatever else that may cover, it clearly covers both affiliation orders and orders under the Summary Jurisdiction (Married Women) Acts, and, in particular, sub-s. (3) says :

> Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may upon cause being shown upon fresh evidence to the satisfaction of the court be revoked, revived or varied by a subsequent order.

The specific powers of subsequent dealings with an order made under the Summary Jurisdiction (Married Women) Acts are contained primarily in s. 7 of the Act of 1895, and the words there are :

> Upon cause being shown upon fresh evidence to the satisfaction of the court at any time [the court] may alter vary or discharge any such order and may upon any such application from time to time increase or diminish the amount of any weekly payment . . .

It will be observed, therefore, that the word " discharge " and not the word " revoke " is used in s. 7, the word " vary " is common to both, and the word " revive " does not occur in s. 7. I think I ought, in passing, to glance at one other point. It is not directly apposite, but, for reasons which I propose to indicate, I think it has a good deal of bearing on the matter, and that is, as this court made clear, I hope, in *Underwood* v. *Underwood* (1), the words " upon fresh evidence " occurring in s. 7, the artificial construction of which is reaffirmed by the Court of Appeal in *R.* v. *Copestake* (2) and the decisions in *Timmins* v. *Timmins* (3), and *Johnson* v. *Johnson* (4), were interpreted as being tied up, not merely with the substance of the order, but with the variation of the monetary provision pure and simple. By the Money Payments (Justices' Procedure) Act, 1935, s. 9, the words " upon fresh evidence " are to cease to have effect in s. 30 (3) of the Criminal Justice Administration Act, 1914, which I have just read, and, in particular, fresh evidence is not to be required as a condition of the exercise of the power conferred on courts of summary jurisdiction by the Summary Jurisdiction (Married Women) Act, 1895, s. 7, to increase or diminish the amount of weekly payments. Plainly the latter part of s. 9 only deals with money payments. There can be no argument about that, and decisions of courts not bearing directly on our jurisdiction have held that the more general words, striking out the words " upon fresh evidence " from s. 7 altogether, relate and relate only, to what I may call the monetary part of the order and not to the substantive part on which the monetary order is based. The cases to which I am referring—and they are set out in the decision of this court in *Underwood* v. *Underwood* (1)—are *Colchester* v. *Peck* (5) and *R.* v. *Copestake* (2), the latter of which I have already mentioned.

The question came directly under review, so far as the married women's jurisdiction was concerned, in *Underwood* v. *Underwood* (1) where, following these cases, it was held that the same considerations, applied—in other words, that, if a spouse was seeking to vary the substance of an earlier order, the words, " upon fresh evidence " still applied, but that, if what was being dealt with was the money part of the order, the words " upon fresh evidence " no longer applied. That being so, we were much pressed, and, I am bound to say, speaking for myself, much impressed, by the argument that for justices to revive, on the ground that there had been subsequent persistent cruelty during a resumption of cohabitation, an order five years old, which had been based on the ground of desertion, involved a complete misconception of their powers. It was submitted that the whole substratum of the order had disappeared when once cohabitation was re-established, and that it was inappropriate to speak of the revival of an order in those circumstances. In view of the course the argument has taken, I am not proposing now to examine at length the various cases in which it may be appropriate to use the word " revival " in connection with one of these orders. I throw out by way of illustration some such case as this. The husband has been found guilty of persistent cruelty, an order is made for the full amount, £2 a week, in favour of the wife, she is given custody of two children, with 10*s*. a week is respect of each of them, and the justices insert a non-cohabitation clause. There comes a time when either the wife becomes so well-off or the husband becomes so poor that, rightly or wrongly, the justices do not merely vary the monetary order but diminish it to vanishing point, leaving, however, the separation order and the custody order. In such a case it is suggested, and, I am bound to say, I do not see any reason why it should not be so, that it would be appropriate, if the circumstances changed, to speak about the "revival" of the order in the wife's favour so far as the money is concerned—at least as appropriate to call it "revival" as it would be to call it "increase." I am not going to speculate about other instances. All I think it necessary for me to say is that, if I had felt myself free to do so, I might have been very strongly inclined to the view that this procedure was wholly misconceived.

It is necessary to say in passing how the original matter stood under the terms of the Summary Jurisdiction (Married Women) Acts at the time that the wife issued this summons. I have been reminded that, in delivering the judgment of this court in *Abercrombie* v. *Abercrombie* (6) ([1943] 2 All E.R. 467), I gave a short, and, I believe, an accurate, summary of the changes made in connection with resumption of cohabitation by the Summary Jurisdiction (Separation and Maintenance) Act, 1925. The upshot is that when this Act was passed, a new conception was introduced, namely, that, without any action on the part of the husband to obtain a discharge of an order made against him, the order shall cease to have effect if the wife continues to reside with her husband for three months or if there is a resumption of cohabitation without any time limit. The point is that provision is made for an automatic cessor of effect without any substantive application on the part of the husband. It is not necessary for him to apply to discharge the order, though, as pointed out in *Abercrombie* v. *Abercrombie* (6), he may be driven to make that application to obtain a judicial decision on whether the fact of resumption of cohabitation is or is not proved.

That is precisely the state of things here. There cannot be any suggestion that at the time when the present summons was issued anything else but a state of cohabitation existed. Therefore, the old order had ceased to have effect unless there was something on which the justices could properly pronounce that it had been revived. I have indicated, I hope plainly, what my own inclination in this matter might have been, but when the time came for counsel for the wife to reply he confronted us with a decision which, I admit, had escaped my attention both in deciding *Underwood* v. *Underwood* (1) and during the earlier part of the argument, and it is only fair to all concerned to say that, though it appears to bear straight on the point, we have not been referred to any single one of the numerous text-books dealing with this subject which introduces it where it ought to be introduced, namely, in a foot-note to the word "revival" in s. 30 (3) of the Criminal Justice Administration Act, 1914. I see that I myself relied on it considerably in delivering the judgment of this court in *Knott* v. *Knott* (7) where I explained the extreme danger to either spouse, if there is contemplated the taking of divorce proceedings, of a decision of the Divisional Court either upholding or reversing a finding of the justices. That view of the matter is very strongly supported by the case to which I am referring, *Pratt* v. *Pratt* (8). The case also appears to me to be direct authority on this point. Before dealing with it I would like to add to what I have said about *Underwood* v. *Underwood* (1), that counsel for the wife has relied on a passage of my judgment where ([1945] 2 All E.R. 561, at p. 87) I say, referring to the Criminal Justice Administration Act, 1914, s. 30 :

> It is clear, of course, that that covers very much the same ground as is covered by s. 7 of the Act of 1895, but it is established by *Dodd* v. *Dodd* (9) that this sub-section, and, indeed, all other relevant matter in this part of the Act, apply with equal force to the Summary Jurisdiction (Married Women) Acts, and the effect, among other things, was to introduce into this particular legislation relating to married women the conception of revival of an order which had been discharged.

I wish to say that I had not *Pratt* v. *Pratt* (8) present to my mind when I delivered that judgment, and that, on any view of the matter, the use of the words "which had been discharged" must be regarded as *obiter*, but, in truth and in fact, that is precisely what *Pratt* v. *Pratt* (8) decides, for in that case a Divisional Court consisting of my predecessor and Bateson, J., held that an order obtained by a wife on the ground of persistent cruelty in Nov., 1924, but revoked in July, 1925, on the ground that the justices found that she had been guilty of adultery, could be revived on fresh evidence, the fresh evidence being that a judge of the

High Court, on a defended petition arising out of the identical allegations of adultery, had held that the wife had not committed adultery. The conclusiveness of the estoppel produced by such a decision was fresh evidence which entitled the justices to set aside their order revoking the earlier order and to go the step further of reviving the older order.

Clearly, there is a difference between such a case and the case we are dealing with of reviving, because of some subsequent matrimonial misconduct, an order which has ceased to have effect by reason of condonation. The two things are not identical, but I am bound to say that I cannot see sufficient difference in principle to justify us in distinguishing this case from *Pratt* v. *Pratt* (8). If it is possible as a matter of law to revive an order which has been discharged or revoked on the merits, it seems to me that it must be equally possible in law to revive an order which has, by Act of Parliament, ceased to have effect because of certain supervening facts, namely, the resumption of cohabitation, which, in turn, has ceased to have effect because there has been a subsequent matrimonial offence which blots out the condonation of the earlier offence.

I cannot see any sufficient difference in principle between these two sets of circumstances to justify me in saying that I am not prepared to follow or be bound by *Pratt* v. *Pratt* (8). I am bound to say, however, that though *Colchester* v. *Peck* (5) was cited to the Divisional Court in *Pratt* v. *Pratt* (8) and, therefore, the court must have been aware of some very significant passages in the judgments of Lord Hewart and Avory, J., and, indeed, in the very short but comprehensive survey of the matter in one sentence in the judgment of Sankey, J., they do not seem to have had cited to them the case, which had then been reported, of *R.* v. *Copestake* (2), for it might possibly have given them cause to consider whether approval of *Colchester* v. *Peck* (5) and *R.* v. *Copestake* (2) by the Court of Appeal did not make the application of the word "revival" to anything but the mere monetary part of the order more than doubtful. Having once more indicated what might possibly have been my own inclination in this matter, I think this appeal is concluded, so far as we are concerned, by the decision of this court in the case of *Pratt* v. *Pratt* (8).

Byrne, J.: I find myself unable to distinguish the case which is under consideration from *Pratt* v. *Pratt* (8), but I am bound to say that, but for the decision in *Pratt* v. *Pratt* (8), I should have inclined very strongly to the view that the Criminal Justice Administration Act, s. 30 (3), related only to orders for the payment of money, for it appears to me that the whole of that sub-section is concerned only with orders for the periodical payment of money and not with what may be called substantive orders, such as separation orders, custody orders, and so forth. Being of that inclination, I should have found myself fortified by the views expressed by the judges who gave judgment in *Colchester* v. *Peck* (5) and *R.* v. *Copestake* (2), but I entirely agree with what my Lord has said in his judgment, namely, that there is no ground here for distinguishing *Pratt* v. *Pratt* (8) and for that reason it follows that, apart from the question of fact in this case, this appeal must fail.

So far as the facts are concerned, I only propose to say that I agree with the view which has already been expressed by my Lord, namely, that the justices had the whole matter before them, and came to a determination and there is no reason to interfere with their finding of fact with regard to persistent cruelty.

Appeal dismissed with costs.

Solicitors: *Brash, Wheeler, Chambers, Davies & Co.*, agents for *H. F. E. Mathews*, Portsmouth (for the husband); *Samuel Price & Sons*, agents for *Wadeson & Eaton*, Portsmouth (for the wife).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

GOLD COAST SELECTION TRUST, LTD. *v.* HUMPHREY (H.M. INSPECTOR OF TAXES).

Affirmed in part. H.L. [1948] 2 All E.R. 379.

[Court of Appeal (Scott, Somervell and Cohen, L.JJ.), October 30, 31, November 1, 4, 22, 1946.]

Income Tax—Profits from trade and trade receipts—Company dealing in gold mining concessions—Transfer of concessions to associated company for fully paid-up shares—Shares not disposable during year of transaction owing to number—Computation of profits and gains—Income Tax Act, 1918 (c. 40), *sched.* D, *case* I.

When there has been a realisation of a trading asset and the receipt of another asset, and when that latter asset is marketable in its nature and not some merely personal advantage which by its nature cannot be turned into money, the profits and gains must be arrived at for the year in which the transaction took place by putting a fair value on the asset received. The fact that it could not, owing to its size, be disposed of in the market in that year does not mean that no profit or gain for income tax purposes has been made out of the transaction. The value to be taken is not the value to the individual trader, because that might bring in irrelevant matters, but the value to the individual trader or to any similar trader who would have been in a position to carry out the deal, *i.e.*, a fair, intrinsic value.

[As to Period of Account to which Trade Receipts and Expenses are Referable, see HALSBURY, Hailsham Edn., Vol. 17, pp. 118-120, paras. 223-225.]

Cases referred to:

(1) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, *87*.

(2) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (1905), 5 Tax Cas. 159; 28 Digest 23 *b*.

(3) *Emery* (*John*) *& Sons* v. *Inland Revenue Comrs.*, [1937] A.C. 91; 156 L.T. 87; 20 Tax Cas. 213; Digest Supp.

(4) *Royal Insurance Co., Ltd.* v. *Stephen* (1928), 44 T.L.R. 630; 14 Tax Cas. 22; Digest Supp.

(5) *Westminster Bank, Ltd.* v. *Osler*, [1933] A.C. 139; 102 L.J.K.B. 110; 148 L.T. 41; 17 Tax Cas. 381; Digest Supp.

(6) *Hughes* v. *Utting & Co., Ltd.*, [1940] 2 All E.R. 76; [1940] A.C. 463; 100 L.J.K.B. 532; 162 L.T. 339; *sub. nom. Utting & Co., Ltd.* v. *Hughes*, 23 Tax Cas. 174; Digest Supp.

(7) *Scottish v. Canadian General Investment Co.* v. *Easson*, [1922] S.C. 242; 8 Tax Cas. 265; 28 Digest 20 *h*.

(8) *Cross* v. *London & Provincial Trust, Ltd.*, [1938] 1 All E.R. 428; [1938] 1 K.B. 792; 107 L.J.K.B. 423; 158 L.T. 217; 21 Tax Cas. 705; Digest Supp.

(9) *Income Tax Comr., Bihar & Orissa* v. *Singh*, [1942] 1 All E.R. 302; Digest Supp.

(10) *Harrison* v. *Cronk & Sons, Ltd.*, [1936] 3 All E.R. 747; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20; *sub. nom. Cronk & Sons, Ltd.* v. *Harrison*, 20 Tax Cas. 612; Digest Supp.

(11) *Absalom* v. *Talbot*, [1944] 1 All E.R. 642; [1944] A.C. 204; 113 L.J.Ch. 369; 171 L.T. 53; 26 Tax Cas. 166, 188; Digest Supp.

Appeal by the appellant trust company (hereinafter called the "trust") from an order of Wrottesley, J. dated May 15, 1946.

The business carried on by the trust was that of financiers, dealers in stocks and shares, and exploiters of and dealers in gold mining concessions. Its practice was to acquire concessions over land in the Gold Coast Colony which it was thought might be gold bearing. The concessions were exploited to the extent necessary to ascertain their potentialities, and, if they were proved to be gold bearing in such circumstances that with further expenditure gold might be produced on a profit-making basis, the trust proceeded to part with the concession to another company the business of which would be to develop and work the gold. It was not the business of the trust to continue its investigation of any concession beyond the initial stage and at no time did it attempt the production of gold on a commercial scale. The usual method was to incorporate or promote a public company and to transfer to that company the concession at a price to be satisfied by the issue of fully-paid shares. The trust and its associated companies were represented on the boards of such mining companies and from time to time the trust, in addition to its vendor shares, took up further shares offered for subscription in such companies as appeared to it likely to be successful.

The trust had a controlling interest in Anfargah Gold Mines, Ltd., which owned a concession. In March, 1933, this concession was sold by Anfargah to Ariston Gold Mines Ltd., for fully paid up shares in Ariston, and in April, 1933, Anfargah was liquidated, and, its assets being distributed in specie, the trust received shares in Ariston. During the years 1935-6, 1936-7, and 1937-8 respectively the trust, by three separate transactions, sold mining concessions and property to three companies—Marlu, Main Reef and Bremang—for blocks of fully paid up shares.

The trust was assessed to income tax under the Income Tax Act, 1918, sched. D, case I, in respect of "profits from trade etc. of financiers." On appeal to the general commissioners, the question for determination was whether the various transactions amounted to realisations of the concessions giving rise to immediate profits to be included in the computation of the profits of the trade of the trust for the purposes of income tax under sched. D, case I, and, if so, on what basis such profit should be ascertained. The commissioners found that when the Marlu, Main Reef and Bremang shares were allotted to the trust there was a realisation of assets sold to these companies, and that, at the date of the allotment, the value of the shares received by the trust was par, the price agreed to be paid by the purchasing companies, but that in the case of the Anfargah shares there was no realisation and no taxable profit. WROTTESLEY, J. upheld the decision of the commissioners in respect of the Marlu, Main Reef and Bremang assessments, but reversed their decision in so far as the Anfargah transaction was concerned. The trust appealed.

Sir Cyril Radcliffe, K.C., and *Heyworth Talbot* for the trust.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

Cur. adv. vult.

Nov. 22. The following judgment of SCOTT, L.J. and SOMERVELL, L.J. was read by

SOMERVELL, L.J.: In the three years with which we are concerned, the trust carried out three separate transactions of the same kind. There was in each year a sale by the trust of mining concessions and property to three other companies for blocks of fully paid ordinary shares. The relevant words in the first agreement, a sale to a company called Marlu Gold Mining Areas Ltd., incorporated two days before the sale, are as follows:

> The consideration for the said sale and transfer of the said lease shall be the sum of £800,000 which shall be paid and satisfied by the allotment and issue to the vendor or its nominees of three million two hundred thousand shares of five shillings each in the capital of the purchaser credited as fully paid up.

Although counsel for the trust based his argument in part on the different facts relating to the three transactions, the principle raised as to each year is the same. It was not disputed that these transactions were in the course of the trust's trade. In other words, it was not suggested that the transaction was the realisation of a capital asset. The assessments challenged were made on the basis that the trust had made a profit in the year in which the transaction took place, that the shares were money's worth, and the assessing commissioners valued the shares at figures, the details of which are not material.

The main, or, at any rate, the first, point argued before the commissioners was (*a*) That no profit or gain can arise from a sale of an asset unless the transaction amounts to a realisation of the asset. (*b*) That a realisation of an asset involves its conversion into either cash or assets readily convertible into cash. (*c*) That in the case of none of the transactions in question were the shares issued to the trust readily convertible into cash. The commissioners found that there was a realisation of the assets and counsel for the trust accepted the position that this finding could not be challenged. He did not, we think rightly, regard this finding as meaning that, in the opinion of the commissioners, the shares were readily convertible into cash, but that there was a realisation, whether the shares were so convertible or not. The question whether there has been a complete realisation is not really affected by difficulties that may be found to exist as to the valuation of the asset received. The alternative argument related to the value to be put on the shares. On this the commissioners found that at the date of allotment the value of the shares received by the trust was par, the price agreed to be paid by the purchasing companies. On this finding, the figures of all three assessments were reduced to figures agreed between the parties.

The argument of counsel for the trust may be stated as follows. He, of course, accepted the position laid down in many cases that a trade or income receipt may be in money or money's worth. He submitted that, in principle and on authority, when the asset received by the trader is other than money, the sum to be taken is the sum which could be realised by the trader in the market in the accounting year in which the transaction took place. He admitted that the mere fact that the taxpayer chose not to realise was irrelevant. If, however, the taxpayer can show that it was impossible to realise, except presumably at a ridiculously low price having regard to the intrinsic value of the asset, then no sum should be brought in. In other words, money's worth means what you can obtain, seeking the most likely purchasers, in the accounting year on which the assessment is based. He further submitted that on the evidence, and on the wording of their finding, the commissioners could not have applied this principle. He invited the court first, we think, to deal with the matter on the basis that on this principle on the evidence in the Case no sum ought to be brought in in respect of any of the years. Alternatively, he asked that the Case should be sent back with a direction to the commissioners to state whether the par value was arrived at as the figure that the shares could be expected to fetch if all had been sold during the trust's accounting year for the best price obtainable, and, if not, to fix the value, if any, on this basis.

Before passing to the Crown's argument, we will refer to how the matter was dealt with in the trust's accounts which counsel for the trust submitted was correct on his submission as to the evidence. The trust valued the 3,200,000 shares which they had received from Marlu at the sum of £107,875, being the original cost to the trust of the properties and rights transferred, plus the sum which had been spent on them since their original purchase by the trust. The method of keeping accounts is often a guide, but is never conclusive, in income tax issues. We express no opinion on this as accountancy. The picture it presents is as if the transaction had provided no profit for the company, whereas, according to the terms of the agreement, these properties were now estimated to be worth £800,000, for which sum the shares were taken in satisfaction. That the accounts as drawn up did not disclose the whole truth is evidenced by a note to this and another similar item in the balance sheet for the year attached to the directors' report. The " investments at cost or valuation," which include these shares, shows a figure in the balance sheet of £259,420 18*s*. 2*d*. The note in a bracket says : " Market value, Mar. 29, 1939, £2,500,491 7*s*. 0*d*." This, of course, may not have been the whole truth either. In subsequent years as shares were sold, in accordance with the trust's policy, the profits as shown on such sales on the above basis were brought into the accounts.

The Solicitor-General, on behalf of the Crown, agreed that money's worth must be an asset of the kind which can be turned into money. He instanced the bank manager's residence in *Tennant* v. *Smith* (1) as an example of an " advantage " that could not be turned into money. If, by a transaction, the taxpayer gets an asset of the former kind which can be valued, that is his profit. It is unnecessary to show that he could, in fact, in his accounting year get this sum in cash. This may be an element in arriving at the value. He submitted that this was right in principle, and also on authority. He was, we think, inclined to argue in the alternative that there was evidence on which the commissioners could have found the par value applying their own knowledge to the evidence on the principle of counsel for the trust.

We will now summarise what seem to us the most important points in the evidence. We will deal primarily with Marlu. On July 30, two days after the agreement, Marlu issued a prospectus offering for subscription at par 2,000,000 shares of 5*s*. each. The trust underwrote 1,600,000 of these shares at par in consideration of an option to subscribe for 1,200,000 shares of 5*s*. each at the price of 6*s*. up to July 31, 1936. The whole of the shares were subscribed, the trust taking up and paying at par for 10,579. The trust purchased some additional shares in the market, and later bought 545,939 shares at 6*s*. under its option. The shares were dealt with on the Stock Exchange at prices which varied between 17*s*. 3*d*. and 7*s*. 3*d*. between 1934 and 1938. The percentages of shares dealt in was small, never exceeding 4 per cent. of those issued after the shares had been allotted to the trust on Nov. 30, 1934.

The trust called a number of witnesses of experience in Stock Exchange transactions and financial dealings. They gave evidence that an attempt to sell these large blocks of shares on the Stock Exchange would probably " kill the market altogether." It might have been possible to get a syndicate or financial house to take 250,000 at par, but if a bid were asked for for 1,000,000, it would " probably be at a very low figure." If the trust had offered 3,200,000 Marlu shares, people would have been very chary of dealing with them at all. A director of the trust said there has not been much opportunity to sell, but shares of this kind held by the trust " were given as security for loans and had a marketable value." He also said that a concession after it was proved was worth a great deal more than the out-of-pocket expenses. Some of the sentences quoted above emphasise to our minds, though it is in no sense conclusive of the argument, the difficulty of applying the kind of test for which counsel for the trust contends in cases of this kind. The whole transaction, as known to financial and mining circles, was on the basis that the trust had confidence in the value of the property, and were taking the shares not for immediate realisation, though they contemplated realising parcels over the years as and when they wanted money for their business. If one assumes a financial company with the necessary liquid resources equally interested in this form of undertaking, there seems no reason why they should not purchase the shares as worth £800,000 which was admittedly an honest estimate by highly skilled people of the value of the rights and property transferred. In transactions such as these there will not usually be a possible purchaser of this kind. If the trust suddenly tried to place the whole block of shares on the market, everyone would want to know why. We are prepared to accept the view that there might in practice have been great difficulty in disposing of the whole block shortly after the purchase at a price which reflected the intrinsic value of the shares.

It is necessary now to consider the authorities, dealing, first, with those relied on by counsel for the trust. In *Californian Copper Syndicate* v. *Harris* (2), there was a sale of mining properties for fully paid shares. The contest was whether this was a trading transaction or a realisation of a capital asset. On this issue the taxpayer lost. It was also held there was a profit, although shares were received and not cash. LORD TRAYNER said (5 Tax Cas. 159, at p. 168) :

> the shares were realisable and could have been turned into cash, if the appellants had been pleased to do so.

In *Inland Revenue Comrs.* v. *John Emery & Sons* (3), a Scottish case, a firm of builders sold plots with houses on them for a sum in cash, ground annuals on the property being created and retained by the builders. LORD MORISON said (20 Tax Cas. 213 at p. 221) :

> it is quite immaterial in what form the profits or gains are taken—money or kind or money's worth. . . . The full amount of the profits and gains arising or accruing from such transactions is affected with income tax.

He went on to hold that the ground annual was part of the price (*ibid*) :

> Ground annuals are a trustee security, and have at any given date an ascertainable cash value. . . . In short, the profits of the appellant's business cannot be ascertained unless the whole consideration which they receive for the houses sold is definitely ascertained.

LORD FLEMING said (*ibid* at p. 223) :

> the realisable value of the ground annuals must be taken into account. . . there is no serious difficulty . . . in ascertaining its realisable value . . .

The case went to the House of Lords, where LORD ATKIN said (20 Tax Cas. 213, at p. 226) :

> It is established that that obligation [the ground annual], or that right on the part of the appellants, was a realisable right, a marketable security in the sense of something which they could have realised at any moment by going into the market.

LORD THANKERTON said (*ibid*, at p. 227) :

> ground annuals such as these have a well known market value and . . . they are constantly traded in, and in that respect they seem at least as good money's worth as any ordinary security quoted on the Stock Exchange.

Counsel for the trust also relied on dicta in *Royal Insurance Co., Ltd.* v. *Stephen* (4) and on *Westminster Bank, Ltd.* v. *Osler* (5), *Utting* v. *Hughes* (6), and *Scottish and Canadian General Investment Co. Ltd.* v. *Easson* (7). It is, we think, unnecessary to refer to these in detail as we have already cited the statements from LORD

Atkin and Lord Thankerton which afforded to our minds the firmest foundation for the argument.

Counsel for the trust agreed that in all these cases the asset was either on the face of it readily realisable or no point was taken of the kind which he was arguing. He also drew our attention to two Indian Appeals to the Privy Council referred to in the judgment of the Master of the Rolls in *Cross* v. *London Provincial Trust* (8). The main issue in that case and the Indian cases was different from that which arises here. It is, perhaps, worth noting that in *Commissioner of Income Tax for Bihar and Orissa* v. *Maharajadhiraja of Darbhanga* (9) one of the items to which Lord Macmillan referred as items which may reasonably be regarded as the equivalent of cash was a colliery. The question is whether these statements, particularly those of Lord Atkin and Lord Thankerton, should be read as limiting what is to be treated as money's worth, or whether they are emphasising what was the fact in those cases, namely, that the asset in question could easily and immediately be turned into money by the taxpayer.

The Crown relied on two decisions of the House of Lords as negativing the former view, and it is necessary to examine them. *John Cronk & Sons, Ltd.* v. *Harrison* (10) arose out of a building society transaction. The taxpayer, who was the builder, was required to guarantee part of the advance made by the society to the purchaser to make up the purchase price. The builder was also required to deposit with the society as collateral security for the guarantee the whole or part of the sum guaranteed. The Crown contended that the builder had received the whole of the purchase price. The builder contended that *quoad* the sums deposited they did not come in for income tax purposes until they were released to him, an event which could not happen for some years, and might not happen at all if the purchaser defaulted. Alternatively, he said they should be brought in at their present values, regard being had to the risk of their loss. The Court of Appeal in effect decided the case in favour of the builder on his alternative contention. The Crown appealed, but there was no cross appeal. Lord Thankerton gave an opinion in the House of Lords with which the other noble and learned Lords agreed. Lord Thankerton was inclined to think the builders' first contention was right, but he adopted the view of the Court of Appeal which he understood to be that, in addition to sums in cash, the builder received " an asset in the shape of a credit in the books of the society, on which interest was payable to the company but which was subject to a contingent liability, which materially affected its value to the company." A valuation was therefore directed, but, in the event of an " actuarial valuation " being impracticable, no sum was to be brought in until released. This decision, and the words used by Lord Thankerton, and in the order, seem to us difficult to reconcile with the view that the limiting criterion of value in valuing an asset as money's worth is what money can be got for it in the market at the moment or in the year relevant to the assessment. On the other hand, the builder did not put forward the immediate realisable value test ; he put forward, as an alternative, the kind of valuation ordered. *Absalom* v. *Talbot* (11) was also a building society transaction. Again the taxpayer was the builder, but in this case he advanced the balance which the purchaser could not find and the building society would not advance, on the security of a second mortgage from the purchaser and in some cases a promissory note. The Crown argued that the sums secured by the second mortgages and promissory notes should be brought in at their face value as debts unless and until shown to be bad. The majority in the House of Lords accepted the taxpayer's contention that they should be valued. We do not want to burden an already long judgment with too many citations. Lord Russell, who was inclined to think the actual receipts as they came in would be the proper measure, accepted the majority view that a valuation was proper, and he used these words ([1944] 1 All E.R. 642, at p. 649) :

> The valuation which I contemplate is one which takes into account all the risks which a creditor runs who (like the appellant in this case) gives very long credit on doubtful security, and which may at some future time convert a presently good debt into a bad one.

Counsel for the trust distinguished these cases on the ground that they were dealing with debts. It is clear, however, that in neither case was the suggested valuation one to be made under the rule dealing with bad debts. As it seems to us, the trader in each case had not received money. He had in the one case a doubtfully secured debt payable *in futuro*. In the other, he had a right to the return of a deposit *in futuro* if the purchaser fulfilled all his obligations over a fairly long period. He had an asset which was regarded as money's worth. If the test is what could he get for it there and then, the noble and learned Lords, as it seems to us, would have used very different words.

We do not regard the task of this court as an easy one in applying these authorities because in none of the cases cited on either side was the point raised A before us argued. It is, therefore, right for us to express our own view on the matter. We were at one time attracted by the argument that, income tax being a demand for a sum of money, the taxpayer should not be treated as having received money's worth, unless what he has can, as a matter of fact, be turned by him into money within the year. This argument has special force today with the present high rates of taxation. This, however, is perhaps an unreliable guide to the construction of words which never contemplated those high rates. B We have come to the conclusion that, when there has been, as is now admitted here, a realisation of a trading asset and the receipt of another asset, and when that latter asset is marketable in its nature and not some merely personal advantage which by its nature cannot be turned into money, the profits and gains must be arrived at for the year in which the transaction took place by putting a fair value on the asset received. The fact that it could not, as we will assume here, owing to its size, be disposed of in the market in that year does not mean C that no profit or gain for income tax purposes has been made out of the transaction. It might be wrong to say it is the value to the individual trader which is to be taken, because that might bring in irrelevant matters. We think it would be right to say that it is the value to him or to any similar trader who would have been in a position to carry out the deal—in other words, a fair intrinsic value. If the words used by the House of Lords in the two last cases we have cited are D applicable, or if what we have just stated is right, then in the case of Marlu there was, in our view, ample evidence on which the commissioners' finding can be upheld. In the other two cases, the purchasing companies had a less successful history, and the shares, though at times above, were at times below par. It may well be that later history is irrelevant, but there was, in our opinion, clearly evidence on which the commissioners could come to their findings in these two cases, and there are no grounds for inferring that they applied the wrong E principle of law.

In the result, we think the judge was right. On the argument as presented to us, we have thought it right to deal fully with the matter which is, we think, one of some difficulty which may affect many transactions. The judge's view of the case, we think, is the same as that which we have tried to express. He does not, however, deal in any great detail with the main argument of counsel for the trust as presented to us. If we had thought that counsel's principle of F law was right, we would have sent the Case back. The words used by the commissioners suggest to our minds that they applied the principle, which we think to be right, and not that contended for by counsel. So far as the first year is concerned, WROTTESLEY, J., reversed the commissioners, who had held that the transaction in that year did not amount to a realisation. The transaction was the exchange of an investment in Anfargah Gold Mines, which was wound up, for shares in Ariston Gold Mines. Counsel for the trust ultimately accepted G the judge's decision. It is agreed that on this decision the matter must go back to the commissioners to determine the profit (if any) arising from the transaction. For these reasons the appeal will be dismissed with costs.

COHEN, L.J., [read by SCOTT, L.J.] I agree that this appeal should be dismissed. Counsel for the trust admitted that the effect of the agreements for sale of the concessions was a realisation thereof in the course H of the company's trade and a substitution of a new asset, namely, the vendors' shares issued in satisfaction of the purchase price. He argued, however, that, unless the vendors' shares were capable of being presently realised in the relevant accounting year, they could only be brought into the profit and loss account for that year at a sum equal to the cost of the concession plus the amount expended on the development thereof prior to the sale. He agreed that there was no decision binding us so to hold, but he said that his argument was supported by judicial opinion in a number of cases, the most important of which was *John Emery & Sons* v. *Inland Revenue Commissioners* (3). The facts of that case, and the principal passages on which counsel relied, have already been cited by Somervell, L.J. I would only observe that in that case it was common ground that the ground annuals could be readily realised at any time. Their Lordships were not directing their attention to a case such as we have to decide, where, although the shares had a market quotation, the number involved was so large that it might be impossible to realise the whole block in the accounting year. I do not think it follows from anything said in that case that their Lordships were of opinion that, unless the real "money's worth" which formed part of the consideration could be obtained in money in the accounting year, the asset could not properly be brought into account at that money's worth ascertained by valuation.

The Solicitor-General relied, first, on the observations of Lord Halsbury, in *Tennant* v. *Smith* (1) where his Lordship said ([1892] A.C. 150, at p. 156) :

> I come to the conclusion that the Act refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable.

This statement is not conclusive, as their Lordships had not to direct their minds to the question of the date at which the "substantial things" had to be "capable of being turned into money," but the Solicitor-General said that another decision of their Lordships in *John Cronk & Sons, Ltd.* v. *Harrison* (10) made it clear that it was sufficient that an estimate of the value of the substantial things could be made in the accounting year, although it might be impossible to realise that value in that year. In that case the appellant company, a firm of builders, had sold a number of houses under an arrangement by which in each case a building society advanced a large proportion of the purchase price and the appellant company guaranteed a portion of that advance, depositing with the society, as collateral security, the whole or a part of the sum guaranteed. The deposit was released when the purchaser had reduced the mortgage by an agreed amount. In the meantime the society allowed to the appellant company interest on the deposit. The question that arose was whether the sums so deposited were trading receipts, and, if so, at what value they should be brought into the accounts. It was held that the sums deposited with the building society should be taken into account at the time of completion of the sales of the houses at their actual value at that time, and not at their face value, but that, in the event of an actuarial valuation being impracticable, they should not be treated as receipts of the company's trade except in so far as such sums or any part thereof were released to the company during the trading periods in question. In the Court of Appeal (whose decision was confirmed by the House of Lords), Maugham, L.J., said (20 Tax Cas., at p. 632) :

> The balance [of the purchase money] is made up by an asset of an uncertain character which ought to be subject to valuation, and which is one of the trade receipts of the appellants which ought to be taken into account for the purpose of ascertaining their profits or gains as traders.

In the House of Lords, Lord Thankerton said (*ibid*, at p. 641) :

> In my opinion, it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the company, such sum to be applicable to reduction of the advance made by the society to the purchaser in the event of the latter's default, any surplus going eventually to the company. In other words, in the example referred to, the true purchase price was not £625, but two sums of £35 and £558 6*s*. 8*d*., payable at the time of the sale, with a further addition of any balance eventually available from the deposit. On the other hand, I am not prepared to say that the view taken by the Court of Appeal is not a legitimate one, though I should prefer my own view expressed above. The view of the Court of Appeal, as I understand it, is that, at the time of the sale, the company received, in addition to the £35 and the cheque for £558 6*s*. 8*d*., an asset in the shape of a credit in the books of the building society, on which interest was payable to the company, but which was subject to a contingent liability, which materially affected its value to the company; that such asset should be valued as at the time of the completion of the sale, and that such value should be entered as part of the price received for the house.

The other learned Lords concurred in this opinion. Lord Thankerton was, I think, differing from the Court of Appeal as to the nature of the transaction. I do not think he was in any way dissenting from the view expressed by Maugham, L.J., that, if the deposit was properly regarded as an existing asset of uncertain value, it ought to be valued and brought into the account.

Viewed, as the Court of Appeal viewed the matter, that case is, I think, clear authority for the view that, if an asset is capable of valuation, it should be valued and brought into the account, even though that value may not be presently realisable in the accounting year. Counsel for the trust sought to distinguish that case on the ground that the asset in question was a book debt and that special rules apply to book debts. He referred us in particular to r. 3 (1) of the Rules applicable to Cases I and II of Sched. D. Now, that rule deals only with deductions which are not to be allowed in computing profits and gains, and I think it is plain from the judgments of the Court of Appeal that they were not considering the matter from the point of view of deductions, but were regarding the deposit as an asset which had to be valued. If that be so, the observations of MAUGHAM, L.J., are of general import. I respectfully agree with the view he expressed, which seems to me in accordance with the general tenor of the Act. It is admitted that the profit and loss account must include assets which have to be valued, and I can see no reason why, if valuation is possible, an artificial value, whether high or low, should be placed on an asset merely because that value cannot be wholly realised in the accounting year. The fact that it cannot be realised in the accounting year is no doubt an element which the commissioners should take into account in estimating the value, but it is not a reason for attributing to the asset a value far below that which other facts, *e.g.*, the terms of the sale agreement, the market quotation and the prices at which the appellant company itself acquired shares in the market, and its own statements to its shareholders about their value, show that the asset should rightly bear.

Appeal dismissed with costs.

Solicitors : *Birbeck, Julius, Edwards & Co.* (for the trust) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

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ffirmed. H.L. [1948] 1 All E.R. 555.

INLAND REVENUE COMMISSIONERS *v.* WESLEYAN AND GENERAL ASSURANCE SOCIETY

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), November 18, 19, 1946.]

Income Tax—Life assurance—Loans payable to assured during life—Repayment out of sum payable at death—No payment of interest by assured—Assessment of amount of loans as annuity—Income Tax Act, 1918 (*c.* 40), *sched. D, case III ; All Schedules Rules, r.* 21.

In construing a document for tax purposes a strained or forced construction is not to be placed on it either to attract or to avoid tax. The document must be construed according to the ordinary rules of construction and the provisions of the relevant tax legislation then applied to it.

An assurance society entered into a life assurance policy with H. whereby, in consideration of a premium of £500, the society covenanted to pay to H. (*a*) an annuity of £7 11*s*. 0*d*. by monthly instalments of 12*s*. 7*d*., and (*b*) on the death of H. a sum equal to the aggregate of £4 14*s*. 8*d*. for each completed month between the date of the receipt of the premium and the death of H. The agreement also provided that, on the security of the policy, H. could request the society to make to him monthly loans free of interest subject to the condition that the aggregate of the loans outstanding at any date should not exceed the amount which would have been payable by the society if H. had died on that date. Once the request had been made the loans were to be made automatically until the request was cancelled, and the loans were to be repaid on the death of H. out of the sum then payable by the society. The question to be decided was whether the monthly sums of £4 14*s*. 8*d*. were subject to income tax under the Income Tax Act, 1918, All Schedules Rules, r. 21. On behalf of the Crown it was contended that these sums, although referred to in the proposal form and the policy as " loans," were in substance the monthly instalments of an annuity and as such were liable to assessment :—

Held: on the proper construction of the policy the sums of £4 14*s.* 8*d.* paid by the society were loans and not monthly instalments of an annuity.

Decision of Macnaghten, J., *reversed.*

Per Lord Greene, M.R.: There have been cases where what has been called "the substance of the transaction" has been thought to enable the court to construe a document in such a way as to attract tax. That doctrine was, I hope, finally exploded by the decision of the House of Lords in *Inland Revenue Comrs.* v. *Westminster* (*Duke*) (1). . . . The doctrine means no more than that the language which the parties use is not necessarily to be adopted as conclusive proof of what the legal relationship is. That is, indeed, a common principle of construction.

[**EDITORIAL NOTE.** The decision in this case turns on the true construction of a contract between the parties and is of no general application. The court, however, deals once again with the doctrine that the substance of a transaction should be regarded rather than the form it takes, and rejects the Revenue argument that in substance the sums in question were instalments of an annuity and were not loans. It is pointed out that the doctrine means no more than that the language adopted by the parties is not necessarily to be adopted as conclusive proof of what the legal relationship between them is, and that in the present case the sums in question were accurately described as loans.

[For Annuities and Other Annual Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-379; and for Cases, see DIGEST, Vol. 28, pp. 62-64, Nos. 316-323.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Westminster* (*Duke*), [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; 51 T.L.R. 467; *sub nom. Westminster* (*Duke*) v. *Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp.

(2) *Perrin* v. *Dickson*, [1930] 1 K.B. 107; 98 L.J.K.B. 683; 142 L.T. 29; 45 T.L.R. 621; 14 Tax Cas. 608; Digest Supp.

(3) *Sothern-Smith* v. *Clancy*, [1940] 2 K.B. 276; [1940] 3 All E.R. 416; 109 L.J.K.B. 977; 163 L.T. 312; Digest Supp.

Appeal by the taxpayer from an order of Macnaghten, J.

The taxpayer, an assurance society, had been assessed to tax under the Income Tax Act, 1918, All Schedules Rules, r. 21, in respect of payments made under a life assurance policy to the holder during his life. The Special Commissioners decided that the payments were loans, but Macnaghten, J., on appeal by the Crown, held that the payments were in effect instalments of an annuity and were assessable to tax. The society appealed. The facts appear in the judgment of Lord Greene, M.R.

Terence Donovan, K.C., and *L. C. Graham Dixon* for the assurance society.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *D. L. Jenkins, K.C.*, and *Reginald P. Hills* for the Crown.

Lord Greene, M.R.: The appellants, the Wesleyan and General Assurance Society, appealed to the Special Commissioners against an assessment to income tax in respect of certain sums which had been paid by them to a policyholder, Charles Hart. The only question arising on this appeal is whether or not, on the true construction of the contractual documents executed between Hart and the society, and in view of the legal rights and obligations which these documents create, the sums so paid were payments of an annuity, or, as the society contends merely loans. If the Crown is right, the payments attract income tax. If the society is right, income tax is not payable. The Special Commissioners decided, in favour of the society, that the payments were loans and not payments of an annuity. Macnaghten, J., reversed that decision, and this appeal results.

It is, perhaps, convenient to call to mind some of the elementary principles which govern cases of this kind. The function of the court in dealing with contractual documents is to construe those documents according to the ordinary principles of construction, giving to the language used its normal, ordinary meaning save in so far as the context requires some different meaning to be attributed to it. Effect must be given to every word in the contract save in so far as the context otherwise requires. In considering tax matters a document is not to have placed on it a strained or forced construction in order to attract tax, nor is a strained or forced construction to be placed on it in order to avoid tax. The document must be construed in the ordinary way and the provisions of the relevant tax legislation then applied to it. If, on its true construction, it falls within a certain taxing category, then it is taxed. If, on its true construction, it falls outside the taxing category, then it escapes tax.

In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not.

There have been cases in the past where what has been called " the substance of the transaction " has been thought to enable the court to construe a document in such a way as to attract tax. That doctrine was, I hope, finally exploded by the decision of the House of Lords in *Inland Revenue Comrs.* v. *Westminster* (*Duke*) (1). The argument of the Crown in the present case, when really understood, appears to me to be an attempt to resurrect it. The doctrine means no more than that the language that the parties use is not necessarily to be adopted as conclusive proof of what the legal relationship is. That is, indeed, a common principle of construction. To take one example, where parties enter into a contract, though they describe it as a licence, but the contract, according to its true interpretation, creates the relationship of landlord and tenant, the parties can call it a licence as much as they like, but it will be a lease. There are other cases in the books in which the parties have described a particular document as a lease when the relationship created by it is that of licensor and licensee. In those cases it is not a lease, but a licence. Similarly here, if the parties have entered into a contract, the legal result of which, on its true construction, is to create an annuity, the parties cannot avoid the legal consequences by referring to the payments as loans.

Bearing in mind those principles, I will briefly examine the facts of this case. The assured, Hart, signed a proposal form for what was described as " an annuity and life assurance with optional interest-free loans." Under para. 3 of that form he is to receive an annuity of £7 11*s.* a year by monthly instalments of 12*s.* 7*d.* There is no question that that sum is an annuity, and, therefore, taxable. It has no real importance in this case, because precisely the same points would have arisen if that annuity had not formed part of the transaction. Under para. 4 he asks for what is described as " a sum payable at the death of the person described . . . above "—that is Hart. Against that this is said :

> . . . a sum equal to the aggregate of £4 14*s.* 8*d.* for each completed period of one month between the date of receipt of the purchase money at the chief office of the society and the death of the person described . . . above.

That is correctly described as a sum " payable at death." In the title of the proposal form it is correctly described as " life assurance," which it is. The sum payable at death is not, as in the case of the ordinary type of life assurance, a sum which is fixed when the contract is made, but is a sum which will fall to be ascertained when it is known what are the number of months for which the assured survives. It is an assurance under which a lump sum is to be payable at the death of the assured quantified by reference to the number of months he lives. It seems to me that there is no reason whatever to construe that contract as anything different from what it purports to be, namely,a contract of life assurance under which the society is to pay a lump sum at the death of the policyholder.

Paragraph 5 sets out the purchase money, £500. In other words, a single premium is payable. Then comes this clause which has given rise to the controversy :

> The owner will have the right to borrow on the security of the bond sums such that the aggregate of the loans outstanding at any date shall not exceed the amount which would have been payable by the society if the annuitant had died on that date.

So far, that language seems to me to be completely free of ambiguity. The right which the assured is given, which he is not bound to exercise if he does not want to, is to borrow certain sums on the security of the policy. That would mean, in so far as he exercised the power of borrowing, that the assurance society would be entitled to call for the deposit of the policy. The policy is to be security for the amounts which he so borrows, which may be nothing, or may be a very small sum for a month or two, or may cover every month for the rest of his life. The document continues: " Such loans shall be free of interest." To make an interest-free loan is a perfectly legitimate transaction. If a party chooses to lend money free of interest the fact that it is free of interest does not make it any the less a loan. The clause proceeds: " and shall not be recoverable by the society otherwise than on death and out of the sum then payable." There again, I see no ambiguity in the language. The fact that a sum of money advanced is not to be recoverable by action, for instance, but is only to be recoverable out of a named asset, is a familiar transaction and is perfectly consistent with the ordinary legal conception of a loan. If, therefore, one takes the language of the clause down to that point, one can find no ambiguity about it. The proposal is for life assurance under which a sum of money quantified in the way indicated is to be payable at death, with the right to borrow against that sum up to the stated amounts free of interest, and the society is only to recoup itself out of the amount which is to be paid at the death of the assured. The clause goes on:

> When the bond is issued the purchaser may request the society to make loans free of interest to the maximum extent and on the earliest date permitted unless and until the request is cancelled.

That enables the assured to obtain month by month a loan of the amount stated, namely, £4 14s. 8d., but he is entitled, so to speak, to make a running request which remains valid until it is cancelled, and by that means he secures for himself into his pocket a sum of £4 14*s*. 8*d*. in every month. It is in respect of sums so paid to Hart that the assessments were made. Lastly, there is an explanatory clause:

> Assuming maximum loans are requested to be advanced at the earliest possible date the total annual payments under the bond will be an annuity £7 11*s*. 0*d*. subject to income tax; interest-free loan (equal to 12 months increase in the sum payable at death) £56 16*s*. 0*d*. not subject to income tax. Total: £64 7*s*. 0*d*., by monthly instalments of £5 7*s*. 3*d*.

That is merely an example of how the contract works out as a matter of pounds, shillings and pence. It is to be noted that the society is disclaiming any right to deduct tax from the interest-free loans. If the payments of what are called loans are, in fact, payments of an annuity, that provision that their payment is not to be subject to income tax is void under r. 23 (2) of the General Rules.

I now come to the policy itself which was dated May 24, 1944. By its terms the proposal form was to be the basis of the contract. That means that the two documents are to be read together, and the proposal form is to be regarded as the basis of the definitive policy. The policy contains a covenant by the society to pay to the assured or his executors " (1) an annuity or annual sum as stated in the third section of the said schedule to the policy " during the lifetime of Hart: that is to say, £7 11*s*. 0*d*., as mentioned in the proposal form, and by para. (2): " The sum as stated in the fourth section of the said schedule on the death of " Hart. It goes on to put in the provisions stipulated for by the proposal form under which Hart was entitled to borrow every month £4 14*s*. 8*d*., and it contains a provision that any sum so borrowed shall not be recoverable by the society otherwise than on the death of Hart, " and out of the sum then payable under the fourth section of the said schedule." So far, the policy follows the stipulations of the proposal form, and what I have said with regard to the construction of the proposal form applies equally to the construction of the policy. The other provisions in the body of the policy I need not mention. The schedule sets out £500 which is called " consideration money," but which is really a single premium. Then the schedule sets out the name of Hart, who is described as " the annuitant " and the amount of the annuity, £7 11*s*. 0*d*., payable by monthly instalments. Then comes the following: " Sum payable at death." That is described as a sum " equal to the aggregate of £4 14*s*. 8*d*. for each completed period of one month between May 25, 1944, and the date of death of the annuitant." Again, that is following exactly the provisions of the proposal form. It is what the assured had stipulated for, and what the society, in accepting the proposal, agreed to give him, namely, a lump sum payable at death quantified in the manner indicated. The clause goes on to say in brackets " less the amounts of any loans made by the society to the purchaser under the provisions of this bond." Some emphasis was laid on those words in connection with an argument which I shall have to describe in a moment. I think it is worth noticing that, if the introduction of those words had the effect of varying what was stipulated for in the proposal form, it would appear that Hart would be entitled to have the policy rectified by striking them out. Either they are consistent with the proposal form, or they are inconsistent with it. If they are consistent with it, then the proposal form has not been departed from. If they are inconsistent with it, then the policy does not follow the terms of the proposal form which was what Hart was stipulating for.

On considering the language of that contract, I see no reason why what it says should not be accepted. If full effect is given to the language the parties have used, the obligation of the society is to provide a sum at death, and the right of the assured is to borrow such sums as he thinks fit month by month, subject to the limitation, against the sum so to be paid at death. He is not to pay interest on such advances, and he is not to be bound to repay them save out of the sum payable at death. That seems to me to be a perfectly intelligible and ordinary type of operation. Why the legal relationship which the parties have in terms created of lender and borrower in respect of those sums should not be given effect to, I fail to understand, unless it be that, by giving effect to what the parties have said, the transaction would avoid tax. I cannot think that, if it had not been for the existence of the Income Tax Acts, anyone would have dreamt of suggesting that this contract means anything else than what it sets forth. It is because, if effect is given to it according to its terms, tax will be avoided that the argument has come into existence—simply to try to get tax out of a transaction which, if it had been done in a different way, but achieving the same financial result, would undoubtedly have attracted tax. The society could have contracted to pay Hart £4 14*s.* 8*d.* a month if it had chosen to do so as an annuity, and in that case tax would have been payable. The society would have had to deduct tax, and under the All Schedules Rules, r. 21, which admittedly would apply in the present case, would be accountable for it to the Crown, but to say that, when parties set up a legal relationship, according to their language and its meaning, of lender and borrower, you must construe the word " loan " as meaning annuity and modify, alter, or strike out all the provisions relating to that loan as being inappropriate to an annuity, seems to me to be re-writing the contract, and I can see no justification for doing so.

The points on which the Crown based its contentions were of this nature. It was argued that, if Hart exercised his right of borrowing up to the full permissible amount, no sum would be payable to his executors at his death. That is true. It was also pointed out that, if he did not exercise the right of borrowing up to its full extent, the sum payable at his death to his executors would be *pro tanto* diminished, and it was said that that shows that this was nothing more than the payment of an annuity. It was argued that, in effect, no sum on that basis could be treated as payable at death, because it was meaningless to say that a loan was to be repayable out of a sum of money which, *ex hypothesi,* might never come into existence. It is true that, if Hart exercised his borrowing right up to the limit, no sum would be payable at death, but I do not see myself what that has to do with it. If you borrow up to the limit of a sum which would otherwise be payable to you, that sum can never come into your pocket because you have exhausted it. That does not alter the fact that the liability of the society under the policy was unquestionably a liability to pay a lump sum at death. If no borrowing took place, that lump sum would be payable. If borrowing did take place, it would either not be payable at all or it would be smaller than it would otherwise have been. But to say that the provision for recovering these so-called loans out of the sum payable at death is meaningless is an argument which I confess I do not understand.

At this point I return to the language of the schedule because, if the schedule is looked at by itself, it might be thought to suggest that the sum which is to be payable at the death of the assured is to be only such a sum as is arrived at after deducting the amounts of any loans. It is said that the only sum which is covenanted to be paid at death is a net sum, and not a gross sum. I do not so construe the language, because it seems to me that that would run counter to the whole tenor of the transaction, and, in particular, would be contrary to what is stipulated for in the proposal form. It seems to me that, reading the two documents together, the reference in the schedule in the words in brackets "less the amount of any loans made by the society to the purchaser under the provisions of this bond" is merely put in as a warning, as COHEN, L.J., pointed out in the course of the argument, to show that the sum which the executors will receive at the death of the assured is liable to be diminished by any advances made against it which, by the terms of the contract, are recoverable at death and not otherwise by the society.

The argument was put in rather a different way by counsel for the Crown. He said: "Looking at the contract and the actuarial method by which these various sums were arrived at, the assured, if he did not exercise his right of borrowing so-called, would not be getting the full financial benefit of the policy, because the calculations on which the policy was based were made on the assumption that he would exercise the right of borrowing." So be it. I cannot see that that alters the legal relationship of the parties. He is not bound to take the full financial benefit by borrowing. He might have very good reasons for not doing so. He might prefer not to borrow, with the result that the sum payable to his executors would remain at the agreed figure. He might find this desirable even if he incurred a small loss by not exercising the right of borrowing. Moreover, he would be entitled, if he did borrow, to repay on whatever day he pleased the amount that he borrowed. It is a loan and is described as a loan, and he could repay it when he liked. It is true that he is under no obligation to repay it, but there is nothing to prevent him repaying it if he wants to. Again, that seems to me to stamp it with the character of a loan, not the character of an annuity.

Then counsel for the Crown said that the contract was really of this nature. The society, he said, were really contracting to pay at death what must be regarded as deferred payment of an annuity, built up month by month, but not payable till death. He said that what Hart would become entitled to under that provision for payment at death was a monthly sum which could not be called for, save by his executors at his death, unless he exercised the right of borrowing, and the right of borrowing really amounted to taking from the society the monthly sum which it was said the society was obliging itself to pay to him. I cannot accept that view. It seems to me quite inaccurate to refer to the sum which the society covenanted to pay at the death of the assured as a series or collection of monthly sums. The real interpretation of that obligation seems to me to be this. It is an obligation to pay at death a lump sum which is to be quantified by reference to the number of months which the assured lives. There is all the difference in the world between that and an undertaking to pay a monthly sum. It is a sum the quantum of which increases month by month, but that is not the same thing as saying that it is a monthly sum. The object of the argument was to get the character of a collection of monthly sums imprinted on the sum payable at death in order then to say that, when the assured borrows a monthly sum against that, he is merely getting the prepayment of what, in its essence, is a monthly sum, and that stamps it with the character of an annuity. I cannot go through the mental process which would involve arriving at that result. It seems to me to be rewriting this contract—to be placing on the legal relationship created by it something quite different from what the language imports.

Putting it shortly, I find that the parties to this contract express in clear language the nature of the legal relationship into which they are entering. I find them using language properly adapted to create that legal relationship. I cannot see any reason for rewriting their contract and construing the language they have used in some unnatural and strained sense.

Only two cases were referred to by the Crown—*Perrin* v. *Dickson* (2) and *Sothern-Smith* v. *Clancy* (3). I cannot find that either of them gives any assistance to the solution of the present question. *Perrin* v. *Dickson* (2) was a very special case, and I do not find it possible to extract from it any principle which would be applicable to a case which was different on its facts. *Sothern-Smith* v. *Clancy* (3) also was a very special case, and it does no more—I think neither of those cases does more—than to lay down the proposition that the true meaning and effect of each contract is to be ascertained on ordinary principles of construction.

I must say a word about the judgment of MACNAGHTEN, J., who took a different view from that taken by the Special Commissioners. He began in the early part of his judgment by using this language :

> A loan which carries no interest, and which neither the borrower nor any other person can ever be under any obligation to repay, seems almost too good to be true.

With all respect to the judge, that approach to the question does not seem to me to be the right one. There is an obligation to repay the loans provided for by this contract. It is an obligation to repay, not by personal payment, but to repay out of a sum which, under the contract, is going to be payable to the borrower at a future date. To say that that is a transaction where there is no obligation to repay seems to me to be misunderstanding the true nature of the transaction. Then the judge goes on to state the argument for the Crown :

> The case for the Crown is that these payments of £4 14*s*. 8*d*. per month, though they are called " loans " in the bond, have none of the characteristics of a loan, and are in truth and in fact " an annuity or annual sum " within the meaning of the Income Tax Acts, since no interest is payable thereon, and they are not repayable by anyone.

As I have already said, the fact that a loan is made free of interest does not make it any the less a loan. The fact that it is only repayable out of a sum which is payable in the future does not make it any the less a loan. One of the commonest forms of loan is of that description. I do not understand the proposition that these payments " are in truth and in fact ' an annuity or annual sum.' " That is, as I ventured to suggest at the beginning of this judgment, no more than an attempt to revive the old suggested principle of substance and form. It is really saying that this transaction has produced the same financial result as if it were an annuity, and, therefore, the contract must be construed as a contract to pay an annuity and not to pay what it says it is to pay. The phrase " in truth and in fact" appears to me in the context to be very misleading, and I am afraid it must have misled the judge. He continues :

> I agree with the contention for the Crown that the payments in question were not loans ; that they were payments which, in the event that happened, namely, the request by Hart, the society was bound to make month by month, and were, therefore, an annuity.

I need not go into that because my reasons for disagreeing with it appear from what I have already said. Then he refers to the argument of counsel for the society that the loans were repayable out of the sum payable by the society on the death of Hart. He says :

> But unless and until Hart revokes the request made in his letter of May 26, 1944, no sum will be payable by the society on his death, and, therefore, the " loans " cannot be repaid.

I do not think I have mentioned that letter before, but it was the letter under which Hart said he wished to avail himself of the privilege of borrowing. His request was in this form : " Will you kindly make loans to me free of interest to the maximum extent . . . unless and until this request is cancelled." It is true that, if he did not cancel this request, the sum payable at death would melt away, but there was nothing to compel him to go on borrowing. He might stop the next day, and the result would be that there would be a sum payable at death, the loans being repayable out of that sum. In any event, it seems to me that the primary obligation on the society is to pay the sum payable at death, and, even if borrowings which are equal to that amount eventually turn out to be made, it is, nevertheless, true to say that the loans are repaid to itself by the society by setting them against what is primarily a capital obligation, namely, to pay a sum at death.

In my opinion, the Special Commissioners were right in the conclusion to which they came, and this appeal should be allowed with costs.

COHEN, L.J. : I agree.

ASQUITH, L.J. : I also agree.

Appeal allowed with costs.

Solicitors : *Field, Roscoe & Co.*, agents for *Evershed & Tomkinson*, Birmingham (for the taxpayers) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law*].

GOODMAN AND ANOTHER *v.* ELKINGTON AND ANOTHER.

[Court of Appeal (Scott, Bucknill and Somervell, L.JJ.), November 15, 1946.]

Landlord and Tenant—War damage—Notice to avoid disclaimer—Form of notice—Multiple lease—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 15—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (*c.* 41), *sched.*

A building lease provided for the erection of three dwelling-houses (which were duly erected) on the land comprised in the lease. The houses having suffered damage by enemy action the tenants under the lease, on Feb. 21, 1946, served on the landlords a notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, s. 4. The three houses were specifically mentioned in the notice. On Mar. 19 (*i.e.*, within one month of the notice of disclaimer, as required by the Act) the landlords applied to the court for a declaration that the notice of disclaimer was of no effect, " on the ground that the land comprised in the lease was not unfit by reason of war damage " and that it " was not unfit for the purpose of dwelling-houses " at the relevant time. On May 3, the landlords filed a second notice, called an " amended notice." It was contended by the tenants that, the lease being a multiple lease, the first notice to avoid disclaimer was not in itself sufficient because its language was not appropriate to s. 15 of the Act of 1939 (as modified by the Act of 1941) which applied to multiple leases, and that the second notice was a fresh application, and, therefore, invalid as being out of time. Alternatively, it was contended by the tenants, that the definition in the Act of a multiple lease as a " lease comprising buildings " did not cover the lease in question because there were no buildings on the land when the lease was negotiated:—

Held : (i) no particular form of notice was required under the Acts of 1939 and 1941, provided that the intention of the notice was made sufficiently clear.

(ii) the terms of the landlords' first notice to avoid disclaimer were appropriate to s. 15 of the Act of 1939 and so covered a multiple lease, and, therefore, the notice was a good notice under the Act and the second notice by the landlords could be wholly disregarded.

(iii) the phrase " comprising buildings " in the definition of a multiple lease in the Act of 1939 was sufficient to cover buildings erected pursuant to a building lease though built subsequent to the date when the lease was actually granted.

(iv) *semble*, an application by a landlord to avoid disclaimer is an application within the County Court Rules, 1934, the provisions of which in relation to, *e.g.*, the form of the application and the amendment thereof, are applicable thereto.

[As to Disclaimer of Leases, see HALSBURY, Hailsham Edn., 1946 Supplement, (pp. 988-999), Vol. 20, para. 219b.

For the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 982 ; and for the Landlord and Tenant (War Damage) (Amendment) Act, 1941, sched., see *ibid.*, Vol. 34, pp. 173, 174.]

Case referred to :

(1) *Price* v. *Mann*, [1942] 1 All E.R. 453 ; 58 T.L.R. 197 ; Digest Supp.

Appeal by the landlords from an order of His Honour Judge Alchin, at Bow County Court, dated June 25, 1946, refusing the landlords' application for a declaration that the tenants' notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, s. 4, was of no effect. The tenants had taken a preliminary objection that the landlords' first notice to avoid disclaimer was not a good notice, as it was not in itself sufficient, and that a second notice, filed some six weeks later, was a fresh application and, not having been made within one month of the notice of disclaimer (as required under the Act), was invalid. The county court judge, in a considered decision, upheld the objection. The facts appear fully in the judgment of Scott, L.J.

R. G. Dow for the landlords.

H. C. Leon for the tenants.

SCOTT, L.J.: This is a question arising primarily under the Landlord and Tenant (War Damage) Act, 1939, but also under the Act of 1941, in so far as that Act introduced certain new terms into s. 15 of the Act of 1939. For practical purposes the two Acts must be read together.

The subject-matter of the proceedings relates to a notice of disclaimer by the tenants of a building lease, dated Aug. 26, 1880, for 99 years from Michaelmas, 1877, running to Michaelmas, 1976, which provided for the erection of three dwelling-houses, which, when erected, became Nos. 26, 28 and 30, Box Street, Poplar. War damage had been done by enemy action to those three houses between 1940 and 1944. At what particular time the damage was done is immaterial. On Feb. 21, 1946, the tenants' solicitors served on the landlords' solicitors a notice in the following terms:

> I the undersigned as solicitor for the executors of Alfred Day Elkington deceased pursuant to the Landlord and Tenant (War Damage) Act, 1939, hereby give you notice that the premises known as Nos. 26, 28 and 30 Box Street, Poplar, in the county of London, are unfit by reason of war damage and that the said executors of Alfred Day Elkington elect to disclaim the lease thereof dated Aug. 26, 1880.

Then there is added:

> No underlease of the said premises has been granted nor has the same been mortgaged. There are statutory weekly tenants in occupation of the property.

That notice was, I think, sufficient notice of disclaimer under the provisions of the two Acts taken together as indicating that the tenants elected to avail themselves of their statutory right conferred by the Acts. Section 4 of the Act of 1939 provides:

> (1) Where the land comprised in a lease is unfit by reason of war damage, the following provisions of this section shall have effect, whether the lease was made before or after the commencement of this Act. (2) The tenant may serve on the landlord . . . (*a*) a notice . . . stating that he elects to disclaim the lease . . .

Under s. 6 (1) it is provided:

> Where a notice of disclaimer is served . . . (*b*) any person having an interest in the reversion immediately expectant on the determination of that lease may, at any time within one month from the service of the notice, apply to the court to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice was served.

The word "unfit" is defined in s. 24 of the Act of 1939 as meaning:

> (*a*) in relation to buildings or works . . . unfit for the purpose for which those buildings or works were used . . . immediately before the occurrence of the war damage in question . . .

By s. 6 (5):

> Unless it is decided by the court on an application made under this section that a notice of disclaimer . . . is of no effect on the ground that the land to which it relates was not unfit by reason of war damage at the time when the notice was served, the land shall be deemed for the purpose of any proceedings pursuant to the notice to have been unfit by reason of war damage at that time.

That sub-section imposes what I will call a statutory presumption, conclusive as to the character of buildings in respect of damage at the time of the service of the proceedings.

Under other provisions in the Act, the landlord may serve a notice to avoid the disclaimer. In s. 15 of the Act of 1939 various provisions were made in regard to a multiple lease, which is defined in s. 24 of that Act as meaning:

> . . . a lease comprising buildings which are used . . . as two or more separate tenements.

The definition thus refers to actual user. There is no question but that these three houses were used as separate tenements. In the Act of 1941 s. 15 of the Act of 1939 was re-enacted with some amendments, and I will refer to those amendments which are relevant. The new amended section is set out in the schedule to that Act, and is as follows:

> (1) In relation to a multiple lease s. 6 of this Act shall not apply and the other provisions of this part of this Act shall have effect subject to the modifications specified in this section. (2) Where a notice of disclaimer, a notice of retention or a notice to elect is served with respect to the lease—(*a*) the person serving the notice or the person on whom it is served; or (*b*) any other person having an interest in or derived out

> of the term created by the lease, or having an interest in the reversion immediately expectant on the determination of the lease; may apply to the court, within one month from the service of the notice, to determine the question whether the tenant should be allowed to exercise the right of disclaimer or retention, either as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, or should not be allowed to exercise that right at all . . . (6) Unless an application is made to the court under this section with respect to a notice of disclaimer, a notice of retention or a notice to elect served with respect to a multiple lease, the land comprised in the lease shall be deemed for the purpose of any proceedings pursuant to the notice to have been unfit by reason of war damage at the time when the notice was served.

Those provisions give jurisdiction to the court to do substantial justice if the notice of disclaimer is valid and within the Act and if the notice of application by the landlord to avoid the disclaimer is also valid and within the Act.

The question is this case arises primarily on the contents of the landlords' notice of application to the court dated Mar. 19, 1946, for a declaration that the notice of disclaimer was of no effect. To follow the position, a few dates are necessary. I have given the date of the notice of disclaimer as Feb. 21, 1946. On Mar. 19, *i.e.*, within one month of Feb. 21, the application by the landlords to which I have just referred was served on the tenants' solicitors in accordance with the provisions of the Act. On May 3, the landlords filed what they called an "amended notice." On May 7, the application came on for hearing before JUDGE ALCHIN and, on its coming on, counsel for the tenant took a preliminary objection that the second application was a fresh application and, not having been made within the month, was invalid. He further contended that the first application was not of itself sufficient unless the provisions of the second application were read into it. The court reserved judgment and on June 25 the judge upheld the tenants' contention that the second application was a fresh notice and that the first application was not sufficient to constitute a "notice" within the meaning of the Act, largely on the ground that he interpreted the first application as an application under s. 6 of the Act alone and not under s. 15.

Important questions are, therefore, raised by this appeal. *Prima facie*, I cannot help feeling that the intention of Parliament was not to impose any particular duty as regards form. There is nothing in the Act of 1939 nor in the Act of 1941 to require a particular form. The object of the legislation seems to me to have been to make provision interfering with the strict legal rights of landlord and tenant, as determined by their contractual instruments and pre-war legislation, only so far as was necessary to ensure that, in the event of war damage, justice should be done as between landlord and tenant on the substantial facts of the position. For that reason I should have thought that Parliament intended the notices to be informal, provided always that the intention of the notice was made sufficiently clear. A notice of disclaimer obviously is a notice that, by reason of war damage, the tenant seeks to get out of his lease altogether. The application of the landlord to avoid disclaimer must be regarded as intended simply to bring to the notice of the court his contention that the facts of the case do not justify the disclaimer and consequent avoidance of the lease. If the two notices brought that issue sufficiently before the court, my view is that *prima facie* the intention of the Act was complied with. It is clear that, after a notice of disclaimer, the landlord will lose his right to give a counter notice by application to the court unless he does it within the statutory period of one month. That limitation of time was deliberately made by Parliament to ensure that issues which depend on pure questions of fact should be disposed of rapidly, so that both landlord and tenant might know where they stood. It follows that the making by the landlord of his application within a month is a definite condition precedent to the right of the landlord to make that application.

In my view, the notice by the landlords served on Mar. 19, was a good notice. To consider the meaning of such a notice the court must read into it everything that is reasonably imported by it, and should not apply any artificial theory of interpretation or technical test for its validity. The declaration asked for by the landlords was in the following terms:

> That the notice of disclaimer . . . in respect of a lease dated Aug. 26, 1880, and made between James Goodman and Josiah Goodman of the first part Arthur Holloway

> of the second part and Mary Watson of the third part is of no effect on the ground that the land comprised in the said lease was not unfit by reason of war damage at the time when the said notice of disclaimer was served.

That notice appears to me to show that the landlords challenge the allegation of the tenants on which their disclaimer was based. The landlords go on to say, though I think it was probably not necessary for them to add it :

> The grounds on which we claim to be entitled to the said order or declaration are
> A that the said land was not unfit for the purpose of dwelling-houses . . .

at the relevant time. That describes the substantial position. The phrase "dwelling-houses" in the plural must be read in the light of the disclaimer, to which the application was an answer, and there the three houses, Nos. 26, 28 and 30, were specifically referred to.

It is contended for the tenants that this first notice by the landlords ought
B to be read as limited to s. 6 of the Act of 1939, and not as applying to a "multiple lease" within s. 15 of that Act, as amended by the Act of 1941. Although, it is said, this lease was a multiple lease as defined by the earlier Act, the language of the application is more appropriate to a claim of "unfitness" only under s. 6, which does not concern multiple leases, and, therefore, that this multiple lease ought not to be treated as having been covered by the terms of the first notice of application. My answer to that is that under s. 15 of the
C Act of 1939, as amended by the later Act, the question of unfitness is dealt with just as plainly as under s. 6 of the Act. Section 15 (6) makes that clear :

> Unless an application is made to the court under this section with respect to a notice of disclaimer, a notice of retention or a notice to elect served with respect to a multiple lease, the land comprised in the lease shall be deemed for the purpose of any proceedings pursuant to the notice to have been unfit by reason of war damage at the time when the notice was served.

D That, it seems to me, is conclusive that the first notice did cover this multiple lease, and, subject to one single point, was a good notice. It is argued for the tenants that the definition of a multiple lease as "a lease comprising buildings . . . used . . . as two or more separate tenements" does not cover this lease because, when the lease was originally negotiated, the subject-matter of the lease was a vacant piece of land with no buildings on it, and that the buildings to-day
E standing on it, referred to in the notice of disclaimer as three separate houses, were only erected subsequently. We are informed, as a matter of fact, that the lease was not executed until after the buildings had been built, but, whether that be so or not, I am satisfied that the phrase "comprising buildings" is sufficient to cover buildings erected pursuant to a building lease, though built subsequent to the date when the lease was actually granted.

For these reasons, in my view, the first notice of application was sufficient,
F but before I leave the case, I will deal with the argument of counsel for the tenants, based on the procedural rules under the County Courts Act, 1934, in regard to pleadings. It is said by him, and I think justly, that the application to the court by the landlords was an application falling within those rules to be treated almost like a claim in an action. His point was that there was no application before the county court judge, as the rules require, for leave to amend the first notice of application, and that, therefore, the second application
G cannot be looked at. My answer is that I am prepared to assume that the second application should be wholly disregarded, but that that does not affect my view that the first one was by itself adequate. I do not propose to consider the second application any further. The appeal must be allowed with costs.

BUCKNILL, L.J. : I agree. Unfortunately, this court has not the advantage of knowing the reasons why the judge came to the conclusion to which he did.
H All he says in his judgment is : "It is clear that the original application must fail." It does not seem to me to be a self-evident proposition and the only implied reason that I can see in his judgment is that he says in an earlier part of it :

> This application was in accordance with the procedure laid down in s. 6 of the Landlord and Tenant (War Damage) Act, 1939, (as amended by the Act of 1941). It is, however, common ground between the parties that the lease in question relates to several properties, and that it is a "multiple lease" as defined by the Act, to which the procedure prescribed by s. 15 applies.

I think that the vital question in the case is whether the first notice given by the landlords was sufficiently in accordance with the provisions of s. 15 to comply with the procedure laid down by the Act. Counsel for the tenants argued that we must treat this application as a pleading, and I do not think it would have been a good pleading if in it the landlords had said something like this : " We apply to the court to determine the question whether the tenants in this case should be allowed to exercise the right of disclaimer or retention." In my opinion, that would be a bad pleading, because it would not be setting out what is the real issue between the parties. The right of disclaimer by the tenant is clearly based on his allegation that the land is unfit by reason of war damage. That is the question to be tried by the judge, and that issue is directly raised in the written application by the landlords in March, 1946. Counsel for the tenants has referred us to the procedure laid down in the County Court Rules, 1936, Ord. 6, r. 4 (2), of which says this :

> The following provisions shall apply to originating applications : (*a*) An originating application shall be in writing and shall state the order applied for and sufficient particulars to show the grounds on which the applicant claims to be entitled to the order and the names and addresses of the persons . . . intended to be served . . .

This was an original application. It was in writing. It did state the order applied for, and it set out clearly, in my opinion, the grounds on which the applicant claimed to be entitled to the order. The necessary names and addresses were also supplied.

In *Price* v. *Mann* (1) a somewhat similar point to this was raised in the Court of Appeal, when Lord Greene, M.R., said ([1942] 1 All E.R. 453, at p. 454) :

> Reading this document as a whole, it seems to me perfectly manifest that a person who received it, and who had that familiarity with the provisions of the Act which a recipient of such a document must be presumed to have, could not possibly be under any illusion as to what it was intended to be and what its legal consequences were.

For these reasons I think that this appeal should be allowed.

Somervell, L.J. : I agree. Although we are differing from the county court judge, the reasons which have led me to consider that this appeal should be allowed have already been stated by my brethren, and I do not think I can usefully add anything.

Appeal allowed with costs.

Solicitors : *Goodman, Brown & Co.* (for the landlords) ; *R. Voss & Snn* (for the tenants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

J. (otherwise S.) *v.* J.

[Probate, Divorce and Admiralty Division (Jones, J.), November 13, 22, 1946.]

Divorce—Nullity—Wilful refusal to consummate marriage—Husband permanently sterilised before marriage by medical operation—Avoidance of procreation of children—Wife's knowledge of husband's intention at time of marriage—Bar to decree—Matrimonial Causes Act, 1937 (c. 57), *s.* 7 (1) (*a*).

Before the marriage the husband caused himself to be made permanently sterile by a medical operation so that his wife should never be able to bear children by him. The wife knew of the operation and its effect on her husband, but with this knowledge she married him. After the marriage sexual intercourse took place, but no children were, or could have been, born. The wife petitioned for a decree of nullity on the ground of her husband's wilful refusal to consummate the marriage under s. 7 (1) (*a*) of the Matrimonial Causes Act, 1937.

Held : (i) the husband had, by the medical operation, intentionally and artificially prevented his wife from bearing children by him, and had, therefore, wilfully refused to consummate the marriage within s. 7 (1) (*a*) of the Matrimonial Causes Act, 1937 ; but

(ii) the wife, by marrying with knowledge of the sterilising operation and its effect, had acquiesced in the circumstances of the marriage of which she now complained, and it would, therefore, be inequitable and contrary to public policy to grant her a decree of nullity.

[AS TO GROUNDS FOR NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639-645, paras. 934-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-271, Nos. 2328-2404.]

Cases referred to:

(1) *Cowen* v. *Cowen* [1945] 2 All E.R. 197; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.

(2) *G.* v. *M.* (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, 3339; also reported as *A.B.* v. *C.B.*, 12 R. (H.L.) 26.

A (3) *L.* v. *L.*, 1931, S.C. 477; [1931] S.L.T. 256; Digest Supp.

WIFE'S PETITION FOR NULLITY on the ground of her husband's wilful refusal to consummate the marriage. The facts are stated in the judgment.

R. J. A. Temple for the wife.

The husband was not represented.

Cur. adv. vult.

B Nov. 22, 1946. JONES, J. read the following judgment. In this undefended suit the petitioner, who is the wife, prays for a decree nisi of nullity on the ground of the husband's alleged wilful refusal to consummate the marriage. The parties married in 1934 and they had sexual intercourse after marriage, the wife being fully competent and the husband being capable of achieving full penetration. The ground on which the petition is based is that the husband has wilfully refused to have intercourse in such a way that the birth of a child might result, and it is alleged and C proved that he actually underwent an operation before marriage to render him sterile and to eliminate the possibility of the wife having a child by him. The operation, according to the medical evidence, although it rendered him sterile, left him capable of achieving penetration and emission.

In *Cowen* v. *Cowen* (1), to which counsel for the wife referred me, the Court of Appeal held that the petitioning wife was entitled to a decree nisi of nullity on D the ground of wilful refusal to consummate the marriage where her husband had either insisted on using a contraceptive or had resorted to the practice of coitus interruptus. In delivering the judgment of the court, DU PARCQ, L.J. said ([1945] 2 All E.R. 197, at p. 199):

> We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. E To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated.

In the present case the husband took a more effective step to prevent his wife bearing any children by him than either the use of contraceptives or resorting to the practice of coitus interruptus. He had an operation performed on him in F 1934, just before the marriage, which, according to the evidence of the doctor who performed it, and one of the medical inspectors of the court, made him completely sterile, although able to achieve penetration and emission. I am satisfied that the husband had the operation performed on him so that the wife should not have a child by him. He told the doctor who performed the operation that he desired it because there was insanity in the wife's family. The wife has told me that to the best of her belief no member of her family has suffered G from insanity, and it may be that the statement made by the husband to the doctor was untrue and was made by him simply to induce the doctor to perform the operation. I find that the husband artificially prevented his wife having a child by him, and I hold that that act on his part amounts to wilful refusal to consummate the marriage.

It is necessary, however, that I should consider whether, even if I am right, in holding that there was wilful refusal on the part of the husband to consummate H the marriage, a decree nisi of nullity should be pronounced in favour of the wife in view of the fact that before she married the husband she acquiesced in the performance of the operation rendering him sterile. Apparently, the doctor who performed the operation would not perform it unless both the wife and the husband signed a statement which he drew up and which he subsequently retained. The statement, dated April 30, 1934, is in the following terms:

> We the undersigned fully understand and realise that the operation of vasectomy desired by J., while likely to improve general conditions of health and function, has the effect of total sterilization which is irremediable.

That is signed, first by the wife in her maiden name of S., and, secondly, by the husband, J.

The wife has given me an account of what she says happened. They were married on June 16, 1934. She says that on April 30, 1934, the husband told her that he had a form which he wished her to sign, and he said he proposed to have an operation to prevent him having children. She says that she refused to sign it, and that they then had an argument. She says that she asked him not to do it, and said to him that he would feel differently after marriage. To that he replied that he was going to have the operation anyhow and if she did not sign he would not marry her. Then, according to her, she said she would sign if he promised he would wait until after they were married before he had the operation. She says that he agreed to this, and that she hoped that she would be able to persuade him to take a different view after the marriage. He then produced a form already written out—undoubtedly the form to which I have referred—and she signed it, and, according to her, he made her swear she would never tell anyone about it or discuss it with anybody, and he then took the form away. She says that on May 6, 1934, she met the husband. Apparently, she must have received some information which caused her to think he had had the operation, and she asked him whether he had. At first, according to her, he denied it, but later he admitted it. She says that she was dreadfully upset, that he said that they could adopt a child, and that when she reminded him of his promise to wait he said he wanted to get the job done. She says that she did not discuss the matter with anyone and that she did not know at that time that the husband had told the doctor that there was insanity in her family. It is impossible for me to come to a conclusion whether this account is true or not, but even if it is true and if the husband did deceive her up to a point, the fact remains that she admits that she knew before the marriage was solemnised that this operation had been performed, and, consequently, she knew, when she married him, that she was marrying a man who had been rendered irremediably sterile and that she could not have a child by him. In view of the fact that she contracted the marriage with this knowledge I consider that she must be held to have acquiesced in the circumstances of the marriage of which she now complains, and that, even though the husband does not defend this suit, it would be inequitable and contrary to public policy that she should be granted a decree of nullity on the ground that by reason of the operation the husband is unable to consummate the marriage.

In *Cowen* v. *Cowen* (1) du Parcq, L.J., (as he was then) said, [1945] 2 All E.R. 197, at p. 200:

> Mr. Fairweather, who addressed us as amicus curiae, suggested that it might be proper to refuse relief to the petitioner on the ground that her conduct showed that she has acquiesced in and approved her husband's course of conduct. If the petitioner had never made any objection to the measures he adopted, or requested him to have normal relations with her, she would certainly not be entitled to the relief which she claims. It may be that relief might properly be refused to a wife who over a long period consented to such imperfect intercourse as was here proved, and only objected to it at a later date, without being able to adduce any excuse or justification for her earlier consent. Each case must be dealt with on its own facts, in the light of established principle.

I think that the principle to which the learned Lord Justice referred was stated in *G.* v. *M.* (2), the headnote of which reads (10 App. Cas. 171) as follows:

> In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved, which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it most inequitable, and contrary to public policy, that he or she should be permitted to go on to challenge it with effect.

The Earl of Selborne, L.C., said (*ibid.*, p. 186):

> My own belief is that, to whatever criticism the phraseology of learned judges in those cases may be open (and I must say that the adoption of that particular phrase "sincerity" seems, as the learned counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not), I think I can perceive that the real basis of reason which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of

> the facts and the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

LORD WATSON said (*ibid.*, p. 197):

> The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or, more correctly speaking, insincerity. I agree with the observations which have been made upon the English cases bearing upon that matter by my noble and learned friend the Lord Chancellor. It humbly appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate. I think that when those cases are dissected they do show the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

The only other case to which I need refer is *L.* v. *L.* (3), the headnote of which is as follows (1931, S.C. 477):

> A woman married a man who was at the date of the marriage, and remained thereafter, impotent in consequence of paralysis. The parties had cohabitated, and had occupied the same bed, for two months prior to the marriage and the woman was aware of the man's condition. Her reason for entering into the marriage was to obtain support for herself and for an illegitimate child, which she had previously had by another man. After the marriage the parties lived together for over four years. In an action of declarator of nullity of marriage brought by the woman:—*Held* (LORD MORISON doubting), that she was barred from founding on the defender's impotency, in respect that she entered into the marriage in knowledge of it, and that in the circumstances of the case, it would be inequitable to allow her to found upon it.

LORD BLACKBURN, referring to *G.* v. *M.* (2), said (*ibid.*, p. 483):

> Applying the reasoning of LORD CHANCELLOR SELBORNE and LORD WATSON in *A.B.* v. *C.B.*, it seems to be both inequitable and contrary to public policy that she should now be allowed to plead her husband's impotency as a ground for setting aside a contract which she entered into with her eyes open.

A.B. v. *C.B.* (2) is the same case as *G.* v. *M.* (2).

Having regard to those authorities, I come to the conclusion that this petition should be dismissed. I should like to say how much help I received from counsel for the wife. This is an undefended suit, but he has referred me to authorities both in support of and against his contentions, and has enabled me to give judgment without asking the King's Proctor to assist me.

Petition dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *R. M. Wood, Johnson & Sons*, Birmingham (for the petitioner).

[*Reported by* HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re TALDUA RUBBER CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 11, 1946.]

Companies—Winding-up—Substratum of company—Alleged disappearance—Company formed partly to purchase a rubber estate, but with power to carry on a variety of activities—Company carrying on business of rubber estate only—Rubber estate sold after 29 *years—No scheme before court to deal with proceeds of sale.*

By its memorandum of association the objects of T. Rubber Co., Ltd., were stated in the widest terms and included (at the end of cl. 3 (*a*)) power "to enter into and carry into effect the agreement, draft of which is referred to in art. 3 of the articles of association." This agreement (which was entered into on Mar. 30, 1917, the same day as the company was incorporated) was for the purchase by the company of the T. rubber estate. By the last paragraph of cl. 3 of the memorandum of association it was provided that the various objects of the company were to be regarded as independent objects and that the name of the company was not to be taken as operating to restrict the various powers set out in the clause. For 29 years the company carried on the business of a rubber estate on the

T. estate, and during that period it carried on no other business except that it purchased rubber from other estates and processed it on its own estate. Pursuant to a resolution passed unanimously on Mar. 7, 1946, the company sold the T. estate and its business thereon. The circular convening the meeting of Mar. 7 intimated that, if the business were sold, the liquidation of the company would be recommended, but on July 17, 1946, a resolution for the voluntary liquidation of the company was defeated by a small majority. In Aug., 1946, a petition for compulsory winding-up was presented by one of the contributories on the ground that the substratum of the company had gone, since the company had been formed solely to work the T. rubber estate. It was also contended by the petitioner that the absence before the court of any concrete scheme by those who were against liquidation for dealing with the proceeds of the sale was a further ground for making a winding-up order:—

Held: (i) on the true construction of the memorandum of association, it was impossible to conclude that the company had been formed solely to work the T. rubber estate. It had been formed partly to carry on the business mentioned in the agreement of Mar. 30, 1917, but with the widest powers to carry on a variety of other activities. Therefore, the sale of the T. estate did not result in a destruction of the substratum because the paramount object of the company was to carry on the business of conducting rubber estates, and was not limited to the business of carrying on the particular estate.

Re Kitson & Co., Ltd. (1) *applied.*

(ii) the fact that there was no concrete scheme before the court for dealing with the proceeds of the sale was no ground for making a winding-up order.

[As to Failure of Substratum, see HALSBURY, Hailsham Edn., Vol. 5, pp. 546, 547, para. 885; and for Cases, see DIGEST, Vol. 10, pp. 822-825, Nos. 5358-5374.]

Case referred to:

(1) *Re Kitson & Co., Ltd.*, [1946] 1 All E.R. 435; 175 L.T. 25.

Petition for the compulsory winding up of a company on the ground that its substratum had gone, the sole business which it had carried on since its incorporation having been sold. The facts appear in the judgment.

S. Pascoe Hayward, K.C., and *Raymond Walton* for the petitioner.
Charles R. Russell for the opposing contributories.
John Monckton for the supporting contributories.

Wynn-Parry, J.: This is a petition for the compulsory winding-up of the Taldua Rubber Co., Ltd., the petition being presented by a contributory and supported by a number of contributories. The petition is opposed by other contributories who, acting together, constitute the majority, but only a small majority, of the shareholders.

The company was incorporated on Mar. 30, 1917, with an authorised capital of £40,000, divided into 40,000 shares of £1 each, of which there have been issued 30,007 shares, all of which are fully paid up or credited as fully paid up. By cl. 3 of the memorandum of association, the objects for which the company was established are stated as follows:

> (*a*) To purchase or otherwise acquire any real and personal property, buildings, machinery, implements, live and dead stock, stores, effects, appliances, and other property of any kind in any part of the world, and to take, obtain and acquire any grant, concession, lease and rights in the Island of Ceylon, the Straits Settlements, and elsewhere in any part of the world, and to enter into and carry into effect the agreement, draft of which is referred to in art. 3 of the articles of association of the company, with such modifications as may hereafter be agreed upon.

By para. (*b*) power is taken:

> . . . to purchase, take on lease or hire or otherwise acquire any other lands in any part of the world, and any machinery, works, stock, plant and real or personal immovable or movable estate or property of any kind and wheresoever situate, including concessions or easements or rights of any kind.

By para. (*c*) it is provided that the company shall have power to plant, grow and produce a large number of things, ending with the words " . . . or otherwise cultivate any land of the company." In para. (*d*) there is power " to treat, cure, submit to any process, or manufacture and prepare for market " a large number of things. In para. (*f*) occurs the first reference to a power to carry on business. There power is given to carry on the business of planters, timber merchants and a large number of other businesses, qualified by the words: " . . . . or any other business connected with or incidental to any of the said businesses . . .", and ending with wide words: " or any other business or businesses which may seem calculated directly or indirectly to benefit the company." By para. (*g*) there is power:

> To enter into any arrangements with any governments, chiefs, rulers and authorities, supreme, local or otherwise, that may seem conducive to the company's interests and to obtain from such governments, chiefs, rulers and authorities, or take over from any other persons or companies possessing the same, any rights, privileges, licences and concessions which the company may think it desirable to obtain.

By para. (*i*) there is power to carry on a large number of businesses without any qualifying words whatsoever. The draftsman, having progressed by stages through the whole alphabet, ends with para. (*z*) which gives power:

> To do all such things as are incidental or conducive to the attainment of the above objects or any of them, the intention being that the objects specified in each of the paragraphs in this clause shall, unless otherwise provided, be regarded as independent objects and shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.

By art. 3 of the articles of association it was provided that the company should forthwith enter into and carry into effect an agreement in the terms of a draft which had been prepared and identified by the subscription of the signatories of the articles, and that the directors should forthwith carry that agreement into effect. That agreement was entered into on the same day, Mar. 30, 1917, as that on which the company was incorporated. After reciting that the parties of the one part, who are described as the vendors, were entitled to the property intended to be sold, and reciting that the purchasers had been incorporated on Mar. 30, 1917, with the object, *inter alia*, of acquiring a property described in the first schedule to the agreement and the business carried on thereon, it was provided that the vendors should sell and the purchasers should purchase the property in question for the consideration of £30,000, which was to be satisfied by the allotment and issue to the vendors, credited as fully paid up, of 30,000 shares of £1 each in the capital of the company. The agreement was duly carried into effect, and the company acquired the property and business in question, and carried on, on the property, the business of a rubber estate for upwards of 29 years.

During that period it carried on no other business, except that it purchased rubber from other estates in Ceylon and processed that rubber on its own estate, that business forming only a comparatively small part of its total activity. The business was accurately described by counsel for the petitioner as moderately successful. In 1925 the company took the necessary steps to convert itself from a private company into a public company. In Feb., 1946, the directors of the company received an offer to purchase the company's estate and business for a sum of £20,625, together with a further sum in respect of stock and tools, to be ascertained by valuation. The directors had power, in the constitution of the company, to bind the company by accepting that offer, but in a very proper exercise of their discretion, they thought fit to refer the matter to the shareholders, and they, therefore, convened a meeting by a notice which was accompanied by a circular setting out in clear terms the nature of the offer which had been received. The meeting to consider this offer was held on Mar. 7, 1946, and a resolution was passed unanimously directing the acceptance of the offer. Pursuant to that resolution, a contract was entered into on Mar. 28, 1946, with the offerors for the sale of the company's property and business. That contract has been carried out to the extent that a considerable sum of money namely, £20,704, has been received, of which £20,500 has been placed on deposit with the company's bankers, and still remains there. There remains a certain valuation to be made, and payment in accordance with that valuation when effected. The circular convening the meeting of Mar. 7, 1946, contained an intimation that, if the offer was accepted, the liquidation of the company would be recommended as a desirable step to follow the carrying out of the contract for the sale of the business. A meeting was convened and held on July 17, 1946, when a resolution for the voluntary liquidation of the company was put to the meeting, and lost. No formal demand for a poll was made, because on an inspection of the proxies it was ascertained what would be the result if a poll were demanded and taken. The figures which I was given were that shareholders holding 14,886 votes were in favour of liquidation, while shareholders holding 14,958 shares were against liquidation, showing a small majority in favour of the company not going into liquidation. The total vote of 29,844 votes was a large vote having regard to the issued share capital of the company, and meant that only the votes in respect of 163 shares were not counted. Following on this meeting, the present petition was presented to the court last August and it now comes before me. The board at the present time consists of three directors, two of whom are in favour of liquidation, and the third is against liquidation. In those circumstances, counsel for the petitioner submitted to me, first, that, on the true construction of the memorandum of association, this company was formed to work the Taldua Estate, and for no other purpose, and that, therefore, the proper conclusion is that the substratum had gone. He then said that, if I were against him on that point, his submission was that this was still a proper case for a winding-up order, grounding his argument on the fact that this matter comes before the court with no specific or concrete proposition put forward by those who are against a liquidation for the carrying on of any particular venture, and that there can be discovered in the authorities no case in which a petition had been rejected in such circumstances.

In my judgment, however, this case, once one has construed the memorandum of association, is covered by authority. I will first turn to the construction of the memorandum of association. It is to be observed that, unlike a number of other cases, the reference to the specific venture in the memorandum of association is not an express reference, nor does such reference as is contained in the memorandum of association appear as the first object of the company in cl. 3. The reference to the particular venture is made by reference to a draft agreement, which, in turn, is said to be referred to in cl. 3 of the articles, and that indirect reference appears at the end of para. (*a*) of cl. 3 of the memorandum of association, which contains provisions of the widest possible import, giving the company power to purchase or otherwise acquire a large variety of things in any part of the world, and:

> . . . to take, obtain and acquire any grant, concession, lease and rights in the Island of Ceylon, the Straits Settlements, and elsewhere in any part of the world . . .

Pausing there, it seems to me that, on the language of a clause so constructed, it is impossible to say that the words providing that the company should enter into and carry into effect a particular agreement can operate to cut down the earlier and extremely wide provisions. The matter does not end there, because in the next two paragraphs of cl. 3 of the memorandum there is power in the widest terms to acquire a very large variety of things, and, as I pointed out earlier it is only when one comes to para. (*f*) that there is for the first time any reference to the carrying on of any business, and in that paragraph the company is given power to carry on a large number of businesses which are in no way directly referred to or qualified by the agreement referred to in para. (*a*). Further, there is in para. (*i*) power to carry on a further large number of businesses, and, lastly, it is made clear in the last paragraph that the various objects are to be regarded as independent objects and that the name of the company is not to be taken as operating to restrict the various powers in the various paragraphs of cl. 3 of the memorandum.

It appears to me, on a mere reading of the relevant parts of cl. 3, that it is impossible to come to the conclusion to which I am asked to come by the petitioner, namely, that, on the true construction of that clause, this company must be taken to have been formed to work the Taldua Estate and for no other purpose. In my judgment, this company was formed partly to carry on the business mentioned in the particular agreement, but with the widest powers to carry on a variety of other activities. That being so, it seems to me that this case is completely covered by the reasoning of Lord Greene, M.R., in *Re Kitson & Co., Ltd.* (1) where he said ([1946] 1 All E.R. 435, at pp. 437, 438):

> In this case what happened was this with regard to Kitson & Co., putting it quite shortly: on July 10, 1945, the company, which was still carrying on business under the

name of Kitson & Co., at the Airedale works, entered into an agreement to procure the carrying out of a sale and purchase, but, in effect, subject to the confirmation of the shareholders, it would be an agreement for sale by the company, and for convenience I may so refer to it, because it was in fact sanctioned by the shareholders. Under it the business of Kitson & Co. was agreed to be sold to a purchaser, its goodwill and all its assets, with one or two minor exceptions, and, so far as the business of Kitson & Co. was concerned, or what was left of it in 1945, it was assigned to a purchaser. That, says counsel for the respondents, destroyed the substratum of the company, and he turns to the memorandum of association and says that it is in that sense that the memorandum of association must be construed, because the purchase of Kitson's business in 1899 was expressed to be the first in sequence of the company's objects and all other powers and objects specified in the memorandum must be regarded as ancillary to the carrying on of that business. In my opinion, that construction of the memorandum will really not bear examination.

In my judgment, the present case is *a fortiori*, because the purchase of the particular business is not even first in sequence of the company's objects. LORD GREENE, M.R., continued (*ibid.*, at p. 438):

> It might possibly have been thought that unless it got this business it was not really starting its career in the way in which the shareholders bargained it should be started; but the question we have to decide is whether, that business having been acquired 46 years ago, the disposal of it last year amounted to a destruction of the substratum. In my opinion, the main and paramount object of this company was to carry on an engineering business of a general kind.

That affords a close comparison with the present case. Here I am dealing with a business which was, in fact, acquired and carried on for over 29 years, so that the question I would have to ask myself here is whether the sale of that business amounted to a destruction of the substratum. That question appears to me to have been conclusively disposed of by the passage I have read from the judgment of LORD GREENE, M.R. Therefore I construe the memorandum of this company in a manner similar to that in which LORD GREENE, M.R., construed the memorandum in *Kitson's* case (1). In my view, the main and paramount object of this company was to carry on the business of conducting rubber estates, and was not limited to the business of carrying on the particular estate. LORD GREENE, M.R., proceeded to give his reasons for that conclusion, and the whole of his reasoning applies, in my view, to the case before me. I, therefore, conclude against counsel for the petitioner on this part of the matter, and, in my judgment, the mere sale by the company of its business earlier this year does not result in a destruction of the substratum.

There then remains the question whether the absence before the court to-day of any concrete scheme for dealing with the proceeds of the sale is a reason for making a winding-up order. It has been observed by counsel for the petitioner that there is no reported case to be found where a petition has been rejected where those who oppose the making of the winding-up order did not bring before the court some concrete scheme, and he urged on me that, on the true view of the judgment of LORD GREENE, M.R., in *Re Kitson & Co., Ltd.* (1) that proposition could be extracted. I do not share that view. As I read the relevant passage in the judgment of LORD GREENE, M.R., he proceeded on quite the opposite view. What he said was this ([1946] 1 All E.R. 435, at p. 439):

> The judge, subject to one matter which I am about to mention, as I read his judgment, would quite clearly have refused to make a winding-up order. Down to this point he did not comment adversely, and it seems to me he had no material for commenting adversely on the question whether there was a real and *bona fide* intention to re-embark in the engineering business at the time the matter was before him. Subject again to what I mentioned a moment ago, it is quite clear he was not prepared to question that. I myself would go further than that, because this question of intention on which counsel for the respondents laid very great stress is, I must confess, on the facts in this case, one which does not impress me. To say that the question whether substratum has gone or has not gone can be affected by the intention that happens to exist in the minds of the board at a given moment appears to me to be going into irrelevant considerations. First of all, the board is not the company. Let it be supposed that at the time of the sale of the Kitson business, so far as the board was concerned they thought that there was no chance and that it was not desirable for the company ever to start again into engineering. It certainly is not proved nor was it proved that the shareholders had any such intention; but assume that it was. A little time afterwards something might happen to make them change their minds. They might see a profitable opportunity of using the company's money again in the engineering business.

What has intention to do with it ? We are dealing with the question of substratum, and to say that the substratum can exist at one moment and cease to exist a moment later, or *vice versa* simply through a change of intention of the board or of the shareholders (I know not which) seems to me to lead into a morass.

Those observations are binding on me, and with respect, I agree with every word of them. They seem to me to apply to this case with full force and effect. Apart from authority, it appears to me that the common sense of the matter demands that the existence or non-existence of a concrete scheme at the time the petition comes before the court should be regarded as a wholly irrelevant matter, otherwise it would be impossible for the court to draw any safe line in any particular case. Where is the court to draw the line ? What period is to be allowed to elapse ? What is to be regarded as satisfactory evidence of the intention of the company to go forward into some new venture ? The court clearly is not called on to adjudge the merits or demerits of any scheme, and this fact appears to me to make the consideration by the court of the existence or non-existence of a particular scheme all the less fruitful. If this point were well taken, it would follow that a shareholder who desired a company to be wound up would be well advised, as soon as the resolution for the sale of the company's business had been passed, immediately to put a petition on the file, and bring the petition on in circumstances in which he could accurately allege that there was no scheme before the court.

For these reasons, and treating this case, so far as reasoning is concerned, as completely covered by the judgment of LORD GREENE, M.R., in *Re Kitson & Co., Ltd.* (1), I dismiss this petition with costs.

Petition dismissed with costs.

Solicitors : *Slaughter & May* (for the petitioner and the supporting contributories) ; *Linklaters & Paines* (for the opposing contributories).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Applied. THOMAS *v.* MARSHALL (INSPECTOR OF TAXES). MARSHALL (INSPECTOR OF TAXES) *v.* THOMAS. [1952] 1 All E.R. 173.

Applied. THOMAS *v.* MARSHALL [1952] 2 All E.R. 32.

HOOD-BARRS *v.* COMMISSIONERS OF INLAND REVENUE.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), November 19, 20, 21, 1946.]

Income Tax—Liability—Income settled on children—"Settlement"—Transfer of assets—Transfer of shares to daughters as an absolute gift—Dividends declared after transfer—Assessment of settlor in respect of amount of dividends—Recovery from children of amount of tax—Finance Act, 1922 (*c.* 17), *s.* 20 (2)—*Finance Act,* 1936 (*c.* 34), *s.* 21 (1), (9) (*b*) (*c*).

Income Tax—Practice—Appeal—Hearing by two special commissioners—Competence—Income Tax Act, 1918 (*c.* 40), *ss.* 62 (5) ; 137 (1), (4) ; 230 (2).

In July, 1938, a father transferred in equal amounts shares to the value of £45,000 to his two daughters who were infants and unmarried, providing the consideration from his own resources. The transfer was absolute, the father not retaining any right or claims in respect of the shares. After the transfer had been effected, dividends were declared amounting to £4,200 for the year ending in April, 1939. The Commissioners of Inland Revenue claimed surtax from the father on this sum on the ground that the transaction was a "settlement" within s. 21 (1) and (9) (*b*) of the Finance Act, 1936, and, accordingly, the income arising therefrom was to be treated under s. 21 (1) as that of the father. An appeal to the special commissioners by the father was heard by two commissioners and the present appeal was based on a Case stated by them.

HELD : (i) it was competent for two commissioners to hear the appeal and state a Case for the opinion of the High Court.

(ii) for a meeting of special commissioners to be a lawful meeting it was not necessary that all the special commissioners should have been summoned to it.

Qy. : whether it was open to the taxpayer to raise the question of the jurisdiction of the special commissioners in an appeal based on a Case stated by those commissioners.

(iii) the transaction entered into by the father was a settlement within s. 21 (1) of the Finance Act, 1936, being a "transfer of assets" within the interpretation section, s. 21 (9) (*b*) (the transaction mentioned in the latter provision not being confined to revocable transactions); in consequence of that settlement and during the life of the father income had been paid for the benefit of the father's children who were infants and unmarried; and, therefore, the income was to be treated for income tax purposes as
A the income of the father.

(iv) by s. 20 (2) of the Finance Act, 1922, the father was entitled to recover from the children (as "persons to whom the income was payable by virtue or in consequence of the disposition") the amount of tax paid by him.

(v) per Cohen, L.J.: The father was a "settlor" within the definition of that word in s. 21 (9) (*c*) of the Finance Act, 1936.

[As to Dispositions in Favour of Children, see HALSBURY, Hailsham Edn.,
B Vol. 17, pp. 267-270, paras. 537-538; and for Cases, see DIGEST, Supp., Income Tax. Nos. 575*a*-575*e*.]

Cases referred to :—

(1) *Hood-Barrs* v. *Inland Rev. Comrs.* [1945] 1 All E.R. 500; Digest Supp.

(2) *R.* v. *Hood-Barrs* [1943] 1 All E.R. 665; [1943] 1 K.B. 455; 112 L.J.K.B. 420; 168 L.T.408; Digest Supp.

(3) *Chamberlain* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317;
C Digest Supp.

(4) *Quinn* v. *Pratt* (1908), 2 K.B. (Irish) 69.

Appeal from decision of Wrottesley, J. (1). The taxpayer transferred shares to his two daughters, who were infants and unmarried. Dividends having been paid on the shares, the taxpayer was assessed to surtax in the sum of £4,200 for the year ended April 5, 1939, under s. 21 (1) of the Finance Act, 1936. The
D special commissioners of income tax dismissed an appeal by the taxpayer against the assessment and their decision was confirmed by Wrottesley, J. (1). The taxpayer now appealed to the Court of Appeal.

Serjeant Sullivan, K.C. and *T. J. Sophian* for the taxpayer.

Sir David Maxwell Fyfe, K.C., D. L. Jenkins, K.C. and *Reginald P. Hills* for the Commissioners of Inland Revenue (respondents).

E **Lord Greene, M.R.**: In this appeal two questions are raised. It will be convenient to deal first with the second. This relates to the jurisdiction of two special commissioners to hold a meeting to hear an appeal, and, when requested to do so, to sign a Case. The practice of two commissioners acting alone for the hearing of an appeal has persisted certainly from the year 1877. An example of it is to be found in 1 Tax Cases at p. 138. The practice was challenged by the present taxpayer in an appeal by him against a conviction of perjury which was
F heard by the Court of Criminal Appeal: see *Rex* v. *Hood-Barrs* (2). The perjury of which he had been convicted was committed at a hearing of an income tax appeal by him before two special commissioners. He took the point before the Court of Criminal Appeal and also before Humphreys, J., who held the trial, that that was not a properly constituted court. That argument was rejected by the Court of Criminal Appeal for reasons which will appear a little later. There
G is thus a decision, not, it is true, binding on this court, but one of great persuasive authority, to the effect that two special commissioners are competent to hear an income tax appeal.

In the present case the argument has had two branches. First, there is the identical contention which was raised before the Court of Criminal Appeal, namely, that two special commissioners could not form a quorum. The other point was that no meeting of special commissioners could be a lawful meeting
H unless it had been summoned by notice addressed to all the special commissioners, so that, even if two could lawfully form a quorum, the meeting itself would be invalid if the remaining special commissioners had not been called. The Crown is prepared to have these points dealt with on the assumption, which in practice I have no doubt is a right assumption, that no summoning of the whole body of special commissioners ever took place.

Turning back to the question of quorum, not only has the practice subsisted for all these years and not only has a decision been given on it by the Court of Criminal Appeal, but it appears to me that the provisions of the Act are quite clear on the subject. The position of the special commissioners and their powers in reference to the carrying out of the Income Tax Acts are to be found in the Income Tax Act, 1918, s. 67 (2) which provides:

> In cases in which the special commissioners have authority to make, sign or allow assessments, or to hear appeals, they shall possess and exercise all the powers of the additional commissioners and general commissioners with respect to assessments, appeals, and the collection and recovery of tax.

By s. 230 (2):

> Anything required under this Act to be done by the general commissioners, the additional commissioners, the special commissioners, or any other commissioners may, save as otherwise expressly provided by this Act, be done by any two or more commissioners.

One thing is clear, and it is the main reason for the judgment of the Court of Criminal Appeal. Nowhere in this Act is to be found an express provision that the special or other commissioners meeting to hear an appeal are not to act by two of their number as commissioners. I should have thought that that by itself was sufficient to get rid of the argument that two cannot form a quorum. It is, however, said that there is an express stipulation in the provision in s. 137 (4) of the Act that the appeal is to be decided by a majority of commissioners hearing it, and, if there are only two commissioners sitting, there can be no such thing as a majority. In one sense that may be true. In another sense a majority of a court of two may be considered as consisting of both of them. Unless both are agreed, there is no majority. Whatever the correct practice may be where two commissioners sitting together differ on fact or law, it seems to me impossible to read a provision that the commissioners' decision shall be a decision of the majority as equivalent to an express provision within the meaning of s. 230 (2). I do not think that anything more need be said about the question of quorum, which appears to me to be beyond any possible doubt.

The other question, as to the necessity of summoning a meeting, calls for these observations. First of all, as was pointed out by counsel for the Crown there is no provision anywhere in the Act from beginning to end either saying in terms that all the commissioners shall be summoned to a meeting of the commissioners or indicating any method of summoning such a meeting save in a special case, and there may be more than one. The case we were referred to was that under s. 66 (6), referring to the dismissal of the clerk to commissioners, a meeting of commissioners is to be called for that purpose, and the sub-section provides:

> Any such meeting as last aforesaid shall be summoned by a notice in writing, signed by the commissioners, or in Scotland by their respective conveners, and served upon each commissioner qualified for the division.

There is no provision of that kind in relation to the summoning of ordinary meetings of commissioners for any purposes, whether executive or quasi-judicial, but that by itself, of course, would not dispose of the matter. Another point that also by itself does not dispose of the question is what one may call the argument of convenience. It is said that the inconvenience would be so great that it cannot be supposed that Parliament so intended, and it is pointed out that the special commissioners include all the Commissioners of Inland Revenue. That appears in s. 67 (1) which says:

> The Commissioners of Inland Revenue, together with such other persons as the Treasury by warrant may from time to time appoint, shall be commissioners for the special purposes of the Income Tax Acts (herein referred to as "special commissioners.")

It would be a strange position if no meeting of special commissioners to hear an appeal could be a valid meeting unless all the Commissioners of Inland Revenue had received a summons to attend a meeting. There again, however, that is not an argument which by itself could carry the day, but it is an indication, if no more than an indication, that Parliament can scarcely have required all the special commissioners to be summoned. That is the more so, perhaps, in that in many cases the special commissioners are the body who hear appeals from the Commissioners of Inland Revenue. I have always understood that where special commissioners sit to hear an appeal from an assessment of surtax made by special commissioners, the commissioners who made the assessment are never invited to form part of the tribunal to hear the appeal. For that there seems to be very good reason, but the matter must depend on the true construction of the Act itself.

It is provided by s. 230 (2), which I have already read, that anything required to be done under the Act may

> save as otherwise expressly provided by this Act, be done by any two or more commissioners.

One of the things required to be done under this Act is to hold a meeting. One of the things that is required by implication also to be done is to summon a meeting. The argument on the question of the necessity of summoning all the commissioners really depends as its central point on the language of s. 137 (1). That is applicable to the special commissioners, though in terms it relates to the general commissioners.

> The general commissioners shall cause notice of the day for hearing appeals to be given to every appellant, and shall meet together for the hearing of appeals from time to time, with or without adjournment, until all appeals have been determined.

It is said that this is a direction that the general commissioners, and in this case the special commissioners, shall meet together, and that must mean that they shall all be summoned. I do not see why it should mean that they should all be summoned. It seems to me that the words really mean, taking the context of the Act as a whole, the commissioners, who are, by other provisions of the Act, competent to sit as an effective tribunal of appeal, that is to say, two commissioners are competent to sit as an effective tribunal of appeal. When s. 137 (1) says: "The general commissioners . . . shall meet together," it means no more than the commissioners who are competent to sit for the appeal shall meet together. I cannot spell out of that any obligation to summon all of the commissioners. One other section of the Act was referred to, namely, s. 62 (5), which provides:

> Not less than two additional commissioners shall be competent to form any meeting and any act, authorised by this Act, shall be valid, if done by the authority of the majority of the additional commissioners present.

That is made applicable to the case of special commissioners by s. 67 (2), to which I have already referred. That reinforces the argument that two special commissioners are competent to form a meeting. I am reminded that precisely the same point arises under s. 64 (2), which provides:

> The general commissioners and additional commissioners and the Land Tax Commissioners respectively shall, for the execution of such of their duties as are required by this Act to be done at a meeting, meet together from time to time, within the times prescribed by this Act within their respective divisions.

That does not appear to carry the argument of the appellant any further on this point.

Therefore, it appears to me, that this point lacks substance. Speaking for myself, I am in entire agreement with the decision of the Court of Criminal Appeal on the point of quorum. On the point as to the necessity of summoning all the commissioners in order to constitute a valid meeting, I have already given my reasons.

Before I leave this part of the case, there is another point to which I must make reference. The appeal comes before us by way of Case Stated. That Case Stated was obtained by the taxpayer in the usual way, by expressing disatisfaction with the decision of the commissioners, which was against him, and going through the steps necessary to obtain a Case and bring it before this court. Having done that, he comes to this court and says: "The document on which I am appealing to this Court is a nullity." He justifies himself by pointing out that at the adjourned, not the original, meeting of the special commissioners counsel took the point that two of them were not competent to sit. The special commissioners, in stating the Case, noted that the point had been taken, but followed the authority I have referred to, which concluded the matter so far as they were concerned. Now the Case comes to this court. Whether the point was mentioned before WROTTESLEY, J. I do not know, but I think I am right in saying that he does not refer to it in his judgment. However, the taxpayer comes to this court and says: "I am entitled before the Court of Appeal to take the point that this very document is a nullity because it purports to be a decision and a Case Stated, but it cannot lawfully be so owing to the fact that the commissioners had no jurisdiction." It must not be thought for one moment from anything that I have said on the merits that I accept the position that it is open to the taxpayer, in those circumstances, to raise this point in this way in this court. It seems to me that, if he wished to take exception to the jurisdiction of the tribunal which purported to hear the appeal, there were other means of taking exception to it and ensuring that the tribunal, if he were right in his contention, should consist of at least three commissioners. Those steps he did not take. He proceeded with the hearing and comes now before this court in the way I have indicated. As I say, all I wish to do is to enter a *caveat* to the effect that it must not be taken for one moment that it is competent to him to raise the point in this court. I have dealt with the case on the merits as I see them because it has been argued on the merits, and the Crown was not anxious to have the point dismissed on the ground that it was not open to the taxpayer in these proceedings.

I now come to the matter of substance which was first argued in the appeal. The taxpayer is appealing against an assessment to surtax in respect of sums received by way of dividends by his two infant unmarried daughters on shares in a company. The shares had originally belonged to him, but, at the date of the dividend, they were registered in the names of his two daughters. The manner in which the daughters came to acquire those shares is set out in the Case. The finding of fact is that the shares were transferred to them by the taxpayer without any consideration or restriction. The assessment appealed against was based on the provisions of the Finance Act, 1936, which deals with income settled on children. Section 21 (1) of that Act provides as follows :

> Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

It was said on behalf of the Crown in the present case that there was a settlement, and, by virtue or in consequence of that settlement, income was paid for the benefit of these infant children, and that that income was to be treated as the income of the present taxpayer. If the word " settlement " in that subsection had been left without any interpretation, I probably would accept the argument that the transaction in the present case could not, in any ordinary sense of the term, be called a settlement, but the legislature found it convenient, as a matter of drafting, to use one word which, *prima facie*, in its ordinary meaning, would not cover everything that the legislature wished to cover, and then, by an interpretation section, provided that it should cover a greatmany other things. The interpretation is to be found in s. 21 (9) (*b*) :

> The expression " settlement " includes any disposition, trust, covenant, agreement, arrangement or transfer of assets.

I must confess, speaking for myself, that I should have felt no difficulty in construing those very plain words. Here is a transaction which falls exactly within the phrase " transfer of assets " because the father, the taxpayer, was found as a fact to have transferred assets, namely, shares, to his infant children. The dividends which they have received clearly accrued to those children by virtue or in consequence of that transfer.

The first argument, however, which was put before us was based on the proposition that the phrase " transfer of assets " cannot include an absolute gift by a parent to a child, and it was pointed out that such a gift was not, apparently, within the mischief of the Finance Act, 1922, which dealt up to a point with benefits conferred by parents on infant children. As I understand it, it was said that, an absolute transfer not being within the mischief of the Act of 1922, it was to be assumed that Parliament viewed such a transaction in a kindly manner and must not be expected to have wished to hit it, but, in talking of the mischief at which a taxing act aims, it is not always easy to see anything which the ordinary man in the street would consider as a mischief. The mischief which taxing Acts often aim at is the mischief that the revenue is not obtaining from certain types of transactions all that it would like to obtain. Therefore, it is common to find that the net is progressively spread wider and wider. I find nothing in the limited scope of the Act of 1922 enabling me to limit in any way what appears to me to be the plain language of the Act of 1936.

A further argument was based on a proposition which, it was said, could be extracted from the speech of Lord Macmillan in *Chamberlain* v. *Inland Revenue Commissioners* (3). The argument was put in these two ways. First, it was said that the transfer of assets, to fall within the meaning of the interpretation clause, must be something in the nature of a settlement in the ordinary meaning of that word. Junior counsel for the taxpayer, putting it in rather different language, but, I think, intending to make the same point, contended that the expression " transfer of assets " in subs. (9) (*b*) must be read *ejusdem generis* with the other matters dealt with, all of which were in the nature of settlements in the ordinary meaning of that word. Incidentally, as WROTTESLEY, J. points out in his judgment, the idea of *ejusdem generis* does not seem very applicable to this string of words. COHEN, L.J. in the present case asked, in the course of the argument, the question : " What is the genus to which ' transfer of assets ' belongs ? " He received no answer to that question, but, as WROTTESLEY, J. points out by way of example, a " covenant " need not bear any resemblance to a " settlement " in the ordinary sense. A covenant can be, as I pointed out in argument, by deed poll. There can be a covenant for the benefit of a child, without the intervention of a trustee, in a deed poll by a father for the payment of income to his child. I can find no justification for suggesting that such a covenant is excluded from the operation of the section, although it bears no resemblance to anything which, in the ordinary sense of the word, could be described as a settlement. It lies in covenant and nothing else. There is no intervention of a trustee. It is a pure matter of contract by document under seal which is binding on the settlor and can be enforced by the child. I find no justification whatever for accepting the argument that " transfer of assets " can be limited in that way.

Counsel for the taxpayer argued that one can only go to such an interpretation clause as this if it is doubtful whether the transaction in question falls within the word used in the original subsection, namely, in this case the word " settlement." In other words, if you find in the word " settlement " in s. 21 (1) something of doubtful import, you then turn to the interpretation clause to see whether that clause throws any light on it. Speaking for the moment without reference to authority, that appears to me to restrict the operation of such an interpretation clause as this in a quite unwarranted and unprecedented manner. The whole object of an interpretation clause expressed in this way I should have thought was to give a word, which, for the sake of convenience, is used in the body of the section, an extended meaning which it would not otherwise bear. Irrespective of what it originally may mean, and taken by itself, it is to have that extended meaning, and I can see no justification in principle or on authority for cutting it down in the way suggested. The arguments addressed to us are based on the language used by LORD MACMILLAN in *Chamberlain* v. *Inland Revenue Commissioners* (3), which arose under the Finance Act, 1938. It was a case of very complicated facts, in which it was alleged by the Crown that the income of a certain company was to be treated as the income of the taxpayer because, by virtue of what was said to be an " arrangement," the shares in question had been put into a certain position by virtue of which infant children were obtaining income. The House consisted of LORD SIMON, L.C., LORD THANKERTON, LORD ATKIN, LORD MACMILLAN and LORD ROMER. I cannot find anything in any of the speeches, omitting for the moment the passage in the speech of LORD MACMILLAN which is relied on, which lends any support to the suggestion that an interpretation clause is to be dealt with in the manner suggested by counsel for the taxpayer. On the contrary, the language used appears to me to point in quite the opposite direction. The section under consideration there was s. 38 of the Act of 1938 which used the same word " settlement." The interpretation is to be found in s. 41 (4) (*b*) of the Act of 1938, which provides as follows :

> The expression " settlement " includes any disposition, trust, covenant, agreement or arrangement.

It has not the phrase " transfer of assets " in it as we have here. LORD THANKERTON, with whose opinion the LORD CHANCELLOR and LORD ATKIN agreed, said, [1943] 2 All E.R. 200, at p. 203 :

> Further, it seems to me that, while the word " settlement " is defined in the widest terms, the more crucial point is likely to be the determination of what the " property comprised in the settlement " consists of in the particular case.

His opinion was based entirely on the point that the property alleged by the Crown in that case to be comprised in the settlement was not what was, in fact, comprised in the settlement. On that ground, the Crown failed in the House of Lords.

There is nothing in that language to suggest any narrow construction of the interpretation clause. On the contrary, it is obvious that the members of the House thought it should be widely interpreted. I think Lord Romer took the same view as to the wide meaning of the interpretation clause, though some of his reasoning was not quite the same as that of the other Lords. It is only from the speech of Lord Macmillan that any kind of support for counsel's interpretation is sought to be extracted. Lord Macmillan uses the following words (*ibid.* p. 204):

> I accept the view that the statutory expansion of the term "settlement," which includes an "arrangement," justifies and, indeed, requires a broad application of s. 38 of the 1938 Act.

There Lord Macmillan is agreeing with the other members of the House that the interpretation clause is a statutory expansion of the term "settlement." He goes on, and this is what is relied on:

> But a settlement or arrangement to come within the statute must still be of the type which the language of the section contemplates.

That has been read as though it meant that a settlement or arrangement to come within the statute must still be of the type which the word "settlement" in the section contemplates. With all respect, I think it cannot mean that. If I may say so with the utmost respect, I cannot bring myself to believe that Lord Macmillan intended to make a suggestion as to the meaning and operation of such an interpretation clause so subversive as that for which counsel argues. If by any chance that were the meaning of his words, I hope I shall not be thought disrespectful if I say that I would not, sitting in this court, accept that as binding on me, for those words, at the most, are merely *dicta* of one of the noble and learned Lords.

The argument as presented by counsel for the taxpayer, in my opinion, does scant justice to Lord Macmillan, because, as I read Lord Macmillan's observation, it is not more than this:—Where you find a word which is interpreted in an interpretation clause, you must look at the section as a whole and see what is the true interpretation in the whole of the context, namely, the whole of the section as related to the type of document with which the section is dealing. You may limit the meaning of the interpretation clause by reference to that context, as, indeed, you may limit the meaning of any word by reference to the context, but it certainly does not, in my opinion, mean that when you look at the word "arrangement" in the interpretation clause—that was the word which was in issue in that case—you are to limit the scope of that word by reference to the one word "settlement" in regard to which the interpretation clause is made. If you did that, it would lead to the extraordinary result that no arrangement could be an arrangement unless it were something which could be described as falling within the ordinary meaning, whatever that may be, of the word "settlement." Lord Macmillan's proposition, as I interpret it, seems to me to say no more than what is obvious. You never construe a word in a statute, whether it be in the body of the statute or in an interpretation clause, without reference to the context in which it appears. That is not a proposition which is anything near what was suggested to us by counsel for the taxpayer. I can find no justification for putting any limitation of the kind suggested on the phrase "transfer of assets," which is the phrase we have to deal with here.

There are one or two subsidiary points, certainly one, about which perhaps I may say a word. If a transfer of shares such as we have here is to be regarded as a settlement, and if the parent who transfers them is to be regarded as a settlor (the interpretation of which I perhaps should have read because it includes any person "who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement,"), it is said that the settlor, the father, would be struck with liability for tax and would not have the right to recover the tax from his children which is given by the legislature to persons who pay tax on what is artificially treated as their income. The provision under which the settlor who pays tax can recover it is the Finance Act, 1922, s. 20 (2), and it was said that under the language of that subsection the parent in such a case as the present would not be entitled to recover from the children the tax that he paid on what is said to be notionally his income. It provides :

> Where by virtue of para. (*b*) or para. (*c*) of sub-s. (1) of this section any income tax or super tax becomes chargeable on and is paid by the person by whom the disposition was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the disposition the amount of the tax so paid.

This subsection is made applicable to the Act of 1936 by s. 21 (5). I cannot see how the argument can be supported. The right to recover is a right to recover from any trustee or other person to whom the income is payable. There is no question of any trustee here. The persons to whom the income is payable are the two children. I see no justification for excluding from the wide phrase " or other person to whom the income is payable " the children to or for whose benefit the income is paid. It is suggested that the words " other person " must be limited to cases of trustees, or agents, or other intermediaries, and do not include the actual beneficiary children. I can see no justification for that. Indeed, if it were true, it would be possible to defeat the purpose of the Act by omitting any trustee from the disposition. In other words, a disposition by a father in favour of his children direct, as was done here, would escape the taxation, whereas if he were foolish enough to execute a deed in which he assigned the shares to a trustee in trust for his children absolutely it would expose him to liability for tax. It seems to me that the language of the section is not to be construed in such a way as to produce so ridiculous a result.

One more argument counsel for the taxpayer advanced. It is that the " disposition, trust, covenant, agreement, arrangement or transfer of shares," mentioned in the interpretation clause of the Act of 1936, must be confined to transactions which in their nature or by virtue of some power are revocable. I can find no justification anywhere for putting any such limit on them.

COHEN, L.J. : I agree. I only desire to add a very few words. On what I may call the procedural point, I do not think we can get any assistance from the decision in *Quinn* v. *Pratt* (4) on which counsel for the taxpayer relied. That Irish case turned on the construction of a provision of the relevant Summary Jurisdiction Act, the terms of which are so different from those of the Income Tax Act that I do not think the case affords us any help in the matter before us. Counsel also relied on that case as giving some support for the procedure his client adopted of not applying for any other form of relief, but seeking to raise the question of jurisdiction on this appeal. I do not think it helps that argument either, because in that case what the plaintiff was doing was seeking to treat the order as null and void in an independent action. It may well be that an order made without jurisdiction would have no force in independent proceedings, but that would not help counsel for the taxpayer in the present case. If we were to hold the decision of the special commissioners to be invalid, it might be that the taxpayer would find himself still faced with the assessment made by the special commissioners, which had not been challenged.

On the merits, I do not desire to repeat anything on the points with which my Lord has already dealt, but there were two subsidiary points to which I desire to refer. Counsel for the taxpayer, in the course of his argument, having first argued that the transfer of shares was not a transfer of assets within the meaning of the interpretation clause, went on to say that, in any event, there was no income because the receipt of dividends was not a receipt of income. He sought to support that argument by saying that it was merely the distribution of assets which already belonged to the shareholders. In my opinion, that is a complete misconception of the rights of a shareholder. He has no property in, nor right to, any particular asset. He has only the right to have all the assets administered by the directors in accordance with the constitution of the company, and his right to a dividend only arises when the dividend is declared. I think there can be no doubt, if he desired to commence proceedings to recover that dividend, he could proceed in debt for a debt due from the company. Therefore, in my view, it is true to say that the dividends received by the daughters were payments of income and, as my Lord has already said, the transfer of shares was a transfer of assets.

The last point I wish to deal with is the question raised by counsel for the taxpayer, that in the present case there was no gift of shares but only a gift of cash. I entirely agree with what my Lord has said, that, on the findings of fact of the special commissioners in this case, this point is not open, but I should like to add that, if it were open, I think the argument which was addressed to us by counsel for the Crown would require consideration. As I followed his argument, it amounted to this. The provision of the sum in question and the transfer of shares were an " arrangement " within the meaning of the interpretation clause. The transfer of the shares was a " transfer of assets," and, in those circumstances, the taxpayer would be a settlor within the meaning of the definition in s. 21 (9) of the Act of 1936. That subsection includes in the definition of settlors

> . . . any person who has provided or undertaken to provide funds, directly or indirectly, for the purpose of the settlement . . .

Counsel for the Crown suggested that in the circumstances of this case the taxpayer would fall within that definition. I do not desire to express a concluded opinion on the point, but I only desire to make it clear that, even if counsel for the taxpayer got over the first fence, I do not think he would necessarily have stayed to the end of the course.

Asquith, L.J.: I agree with both judgments which have been delivered and desire to add nothing.

Appeal dismissed with costs.

Solicitors: *J. de Mega & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

R. *v.* MILLS; R. *v.* LEMON.

[Court of Criminal Appeal (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 9, 1946.]

Criminal Law—Evidence—Confession—Confession prompted by verbal information given by police of statement by confederate—Judges Rules, r. 8.

By r. 8 of the Judge's Rules: " When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements . . . and nothing should be said or done by the police to invite a reply . . ."

Where, however, contrary to this rule, a precis of the confederate's statement was given verbally to the prisoner by the police and the prisoner was asked if he wished to make a reply and then made a confession which was intelligible without evidence being given of the preceding circumstances and of the objectionable question put to him by the police.

Held: the confession is admissible.

R. v. *Gardner and Hancox* (1) *followed.*

[As to Confessions by the Accused, see HALSBURY, Hailsham Edn., Vol. 9, pp. 203-207, para. 291; and for Cases, see DIGEST, Vol. 14, pp. 410-426, Nos. 4303-4498.]

Case referred to:

(1) *R.* v. *Gardner and Hancox* (1915), 85 L.J.K.B. 206; 114 L.T. 78; 80 J.P. 135; 11 Cr. App. Rep. 265; 14 Digest 393, *4138.*

Appeal against a conviction before the Recorder of Bristol.

The appellants, Mills and Lemon, were convicted of highway robbery. Statements and questions by the police, contrary to the Judge's Rules, elicited from the prisoners confessions which were given in evidence. The prisoners contended that the confessions were inadmissible. The facts appear in the judgment of Lord Goddard, C.J.

Cyril Lavington for the appellant, Mills.
F. J. Bate for the appellant, Lemon.
C. H. Grundy for the Crown.

Lord Goddard, C.J., delivered the following judgment of the court: The two appellants were convicted before the Recorder of Bristol of a highway robbery. The case against them was that, together with an American soldier named West, they were engaged in the robbery of a man who had gone to the bank to collect wages. The circumstances which give rise to this appeal are these. West was arrested, and he made a statement to the police in which he clearly implicated the appellants. Lemon was afterwards arrested, Mills later went voluntarily to the police station. At the police station they were interviewed separately. The officer in charge of the case told each of them what West had said. Without reading West's statement to them in turn, he gave a precis of the statement which, in effect, was informing them that West had said they were together with him at the time that the robbery was committed. Lemon was asked if he wished to make a statement, and he said that he would think it over. Shortly afterwards he said that he would like to write out his own account, and he did so. His account was as clear a confession as could well be imagined. Mills afterwards also dictated to the police officer and signed a full confession of his part in the affair. At the trial objection was taken on two grounds to the admissibility in evidence of these confessions. First, it was said that they had been obtained by threat or inducement. The recorder heard the evidence about that and came to the conclusion that there had been neither threat nor inducement in either case, and this court is certainly not prepared to differ from that.

Another point, however, is raised, it being said that these confessions were obtained in a manner contrary to r. 8 of what are commonly called the "Judges' Rules." It is to be observed that the Bristol police did not observe this rule which has been laid down for their guidance, and the sooner they study these rules and learn and abide by them, the better. The rule is this:

> When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

If, therefore, the police had handed both of the appellants the statement which West had made and left them to decide whether they would make statements or not, the rule would have been complied with and no objection could have been taken. The police, however, gave the appellants a precis of West's statement and then asked them if they wished to make a reply. That they should not have done.

The question then arises whether the statements which they did make were inadmissible in evidence. What lies at the root of r. 8 of the Judges' Rules is this. There used to be a practice by which the police would give evidence before the jury saying: "I saw the prisoner. I told him that John Smith was arrested and John Smith said: 'Yes, I was there and the prisoner was with me.'" Then the prisoner made a statement and, perhaps, said he was not there at all, but that was a means of getting before the jury the statement of the other man. The other man was not called as a witness and, therefore, his statement could not be given in evidence and it was wrong that it should be given in evidence in court by the device of saying: "I told the prisoner the other man had said such and such a thing. I asked him whether he wanted to say anything in answer and this was his answer." Of course, the position still remains that, if the answer which the prisoner gave is not intelligible without the question being given to the jury, and the question is properly ruled out, the answer must be ruled out. On the other hand, if the prisoner chooses to write out or dictate a full confession, there is no authority which says that, if the confession is intelligible without the question which gave rise to it, if the question is excluded, the confession must be excluded. Indeed, so to hold would be quite contrary to the decision of this court in *R.* v. *Gardner and Hancox* (1). The Judges' Rules were framed after that case, and it will be observed that r. 8 nowhere states that the answer which is given is not to be admissible, although, as I have already said, if it can only be intelligible by giving the question, the whole thing must be ruled out.

In the present case, the police should have supplied a copy of West's statement to the appellants so that they should have the necessary information, and no objection could be taken, but, there is the clearest possible authority in *R.* v. *Gardner* (1), that, although the way the police have acted may be objectionable, these confessions cannot be kept out as inadmissible. It seems to me that they were clearly admissible. The appellants made a full confession of the part they had taken in the affair, and the recorder quite properly would not allow the police to give evidence of the circumstances which had preceded the making of the confession, because that would have enabled the police to say: "West says you were with him when he committed the robbery." That was kept out, but the confession which these men wrote out was intelligible without that, and, consequently, it was properly left before the jury with the inevitable result that the jury convicted, and rightly convicted, the prisoners. Therefore, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

MACONOCHIE BROS. LTD. *v.* BRAND AND OTHERS.

[KING'S BENCH DIVISION (Henn Collins, J.), November 7, 1946.]

Landlord and Tenant—Notice to quit—Validity—Tenancy for 6 months certain from Mar. 25, and thereafter half-yearly tenancy determinable by 6 months' notice to expire on any quarter day—Notice dated Dec. 17 to quit on following June 24—Rent for subsequent quarter accepted by mistake—Creation of fresh tenancy.

By an agreement dated Jan. 31, 1945, the landlords let premises to the tenants for a term of six months from Mar. 25, 1945. A clause in the agreement provided that, "unless either party shall give to the other not less than six months' previous notice in writing the tenancy shall continue after Sept. 29, 1945, as a half-yearly tenancy determinable by six months' notice on either side to expire on any quarter day." A notice dated Dec. 17, 1945, called on the tenants to quit the premises on June 24, 1946, or at the end of the half-yearly tenancy which would expire six months from the date of the service of the notice. The plaintiffs received and paid into their bank under a misapprehension a cheque from the defendants for rent in advance in respect of a quarter subsequent to the date of the expiration of the notice to quit:—

HELD: no new tenancy had been created by the acceptance of the rent, and the notice to quit was effective to determine the tenancy on June 24, 1946.

[AS TO WAIVER OF NOTICE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 142-144, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 31, pp. 455-458, Nos. 6029-6058.]

Case referred to:

(1) *Davies* v. *Bristow*, [1920] 3 K.B. 428; 90 L.J.K.B. 164; 123 L.T. 655; 36 T.L.R. 753; 31 Digest 459, *6065*.

ACTION to recover possession of premises let for a term of six months certain and thereafter on a half-yearly tenancy "determinable by six months' notice . . . to expire on any quarter day." The facts appear fully in the judgment.

R. T. Monier-Williams for the landlords.
F. Ashe Lincoln for the tenants.

HENN COLLINS, J.: In my opinion, the plaintiffs are entitled to the relief which they claim, namely, the possession of the premises consisting of the third floor at 140-142, Great Portland Street, and to the mesne profits at the rate which they claim.

There are two points in this case. First, it is said that, assuming a certain notice to quit—about which I will have a word to say in a moment—to be a good notice, the plaintiff created a new tenancy thereafter by the acceptance of rent. That they did receive and pay into their bank a cheque paid in respect of a quarter's rent in advance, that quarter being after the expiration of the notice to quit, is true, but it is equally true that the question is: Was a new tenancy thereby created? That is, not a tenancy to be discovered by some act of law, but a tenancy created by two assenting minds. It is obvious that the one thing which the landlords wanted was possession of these premises, and to tell me that they assented to the creation of a new tenancy is to tell me what I do not believe. Therefore, if I have to find that there was a new tenancy, it would have to be because of some legal ingenuity and in face of what my mind informs me is not the fact.

In *Davies* v. *Bristow* (1) ([1920] 3 K.B. 428 at pp. 437, 438) LUSH, J., points out clearly that "waiver of a notice to quit" is a convenient, but inaccurate, expression when what has happened is that the notice has expired and rent has been accepted thereafter. When the term has expired by the effluxion of time or by a competent notice, it is wrong to talk about a waiver. If the relations of landlord and tenant continue thereafter, it is by agreement between the parties. On the facts of this case I am clear that the cheque was received and paid into the bank under a misapprehension, and in the light of the evidence I am satisfied that the defendants paid it in the hope that it would be accepted and that the acceptance would enure to their benefit in some sort of waiver of the notice to quit or some new implied tenancy. I, therefore, have no ground for thinking that a new tenancy was created.

Was there in the document of December, 1945, a notice effective to determine the tenancy created by the agreement dated Jan. 31, 1945? Whether or not that was a good notice depends primarily on the proper construction of cl. 21 of the agreement. The agreement of Jan. 31, 1945, is for a term of six months from Mar. 25, 1945, and it contains in cl. 21 this condition:

> Unless either party shall give to the other not less than six months' previous notice in writing the tenancy shall continue after Sept. 29, 1945, as a half-yearly tenancy determinable by six months' notice on either side to expire on any quarter day.

The tenancy, therefore, is for six months certain subject to the fact that between its date, Jan. 31, and Mar. 25, 1945, either party could say he was not going beyond Sept. 29, 1945. If neither said that, the tenancy was to continue after Sept. 29, 1945, as a half-yearly tenancy determinable by six months' notice on either side to expire on any quarter day.

If the expression "half-yearly tenancy" is to govern in that clause, then the tenancy goes from September to March and from March to September, and can only be determined on one or the other of those dates, but the agreement further provides that the tenancy is "determinable by six months' notice on either side to expire on any quarter day" and not only on any two of the possible four. Therefore, if one reads "half-yearly tenancy" in the sense for which the tenants contend one gets a direct conflict of language. One or other of those two expressions has got to be modified or you get direct contradiction. Is it right to say that the notice is to expire on any quarter day, being either Lady Day or Michaelmas, or is it more accurate to say that "half-yearly" means a tenancy subject to a six months' notice? I take the latter view. I think one does no violence at all to the clause by reading "half-yearly

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tenancy " as meaning a tenancy which is subject to six months' notice, that notice required to be given so as to expire on any quarter day.

If that is the right construction of the agreement, it is not to be questioned but that the notice to quit dated Dec. 17, 1945, was effective to determine this tenancy on June 24, 1946, six months next after the Christmas quarter, because it contains the words :

> . . . on June 24, 1946, or at the end of the half-yearly tenancy which will expire six months from the date of the service of this notice.

On the construction I put on cl. 21 those two alternatives are synonymous and this tenancy did, in fact, expire by notice on June 24, 1946. It has not been revived by any subsequent agreement, and there must, therefore, be judgment for the landlords for possession and for mesne profits, with costs.

Judgment for the plaintiffs.

Solicitors : *Harry Baker* (for the landlords) ; *A. Kramer & Co.* (for the tenants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

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